

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO. 6499 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.140 of 2017 in O.S.No.456 of 2010 dated 25.10.2017 passed by the Additional Senior Civil Judge at Kothagudem, dismissing the application filed under Order VI Rule 17 r/w Section 151 C.P.C to amend the written statement to incorporate certain sentences in the written statement.

The petitioner herein is the defendant in the suit and she filed written statement on 17.12.2012 before the Trial Court, raising several contentions. Thereafter, the matter went on several adjournments. The witnesses on behalf of the plaintiff were examined. The petitioner herein also filed her affidavit under Order XVIII Rule 4 C.P.C, in lieu of examination-in-chief.

At that stage, the defendant herein filed petition alleging that the word 'not' between 'It is' and word 'true' in the sixth line of third paragraph of the written statement was found missing. It is submitted that, it is purely a typographical mistake and sought for amendment of the written statement to permit the petitioner to add the word 'not' between 'It is' and word 'true' in the sixth line of third paragraph of the written statement. It is alleged that the respondent herein filed suit for specific performance, based on agreement of sale-Ex.A-1 and the defendant filed written statement denying the execution of agreement of sale. Though, it appears that the petitioner herein made an admission about offering the property for sale in the

sixth line of third paragraph of the written statement, she denied the very execution of the agreement of sale-Ex.A-1 at another point and finally prayed for dismissal of the suit. Therefore, the alleged admission is not unequivocal and requested to grant leave to amend the writ statement.

The respondent filed counter denying material allegations, *inter alia*, contending that the petitioner made an unequivocal admission, admitting offer for sale to sell the property in favour of the respondent herein and the witnesses examined on behalf of the plaintiff were cross-examined on the same lines, as contained in the sixth line of third paragraph of the written statement. Apart from that, in examination-in-chief filed under Order XVIII Order 4 C.P.C, the petitioner admitted about the said fact and now, the petitioner cannot resile from the earlier statement, withdrawing the unequivocal admission and that the petitioner did not exercise due diligence and therefore, leave cannot be granted to amend the written statement, in view of proviso to Order VI Rule 17 C.P.C and prayed for dismissal of the petition.

Upon hearing arguments of both the counsel, the Trial Court dismissed the petition, holding that, it is not a purely typographical mistake and it is an admission which cannot be withdrawn by amending the written statement. The said order is assailed in the present revision, contending that the whole contents of the written statement have to be taken into consideration to find out whether the allegations made in the written statement amounts to admission or not, when the petitioner prayed for dismissal of the suit in the written

statement, the question of admission does not arise. Therefore, the word 'not' is missed due to typographical error and sought permission of this Court to amend the written statement while contending that the order passed by the Trial Court is erroneous.

Learned counsel for the respondent supported the order of the Trial Court in all respects, while reiterating the allegations made in the counter.

Upon considering rival contentions and hearing arguments of both the counsel, the point that arose for consideration is ***“Whether the proposed amendment would amount to withdrawal of an admission made in the written statement regarding offering the property for sale. If so, can the Trial Court exercise its jurisdiction under Order VI Rule 17 C.P.C. If not, whether the order passed by the Court below be sustained?”***

P O I N T:

The respondent filed suit for specific performance, based on Ex.A-1 and sought for relief of specific performance. The petitioner/defendant filed written statement on 17.12.2012, relevant portion of the written statement is necessary for proper adjudication of the controversy between the parties. Paragraph No.3 is the relevant portion of the written statement which is sought to be amended by incorporating the word 'not' between 'It is' and word 'true' in the sixth line of third paragraph of the written statement and it is extracted hereunder.

“3) It is true that the defendant is the owner and possessor of the house bearing H.No.7-3-51/1 along with its appurtenant site to an extent of 400 Sq.Yards., situated at Medara basthi of Kothagudem Town which is a titled house. But, it is not true that the said house is in dilapidated condition. **It is true that the** defendant has proposed to alienate the above said house property and offered the plaintiff to purchase the same for a consideration of Rs.4,10,000/- and the defendant accepted the rate and entered into an agreement of sale on 14.08.2009.....”

The specific sentence in the sixth line of third paragraph clearly pointed out that the petitioner/defendant proposed to alienate the property and offered the plaintiff to purchase the same for consideration of Rs.4,10,000/- and the defendant accepted the rate and entered into agreement of sale on 14.08.2009. This admission is now intended to be withdrawn by amending the written statement incorporating the word ‘not’ between ‘It is’ and word ‘true’ in the sixth line of third paragraph of the written statement. However, in the later paragraphs, the defendant/petitioner denied the very execution of the agreement of sale and finally contended that she is not under obligation to execute sale deed and requested the Trial Court to dismiss the suit. But the other paragraphs, except the third paragraphs which is extracted above, are not relevant for deciding the real controversy.

According to Order VI Rule 17 C.P.C, the Court may at any stage of the proceedings allow either party to alter or amend his/her 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 inspite of due diligence, the party could not have raised the matter before the commencement of trial.

The intention of the Legislature in incorporating Order VI Rule 17 C.P.C is to avoid multicplicity of litigations, permitting the parties to amend their pleadings.

In **Rameshkumar Aggarwal v. Rajamala Exports Private Limited and others**¹, the Apex Court relying on **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**², 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
- (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.

¹ AIR 2012 SC 1887

² 2009(8) SCJ 401

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 view of the law laid down by the Supreme Court in the above judgment, now the contentions in the present petition have to be considered. In the present case, plaintiff was examined and the evidence of plaintiff was closed. In the cross-examination, the petitioner allegedly elicited the factum of execution of agreement of sale-Ex.A-1 in the same lines as contained in paragraph 3 of the written statement. Even otherwise, the petitioner filed her affidavit under Order XVIII Rule 4 C.P.C, in lieu of her examination-in-chief and the specific contentions in the sixth line of third paragraph of the affidavit are extracted hereunder:

"3) It is true that the defendant is the owner and possessor of the house bearing H.No.7-3-51/1 along with its appurtenant site to an extent of 400 Sq.Yards., situated at Medara basthi of Kothagudem Town which is a titled house. But, it is not true that the said house is in dilapidated condition. **It is true that**

the defendant has proposed to alienate the above said house property and offered the plaintiff to purchase the same for a consideration of Rs.4,10,000/- and the defendant accepted the rate and entered into an agreement of sale on 14.08.2009.....”

This unequivocal admission estopps the petitioner to contend otherwise, in view of Section 31 of the Indian Evidence Act. Section 31 of the Indian Evidence Act, deals with admissions and according to it, admissions are not conclusive proof of the matters admitted but they may operate as estoppel under the provisions contained in the Act. At the same time, Section 58 of the Indian Evidence Act says that, no fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings, provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission. Thus admissions are two types, one is judicial admission and another is evidentiary admission. The admission made in pleadings is judicial admission. But, such admission cannot be withdrawn by amending the pleadings, in view of the law declared by the Apex Court in **S. Malla Reddy v. M/s. Futuren Builders Co-operative Housing Society and others**³, where the Apex Court held that the admission cannot be permitted to be withdrawn by amending the pleadings. But, the contention of the learned counsel for the petitioner is that, it is not an unequivocal admission, in view of the prayer in the written statement. But, this Court is concerned

³ AIR 2013 SUPREME COURT 3693

with the proposed amendment in the sixth line of paragraph 3 of the written statement regarding offer made by the petitioner to sell the property and accepted by the plaintiff and entering into agreement of sale dated 14.08.2009. If the proposed amendment is allowed, it permitting the petitioner to add word 'not' between 'It is' and word 'true' in the sixth line of third paragraph of the written statement would amount to withdrawing a judicial admission made in the pleadings and such amendments cannot be allowed, in view of the law declared in the above two judgments.

Yet, the other contention raised by the learned counsel for the respondent is that, after commencement of trial in the suit, the parties cannot be permitted to amend their pleadings, except where the petitioner is able to establish that despite exercise of due diligence, said plea could not have raised by way of amendment. No doubt, proviso to Order VI Rule 17 C.P.C created a clear interdict on the power of this Court to allow amendments subsequent to Act No.21 of 2002, amending Order VI Rule 17, but, what is due diligence is a matter required to be considered.

The word "due diligence" is not exactly defined by the Act, but in **Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd**⁴, the Apex Court held as follows:

"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

⁴ 2006 (6) BomCR 510

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 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**⁵" 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."

Here, in the instant case, the petitioner filed written statement, allowed to frame issues and cross-examined the witnesses on behalf of the plaintiff allegedly in the same lines of plea raised in the written statement, more particularly, in paragraph 3 of page no.1 of the written statement and also filed an affidavit under Order XVIII Rule 4 C.P.C, admitting the execution of agreement of sale, as averred in paragraph 3 of page 1 of the written statement. But, the petitioner now intended to withdraw the admission. Filing of affidavit clearly

⁵ (2008) 5 Supreme Court Cases 117

says that the petitioner failed to exercise due diligence in prosecuting the proceedings and proceedings. Thus, unless the petitioner is able to establish that, despite exercise of due diligence, he could not have raised such plea bring those facts by amending the plaint and the Court cannot permit such amendments. Therefore, the petitioner miserably failed to establish that, despite exercise of due diligence, he could not have raised such plea by amending the written statement appropriately and at the same time, it amounts to withdrawal of an admission. That apart, he has estopped to withdraw such admission in view of Section 31 of the Indian Evidence Act, coupled with Section 58 of the Indian Evidence Act.

Therefore, it is not a fit case to interfere with the order passed by the Trial Court by exercising power under Article 227 of the Constitution of India, which is limited. Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised suo motu. It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India, as held by the Apex Court in **State (N.C.T. Of Delhi) v. Navjot**

Sandhu@ Afsan Guru⁶ that under Article 227 of Constitution of India the High Court can interfere with the directions of the Subordinate Courts.

In view of the law laid down by the Apex Court, this Court cannot exercise its power under Article 227 of the Constitution of India though the order is wrong, since the power can be exercised only to keep the subordinate Courts and Tribunals within its bounds.

This Court while exercising power under Article 227 can exercise its discretion to interfere in the following circumstances:

- a) When the inferior court assumes jurisdiction erroneously in excess of power.
- b) When refused to exercise jurisdiction.
- c) When found an error of law apparent on the face of record.
- d) Violated principles of natural justice.
- e) Arbitrary or capricious exercise of authority or discretion.
- f) Arriving at a finding which is perverse or based on no material.
- g) A patent or flagrant error in procedure.
- h) Order resulting in manifest injustice.
- i) Error both on facts and law or even otherwise.

In the present facts of the case, none of the grounds permits the Court to exercise power under Article 227 of the Constitution of India are found. Therefore, in the absence of any manifest error, it is difficult to refrain the order passed by the Trial Court. In view of my foregoing discussion, I find no reason to set-aside the order passed by the Court below.

However, the Trial Court is directed to consider the entire written statement and the contentions raised therein, including the

⁶ (34)2005 (3) ALT (CrI.) 125 (SC)

reliefs claimed and evidence adduced by both parties, at the end of the written statement and decide the matter, uninfluenced by any of the observations made by this Court in this order.

With the above observation, and in view of my finding the civil revision petition is dismissed, confirming the order in I.A.No.140 of 2017 in O.S.No.456 of 2010 dated 25.10.2017 passed by the Additional Senior Civil Judge at Kothagudem.

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

JUSTICE M. SATYANARAYANA MURTHY

Dated:19.01.2018

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