

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.2867 OF 2017

ORDER:

The unsuccessful petitioners in I.A.No.78 of 2016 in O.S.No.44 of 2003 on the file of Additional Senior Civil Judge at Karimnagar, preferred the civil revision petition challenging the order dated 22.03.2017, wherein the Court below dismissed the petition filed under Order VI Rule 17 C.P.C.

The petitioners who were the plaintiffs before the Trial Court filed O.S.No.44 of 2003 against the defendants in the year 2003 claiming perpetual injunction restraining the respondents from interfering with their rights and possession of the plaintiffs 1 to 6 over the suit land bearing Sy.No. 291/A to 291/B, admeasuring Ac.7-00 situated in Arepally Revenue village Shivar of Karimnagar Mandal which is described in the schedule annexed to the plaint.

It is alleged that the petitioners are the joint owners and possessors of the suit schedule property, having inherited the land from their ancestors. Defendants 1 & 2 have no right or ownership or possession for interest over the suit schedule property. But they are the owners of the dry land in Sy.No. 291/A which is abutting to the suit schedule property on its Northern side. Taking advantage of the fact that the land bearing Sy.No. 291/A is abutting suit land on the north inside, the defendants 1 & 2 are trying to forcibly occupy the suit land. The defendants 1 & 2 filed written statement on 15.10.2003 setting up title on them independently and sought for dismissal of the suit.

During pendency of the suit, in view of the defendants setting up independent title through their ancestors, the petitioners filed petition under Order VI Rule 17 C.P.C, which ended in dismissal by the Trial Court against which the present civil revision petition is preferred under Article 227 of the Constitution of India.

The petitioners filed a suit for relief of perpetual injunction in respect of land in Sy.No. 291/B. While the suit was coming up for trial, the suit was dismissed for default on 01.07.2008, due to which the petitioners have filed restoration application along with delay condonation petition in I.A.No.560 of 2009 and the same was allowed and the suit was restored. During pendency of the restoration application, the respondents by taking advantage of pendency of restoration petition, they had removed boundary stones between Sy.Nos. 291/A and 291/B and encroached into the land of the petitioners to an extent of Ac.1-04 gts of land out of Ac.7-00 gts in Sy.No. 291/B. Since the suit was not restored, the petitioners could not able to take steps for recovery of the same by appropriate amendment to the plaint. Moreover, the petitioners intended to withdraw the suit with a prayer to file a fresh suit, since the boundaries are not shown in the suit schedule property. In the meanwhile, the suit was restored and the petitioners have filed affidavit, under Order XVIII Rule 4 of C.P.C in lieu of examination-in-chief. But the petitioners intended to file an application for withdrawal of suit with a prayer to file fresh suit in two aspects i.e inadvertently previous history of land was not pleaded, besides the boundaries are not shown to the suit land, which is formal defect and also not mentioned about their alienation of land to an extent of ac.0-29 gts and 44 square yards, thereby they have filed I.A.No.776 of 2013 under Order XXIII Rule 1(2) CPC seeking leave of the Court to withdraw the suit with a prayer to

file fresh suit for declaration of title and recovery of possession. But the Court below dismissed the same on 07.02.2014. Being aggrieved by the same, the petitioners have preferred C.R.P.No. 2203 of 2014 before this Court and the said civil revision petition was also dismissed by this Court on 26.02.2015 observing that the relief as sought in Order XXIII Rule 1(2) C.P.C to file a fresh suit may also be taken by invoking Order VI Rule 17 C.P.C.

The Supreme Court of India also observed that, right of withdrawal of the suit and his absolute right of the plaitniff or asking leave is only matter of interfering and receipt and granting of leave this matter of course not of discretion refusal to allow withdrawal would amount to encroachment of proliferation of litigation.

In the light of the above decision of the Apex Court, the petitioners have filed a review petition for reviewing the dismissal order and the same is pending for notice. While so, the Court below insisted the petitioners to proceed with the suit. As there was a formal defect in the suit and the subsequent events have arisen, it is not proper to proceed with the suit unless the plaint is suitably amended. As such, the petitioners have filed I.A.No.78 of 2016 to permit them to amend the pleadings as mentioned in the affidavit, as the proposed amendment does not cause any prejudice to the rights of the defendants 1 & 2 and also to avoid multiplicity of the proceedings.

The respondents filed counter affidavit contending that the petitioners did not file the suit for appropriate relief, but falsely claimed an extent of Ac.1-04 gts out of Ac.7-00 gts in Sy.No. 291/B while admitting dismissal of the suit and filing of applications. Respondents denied alleged removal of boundary stones between Sy.Nos. 291/A and 291/B and encroachment of land to an extent of Ac.1-04 gts. As the

petitioners are contemplating to remove the boundary stones and disturbing the land in Sy.Nos. 291/A and 291/B, the respondents filed a petition for appointment of an advocate Commissioner to note down the physical features of the land stated Supra. The Commissioner was appointed and submitted report that the existence of ridge between Sy.Nos. 291/A and 291/B. Therefore there is no question of removing the boundary stones and occupation of the land to an extent of Ac.1-04 gts. Further, it is stated in the counter affidavit that the present suit is filed with false allegations as the restoration petition was allowed with the condition to file affidavit as examination-in-chief of the petitioners and they have filed affidavit of PW-1 in the month of July 2013. Therefore, the petition is filed taking advantage of the pendency to malign the respondents and by making false allegations.

It is also contended that, when the examination-in-chief of the petitioners was filed in the month of July 2013, the trial has commenced and the witness was adopting dilatory tactics and therefore, the petitioners are not entitled to seek the relief of amendment of plaint invoking Jurisdiction under Order VI Rule 17 C.P.C. It is further contended that, when the petitioners failed in their attempt throughout, in I.A.No.776 of 2013 filed under Order XXIII Rule 3 C.P.C to withdraw the suit, with the liberty to file fresh suit, the petitioners are not entitled to invoke Order VI Rule 17 C.P.C. It is also contended that, a part of the land to an extent of Ac.0-29 gts 44 square yards within the suit land was not raised at any point of time. But, for the first time asset allocation is made in the petition. Therefore, such contention cannot be raised in the present suit converting a suit for injunction into a suit for declaration, which relief is hopelessly barred by limitation and prayed to dismiss the petition.

Upon hearing augment of both the Counsel, the Trial Court dismissed I.A.No.78 of 2016 on various grounds, mainly on the ground of alienation. The Trial Court observed that the amendments sought by the petitioners would change the basic structure of case on account of the proposed amendment and it would take away the valuable right accrued to the respondents. Aggrieved by the order passed by the Court below, the present civil revision petition is filed on various grounds.

The High Court made certain observations while disposing of C.R.P.No. 2203 of 2014, that the petitioners are entitled to seek relief under Order VI Rule 17 C.P.C to remove the formal defect in the suit. But the Court below did not consider the observations in proper perspective and thereby dismissed I.A.No.78 of 2016. The other ground is that the Trial Court by dismissing I.A.No.78 of 2016 committed jurisdictional error warranting interference of this Court to exercise power under Article 227 of the Constitution of India. It is also pointed out that the order under challenge is unsustainable for the reason that, the trial has not yet been commenced, except filing an affidavit by P.W.1, in lieu of examination-in-chief and Order XVIII Rule 4 C.P.C and the same cannot be treated as commencement of trial and therefore the dismissal of the petition on the ground of commencement of trial is unsustainable and the order is liable to be set-aside.

During hearing learned counsel for the petitioners Dr. J. Vijayalakshmi contended that, when the petition was filed before commencement of the trial, such pre-trial amendments have to be allowed liberally and when this Court made a clear observation in C.R.P.No. 2203 of 2014 that the petitioners are entitled to amend the plaint, the Trial Court is bound to allow the petition, instead of allowing

the petition, the Court below committed an error in dismissing the application. When the proposed amendment is bonafide, the Court must literally construe the cause shown in the plaint, since the subsequent events during pendency of the trial necessitated such amendment and that the relief of declaration is not barred by limitation. Hence the petition filed under Order VI Rule 17 C.P.C is to be allowed.

Learned counsel for the petitioners placed reliance on the judgements of the Apex Court in **Vidyabai and others v. Padmalatha and another**¹, **Mashyak Grihnirman Sahakari Sanstha Maryadit v. Usman Habib Dhuka and others**², **State of Orissa v. Sudhansu Sekhar Misra and others**³ and also judgment of this Court in **Brij Gopal Pallod and others v. Municipal Council, Zaheerabad, Medak District**⁴

On the strength of the principles laid down in the above judgement learned counsel for the petitioners sought leave of this Court to allow the revision petition setting aside the order passed by the Trial Court.

Whereas, learned counsel for the respondents argued in support of the order under challenge in all respects while contending that when the trial has been commenced, the petition is liable to be dismissed as there was no explanation about exercise of due diligence in view of proviso to Order VI Rule 17 C.P.C. That too time barred amendments cannot be allowed. Therefore the order passed by the Court below is free from any illegality, warranting interference of this Court.

Learned counsel for the respondents placed reliance on the judgement of the Apex Court in **Rajesh Kumar Aggarwal and others v. K.K. Modi and others**⁵ and Division Bench judgment of this Court in

¹ (2009) 2 Supreme Court Cases 409

² (2013) 9 Supreme Court Cases 485

³ AIR 1968 SUPREME COURT 647

⁴ 2013 (1) ALD 512

⁵ (2006) 4 Supreme Court Cases 385

Andhra Pradesh State Financial Corporation, Hyderabad v. K.V. Ramana Murthy and another⁶, based on the law declared in the two judgements, learned counsel for the respondents requested this Court to dismiss the petition confirming the order passed by the Court below.

Considering rival contentions and perusing a material available on record the point that arise for consideration is as follows

“Whether the petitioners be permitted to amend the plaint to claim various reliefs mentioned in paragraph 20 of the plaint.?”

P O I N T:

Admittedly, the suit was filed for perpetual injunction restraining the defendants 1 & 2 and their family members from interfering with their right and possession of the plaintiffs 1 to 6 over the suit schedule property in Sy.No. 291/B in the land admeasuring Ac.7-00 gts in Karimnagar Mandal. Later, due to the death of the fifth plaintiff-Malla Reddy, his legal representatives were brought on record as plaintiffs 7 to 10, vide order dated 01.12.2015, the amendment was carried out in the Court below. But, I.A.No.78 of 2016 was filed before the Court below in the year 2016 and after bringing the legal representatives of the deceased fifth respondent, the suit was dismissed for default on 01.07.2008 on the ground that, when the suit was posted for trial, due to non appearance, the suit was dismissed. Later, the petitioners filed I.A.No.560 of 2009 for restoration of the suit and during pendency of the restoration application, the respondents allegedly took advantage of pendency of restoration petition and removed the boundary stones between Sy.Nos. 291/A and 291/B, encroached into the land of the petitioners to an extent of Ac.1-04 gts out of Ac.7-00 gts in Sy.No. 291/B. Till Restoration

⁶ 2017 (4) ALD 512 (DB)

of this suit, the petitioners could not take steps to claim recovery of possession and even thereafter, the petitioners filed an I.A.No.776 of 2013 under Order XXIII Rule 1 & 2 C.P.C seeking relief to withdraw the suit with leave to file fresh suit for declaration of title and recovery of possession. But the same was dismissed and thereafter, the matter was carried to this Court in C.R.P.No. 2203 of 2014, which ended in dismissal on 26.02.2015 making an observation that the defect can be cured by invoking Order VI Rule 17 C.P.C.

It appears from the allegations made in the affidavit that, the suit was restored even prior to 2013 and thereafter the matter went on several adjournment for more than 3 years, after its restoration and before filing the petition to amend the plaint seeking different reliefs. The present relief sought for in the suit by way of proposed amendment which is for declaration of title and recovery of possession of Ac.1-04 gts in Sy.No. 291/B and for recovery of Ac.0-29 gts and 44 square yards in the extreme North side of Ac.7-00 gts of land.

It is also further sought to rectify the mistakes in the schedule annexed to the plaint i.e Schedule B pertaining to Ac.1-04 gts, which is allegedly encroached by the respondents during pendency of restoration application by giving specific boundaries to the property.

As seen from the register of the suit, it is evident that it was filed in the year 2003, but it was got dismissed for default and restored by filing an application in I.A.No.560 of 2009. After Restoration, a petition was filed under Order XXIII Rules 1 & 2, seeking leave of the court to withdraw the same with the permission to file fresh suit, but failed to succeed in the attempt. Having failed in the attempt, filed the present application I.A.No.78 of 2016 taking advantage of the observations made by this Court while deciding C.R.P.No. 2203 of 2014. Thus, the

petitioners are aware about the defect in the plaint and sought for relief under Order XXIII Rule 1 C.P.C even in the year 2013, but did not file any application for necessary amendment by this court in C.R.P.No. 2203 of 2014. Even though, a specific observation was made in the order in C.R.P.No. 2203 of 2014, the petitioners maintained silence for a considerable period till 09.02.2016 i.e when the petition was filed for amendment of pleadings Under Order VI Rule 17 C.P.C and took almost one year time to seek leave to get this plaint amended.

On overall consideration of the facts, it is evident that the petitioners did not exercise their due diligence in raising certain pleas before the Court below. When the petitioners have detected the defect and alleged encroachment during pendency of the restoration petition in the year 2009, the petitioners ought to have filed an application under Order VI Rule 17 C.P.C, seeking leave of the court to raise search plea to claim title and declaration and recovery of possession. But the petitioners maintained silence all through and allowed the Court to proceed with the matter and resorted to a different procedure to withdraw the suit under Order XXIII Rule 1(2) C.P.C.

When the suit was filed in the year 2003, and when a trial has commenced by filing an affidavit under Order XVIII Rule 4 C.P.C, the trial is deemed to have been commenced, unless the petitioners satisfied the Court that despite exercise of due diligence, the petitioners could not have raised the specific plea before the Trial Court by amending the plaint suitably to claim different reliefs. In the absence of any explanation in the entire affidavit about exercise of due diligence in view of the bar under the proviso to Order VI Rule 17 C.P.C, the Court shall not allow amendments.

Order VI Rule 17 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.

As the petitioners failed to satisfy the Court about exercise of due diligence, by applying the law laid down in the above judgement the petition is liable to be dismissed.

Learned counsel for the petitioners contended that the plaint can be amended at any stage of the proceedings and placed reliance on the judgement of Apex Court in **Vidyabai**¹ case, wherein, the Apex Court while deciding the petition under proviso to Order VI Rule 17 C.P.C, held in paragraphs 42 & 43 that, it is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002. As per the proviso, no application for amendment shall be allowed after the trial has commenced, unless satisfied the Court that in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order VI Rule 17 was due to the recommendation of the Law Commission since Order Rule 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and

speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief.”

Learned counsel for the petitioners also relied on another judgment in **Nirman Sarkar**, wherein, the Apex Court in identical case facts, decided entitlement of plaintiff to amend the plaint. The few facts relevant are that, indisputably, the Plaintiff-Respondent No. 1 was the office-bearer of the Society at the relevant time and by Resolution taken by the Society Respondent No. 1 was authorized to complete the transaction. Hence, it is incorrect to allege that the Plaintiff-Respondent No. 1 was not aware about the transaction of 1989. Moreover, before the institution of the suit in the year 2010, the Plaintiffs allegedly came to know about the Conveyance Deed dated 8th February, 1989, some time in the year 2009, but relief was not sought for in the plaint which was filed much later i.e. 14th October, 2010. The High Court has not considered these undisputed facts and passed the impugned order on the general principles of amendment as contained in Order VI Rule 17 of the Code of Civil Procedure. Hence we do not find any ground for allowing the amendment sought for by the Plaintiffs which was not only a

belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence. The High Court has committed serious error of law in setting aside the order passed by the trial court whereby the amendment sought for was dismissed. The impugned order of the High Court cannot be sustained in law.

These two judgements are in support of the order passed by Court below and if, these principles are applied to the present facts of the case, more particularly, **Nirman Sarkar**² case, the petitioners are not entitled to claim relief under Order VI Rule 17 C.P.C, since the amendment is not only belated after 13 years from the date of filing suit but also failed to satisfy the Court about the requirement under the proviso to Order VI Rule 17 C.P.C introduced by Act 22 of 2002.

Further, the learned counsel to the petitioner would contend that the Court can permit amendment of pleadings at any stage of the pleadings and proposed amendment is necessary to avoid multiplicity of the proceedings and even after commencement of trial, the proposed amendment can be permitted and placed reliance on the judgement in **Brij Gopal Pallod**⁴ case, wherein, the Apex Court held in paragraphs 13, 14 & 16 as follows:

“13. There is another way of looking at the matter. If mere filing of affidavit is to be treated as commencement of trial, the affidavit, including the documents mentioned therein should become part of it, without any verification at all, and the Courts should not have any concern over it. Such a procedure would be detrimental to the very concept of adjudication of suits. Several inadmissible and irrelevant documents would gain their entry into the record and in many cases, the principle that a document once admitted into evidence cannot be removed from the record or demarked, comes into

play. For all practical purposes, the prohibition contained in Section 35 of the Indian Stamp Act would become redundant. Not only that. Undue advantage of the benefit under Section 36 of that Act would also be taken by the parties.

14. The safest approach seems to be that the trial of the suit can be said to have commenced when the trial Court makes the chief-examination of the first witness in the suit presented in the form of an affidavit, as part of record, after verification of its content, and on an examination of the documents mentioned therein from the point of view of admissibility, and when such witness is available for cross-examination by the opposite party.

16. The actual setting down of the case for recording of evidence, in the present legal regime, takes place when the first witness is ready and available for cross-examination. The reason is that filing of affidavit in lieu of chief-examination is mostly a ministerial act.”

Taking advantage of this principle, when no evidence was recorded by the Trial Court, the trial is not deemed to have been commenced. But, the trial is deemed to have commenced on the day when the issues were framed and posted for trial, when affidavit under Order XVIII Rule 4 is filed, marked the documents as exhibits.

According to Rule 17 Order VI of C.P.C., 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. However, the principles to decide petitions under Rule 17 Order VI of C.P.C. are well settled. Viz., the amendment shall not alter the basic

structure or nature of the claim and that the amendment shall not take away the valuable right that accrued to the respondent or such amendment would not amount to withdrawing unequivocal admissions made in the pleadings.

Therefore, the Court is required to consider the basic principles to decide the petition. The Apex Court in various judgments, highlighted the scope of Order VI Rule 17 C.P.C and laid down certain guidelines to exercise jurisdiction under Order VI Rule 17 C.P.C, which is purely discretionary in nature.

In **Rameshkumar Aggarwal v. Rajamala Exports Private Limited and others**⁷, the Apex Court relying on **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**⁸, to decide 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;
- 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

⁷ AIR 2012 SC 1887

⁸ 2009(8) SCJ 401

(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."

In **Bairam Susheela v. Pendota Rama Rajaiah**⁹, this Court held that mere grant of permission to amend the pleadings does not confer or take away the rights of the parties. On the basis of the amendment, necessary issues have to be framed after giving an opportunity to the other party and evidence has to be adduced on the issues so framed, if necessary. It shall always be open to the parties to raise such pleas as are open to them touching on the relief introduced through amendment.

In view of the principle laid down in the above judgment, the Court has to allow application filed under Order VI Rule 17 C.P.C before commencement of trial liberally.

In the present facts of the case, the examination-in-chief by way of affidavit under Order XVIII Rule 4 C.P.C was filed in the month of July

⁹ 2004 (5) ALT 233

2013 and even in the affidavit also, there was no averment to the effect that the respondents occupied an extent of Ac.1-04 gts out of the suit land, since the witness of the petitioners PW.1 conveniently avoided the cross examination in the month of July 2013 and filed petitions one after the other, even without making any allegation with regard to alleged encroachment, this itself is suffice is to conclude that the proposed amendment is malafide with an intent to procrastinate the proceedings in the suit obviously for the reasons best known to them. Therefore, it is obvious that the petitioners are totally negligent in prosecuting the proceedings and protracting the proceedings on one ground or the other by filing successive applications. Even in the year 2015 when the legal representatives of the fifth plaintiff were added, they did not raise such contention and sought for amendment of pleadings.

The word 'due diligence' is not defined anywhere, but the Apex Court analysed the word 'due diligence'.

The words "due diligence" is not exactly defined in the Code, but in ***"Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd"***¹⁰

"The Dictionary meaning of the expression "due diligence" as given in the Blacks Law Dictionary, Sixth Edition, 1990 means "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Similarly the Law Lexicon by P. Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause shown as to why in spite of due diligence a party could not have raised

¹⁰ 2006 (6) BomCR 510

the matter before commencement of trial, the Court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other."

In "**Chander Kanta Bansal v. Rajinder Singh Anand**"¹¹ the Apex Court while deciding a matter pertaining to amendment of pleadings under Order VI Rule 17 of C.P.C. discussed about the word "due diligence" in paragraph No.16 as follows:

"The words *"due diligence"* has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word *"diligence"* means careful and persistent application or effort. *"Diligent"* means careful and steady in application to one's work and duties, showing care and effort. As per *Black's Law Dictionary (Eighth Edition)*, *"diligence"* means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. *"Due diligence"* means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to *Words and Phrases by Drain-Dyspnea (Permanent Edition 13A)* *"due diligence"*, in law, means doing everything reasonable, not everything possible. *"Due diligence"* means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

On a careful analysis of the entire facts, it is clear that the petitioners are not diligent in taking steps to file an application under Order VI Rule 17 C.P.C and they conveniently, at their whim approached the Courts and filed successive applications one after the other. If, such conduct is encouraged, it would render the proviso redundant or superfluous. On the other hand, when the petitioners are at latches and

¹¹ (2008) 5 Supreme Court Cases 117

failed to tender P.W-1 for cross-examination in the month of July 2013, it is difficult to accept the principle laid down by the Court in **Brij Gopal Pallod⁴** case referred supra, since the trial is deemed to have been commenced on that day itself for trial.

The other contention raised by the learned counsel for the petitioners is that, the amendment can be allowed at any stage of proceeding to avoid multiplicity of proceedings. But this view is not acceptable, for the simple reason that in view of incorporation of proviso to Order VI Rule 17 C.P.C fixing time limit to amend their pleadings before commencement of trial. The proviso did not take away the power of the Court completely, which is subject to proof of exercise of due diligence. As observed by me in the earlier paragraphs, the petitioners miserably failed to exercise due diligence and filed a petition as an afterthought under Order XVIII Rule 4 C.P.C in lieu of examination-in-chief in the month of July 2013.

The petitioners also claimed recovery of possession of Ac.0-29 gts 44 square yards. But the defendants raised it specifically in the written statement that those alienations took place long prior to filing of the suit and thereby at this stage, the petitioners are not entitled to claim such relief by amending the plaint. The Trial Court took note of the conduct of the petitioners as to how the matter was explained and as to how the petitioners were dragging a matter on one pretext or the other. In paragraph 17 of the order, the Trial Court observed that the alienation of Ac.0-29 gts 44 square yards took place about 20 years ago on the extreme southern side of Ac.7-00 gts prior to filing of the petition and the alienation was made by plaintiffs 1 to 3 and they sold the said property to plaintiff no.4 for valuable consideration. But the petitioners kept quiet

for all these years and all of a sudden, filed a petition for withdrawal of suit on the ground of formal defect.

Thus, the proposed amendment to recover Ac.0-29 gts 44 square yards is hopelessly barred by limitation, when the claim is barred by limitation and the Court cannot permit the parties to amend the pleadings by exercising power under Order VI Rule 17 C.P.C. Therefore, the Trial Court dismissed the petition rightly for the reason that the amendment was sought by the petitioners at a belated stage and the petitioners failed to take reasonable care in prosecuting the proceedings i.e. due diligence and bring those facts to the notice of the Court at appropriate time. But, the petitioners filed petition belatedly after expiry of limitation for recovery of Ac..0-29 gts and 44 square yards and that such amendment would take away the valuable right that accrued on the respondents, as such, the order passed by the Trial Court is free from any legal infirmity, warranting interference of this Court and thereby the petition is liable to be dismissed as it is devoid of merits.

In the result, the Civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:23.02.2018

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