

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.4751 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India challenging the order dated 19.07.2017 passed in I.A.No.747 of 2015 in O.S.No.66 of 2012 by the Junior Civil Judge, Razole, whereby, the petition filed under Order VI Rule 17 of Civil Procedure Code (for short "C.P.C.") to amend the plaint incorporating the claim for recovery of possession, was allowed.

The respondent herein/plaintiff filed a petition under Order VI Rule 17 of C.P.C. alleging that in his cross-examination he admitted that the coconut trees situated in A1 marked portion of the plaint plan are not in his possession and that A1 marked portion of the plaint plan is part and parcel of the land sold to him by the petitioner herein/defendant. It is absolutely belongs to him and that he is entitled to recover possession of the same from the defendant. Therefore, respondent/plaintiff requested to grant leave to amend the plaint to raise certain pleas as mentioned in the petition.

The petitioner herein/defendant filed counter denying the material allegations *inter alia* contending that he is in possession and enjoyment of the property and that there is no A-1, A-2 marked portions of the plaint plan on ground, and the coconut trees i.e. C-1 to C-7 and land where they were situated are in peaceful possession and enjoyment of the petitioner herein since they were planted by him and the respondent/plaintiff has no right to seek relief of declaration of title in respect of A-1 and A-2 marked portion of the plaint plan and that the evidence of P.W.1 was completed long prior to filing of the petition, thereby, the

respondent/plaintiff is not entitled to claim any relief in the petition and sought for dismissal of the petition.

Despite objection raised by the petitioner herein/defendant in the suit, the trial Court allowed the petition granting leave to amend the plaint.

Aggrieved by the order of the trial Court, the present revision is filed on two grounds, they are as follows:

- (1) That the suit was filed in the year 2012 and the written statement was also filed in the same year raising several contentions. There is no A-1 and A-2 marked portions of the plaint plan on land, and the coconut trees i.e. C-1 to C-7 and land where they were situated are in peaceful possession and enjoyment of the petitioner/defendant, but this fact was not considered by the trial Court and proposed amendment is barred by limitation.
- (2) The respondent/plaintiff failed to explain as to why he could not bring on record certain facts before commencement of trial, before the trial Court. In the absence of any explanation about exercise of due diligence, the order passed by the trial Court is liable to be set aside and requested to set aside the same and allow the revision.

During hearing, learned counsel for the petitioner reiterated the grounds urged in the revision.

Learned counsel for the respondent supported the order in all respects while contending that to avoid multiplicity of proceedings, the amendment can be permitted by exercising power

under Order VI Rule 17 of C.P.C. and requested to dismiss the petition.

As seen from the allegations made in the affidavit filed before the trial Court, the said petition was filed only after examination of P.W.1, in third paragraph of the affidavit, respondent herein/plaintiff admitted about the possession of the petitioner herein/defendant and respondent/plaintiff was forced to file a petition for recovery of possession besides declaration of title as he is out of possession.

The respondent/plaintiff sought for declaration of title initially, but on account of admission made by him in his cross-examination, he sought for amendment of the plaint to enable him to recover the possession of the property besides other reliefs claimed in the plaint. But the trial has been started and P.W.1 was already examined and admissions made in the cross-examination of P.W.1 gave raise to amendment of the plaint to claim recovery of possession of schedule property A1 described in the schedule annexed to the plaint.

Entire affidavit is silent as to the exercise of due diligence and failure to bring those facts despite exercise of due diligence strictly adhering to Order VI Rule 17 of Cr.P.C. introduced by Act 22 of 2002.

Learned counsel for the petitioner contended that only to avoid multiplicity of proceedings, the trial Court allowed such application and placed reliance on the judgment of Apex Court rendered in “**Sampath Kumar v. Ayyakannu**”¹. In the said judgment, the Apex Court held as follows:

¹ 2002 (6) ALD 63 (SC)

“In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the Trial Court it was open to the plaintiff to file a fresh suit and that is one of the reason which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.”

No doubt, the principle laid down by the Apex Court in ***Sampath Kumar v. Ayyakannu*** (referred supra) is one of the principles for exercise of power under Order VI Rule 17 of C.P.C. But in the later judgment in “***Rameshkumar Aggarwal v. Rajamala Exports Private Limited and others***²”, the Apex Court relying on “***Revajeetu Builders and Developers v. Narayanaswamy & Sons and others***³”, while deciding the scope of proviso to Order VI Rule 17 C.P.C laid down certain guidelines for granting or denying relief under Order VI Rule 17 of CPC viz., as follows:

“On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

- 1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
- 2) Whether the application for amendment is bona fide or mala fide?
- 3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

² AIR 2012 SC 1887

³ 2009(8) SCJ 401

4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally nature and character of the case?

And

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

It is clear that while deciding the application for amendment ordinarily the court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

24. The Apex Court further held that,

"amendment application to be filed if necessary immediately after filing suit i.e. before commencement of trial. If the petitioners are able to prove or explain as to how they failed to take steps before the trial commenced despite exercising due diligence, the Court can allow such amendment. The factum of exercising due diligence depends upon circumstances."

Order VI Rule 17 of C.P.C deals with Amendment of Pleadings and according to it, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion

that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

In “**J. Samuel v. Gattu Mahesh**⁴”, the Supreme Court laid down certain tests as to what is ‘due diligence’ with reference to Order VI Rule 17 C.P.C and proviso thereto and held as follows:

“3. diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term ‘Due diligence’ is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit”

Similarly, in “**Rajkumar Gurawara (Dead) Thr. Lrs vs M/S. S.K.Sarwagi & Co. Pvt. Ltd**⁵”, the Apex Court laid down the following conditions to grant application for amendment subject to certain conditions:

- (i) when the nature of it is changed by permitting amendment;
- (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party;
- (iii) when allowing amendment application defeats the law of limitation.

⁴ 2012 (2) SCC 300

⁵ 2008 (14) SCC 364

In view of the law declared by this Court in “**J. Samuel v. Gattu Mahesh**” (referred supra), to exercise power under Order VI Rule 17 C.P.C. to grant leave to amend the pleadings after commencement of trial, the petitioner has to establish that despite exercise of due diligence, he could not bring those facts on record before commencement of trial.

If this principle is applied to the present facts of the case, there is absolutely nothing to conclude that the petitioner could not bring those facts despite exercise of due diligence before commencement of trial and the affidavit itself is clear that only on account of his admission in the cross-examination of P.W.1, he was forced to file petition to amend the plaint. In the absence of any explanation, the order passed by the Court below is contrary to the principle laid down in “**J. Samuel v. Gattu Mahesh**” (referred supra). Hence, the order passed by the trial Court is liable to be set aside.

In the result, the revision is allowed. The order dated 19.07.2017 passed in I.A.No.747 of 2015 in O.S.No.66 of 2012 by the Junior Civil Judge, Razole is hereby set aside. No costs.

Consequently, miscellaneous applications pending if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

05.11.2018
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