

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.6995 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.873 of 2017 in O.S.No.1249 of 2006 dated 17.11.2017 passed by the VII Senior Civil Judge, Vijayawada.

The petitioner is the plaintiff and the respondents are the defendants and for the sake of convenience, they will hereinafter be referred as were arrayed before the Trial Court.

The petitioner filed I.A.No.873 of 2017 before the Court below seeking leave of the Court to amend the plaint, alleging that, she filed O.S.No.1249 of 2006 against the defendants for grant of perpetual injunction, restraining the respondents, their men, agents, servants and associates from interfering with the peaceful possession and enjoyment of the suit schedule property. It is alleged that, originally the first defendant was the owner of the suit schedule property and the surrounding properties, he divided the same into plots and sold them to the public. The first defendant had shown the layout plan of the plaint schedule property for getting it approval from the municipal corporation. On satisfying the same, the plaintiff purchased Plot Nos.38 & 39 for a sale consideration of Rs.24,000/- under sale agreement dated 24.08.1994 executed by first defendant and he delivered the same to the plaintiff. The first defendant executed registered General Power of Attorney in favour of petitioner's husband by name Nandhyala Sambasiva Rao on 20.03.1995 by giving power to register the sale deed in favour of the petitioner. The General Power of Attorney Holder obtained permission from the Special Officer

and Competent Authority, Urban Land Ceilings, Vijayawada. In terms of the said permission, husband of the plaintiff executed a registered sale deed dated 17.08.2004 and since then she has been in peaceful possession and enjoyment of the schedule property which is well known to the first defendant and other defendants also. The petitioner and surrounding plot owners formed into a society namely Vinayakanagar Welfare Association and they appointed a watchman to look after their properties. The authorities have issued notice for payment of the vacant land tax for the years 2003-04, 2004-05 and 2005-06.

While the matter stood thus, the petitioner and her husband visited the plaint schedule property with a view to develop the plaint schedule property by digging pits to construct a compound wall on the sides of the same, the first defendant along with defendants 2 to 4 tried to encroach into the schedule property and threatened them with dire consequences to vacate the schedule property on 17.12.2006. The petitioner's husband gave a report to the Commissioner of Police and during the course of enquiry, Nunna Rural Police stated that the matter is civil in nature and advised to seek remedy through civil proceedings. The petitioner came to know that the defendants 1,4 & 5 in collusion with each other are acting detrimental to the interests of her, in the plaint schedule property and the defendants have no right whatsoever over the plaint schedule property. In order to protect the plaint schedule property from any illegal encroachment by the defendants, the petitioner filed O.S.No.1249 of 2006 from any illegal encroachment by the defendants seeking the relief of permanent injunction.

The second respondent filed a suit against the petitioner in O.S.No.3726 of 2006 on the file of III Additional Junior Civil Judge's Court, Vijyawada for permanent injunction claiming rights over the plaint schedule property. The said suit was transferred as per orders in Tr.O.P.no.150 of 2007 to II Additional Senior Civil Judge's Court and renumbered as O.S.No.332 of 2007 and clubbed with O.S.No.1249 of 2006.

During the course of trial, the plaintiff has examined PWs.1 & 2 and suit was posted for further evidence to 21.09.2017 and at that stage, the petitioner/plaintiff was advised to file a suit for declaration and obtained valuation certificate and to convert suit for injunction into declaration of title and other consequential reliefs.

It is specifically contended that the documents executed by P.Ws.1 & 2 in favour of others are not binding on her, but it came to the notice that the respondents denied the title of the petitioner during trial and therefore, filed petition to amend the plaint seeking leave of the Court to convert the suit for injunction simplicitor into suit for declaration of title and other consequential reliefs.

As the respondent denied the very title of this petitioner for the first time in the evidence, she filed I.A.No.873 of 2017 before the Trial Court on 21.09.2017 seeking leave of the Court to amend the plaint.

Respondents 4 to 7 filed counter denying material allegations, including sale of the property in favour of this petitioner and also execution of registered sale deed. It is specifically contended that the first respondent is the absolute

owner of an extent of Ac.1-00 in R.S.No.17 situate in Mutyalampadu within Vijayawada limits in the year 1993 and the first respondent converted the said property into house plots and subsequently, the first respondent sold an extent of 180 sq.yds under house plot No.38 in R.S.No.17 to Smt. Vellampalli Krishna Kumari w/o Vijaya Kumar for a valuable consideration of Rs.7,000/- on 24.04.1993 and the first respondent executed a Possessory Sale Agreement in favour of Smt. Vellampalli Krishna Kumari after receiving entire sale consideration from her and on the same day, the first respondent delivered possession of the said property to Smt. Vellampalli Krishna Kumari. Since the date of sale agreement dated 24.04.1993, the said Smt. Vellampalli Krishna Kumari is in possession and enjoyment of the same and Jasti Panduranga Rao and Jasti Alivelu Manga Thayaramma, the first respondent to execute and register the sale deed for the above said plot in favour of the fourth respondent. Accordingly, the first respondent executed and registered the sale deed on 31.08.2000 in favour of the fourth respondent bearing registered Document No.5235/2000 on the file of Vijayawada District Registry. On 24.04.1993, the first respondent, due to his inconvenience, he executed General Power of Attorney in favour of Vellampalli Vijaya Kumar i.e husband of the petitioner for the purpose of obtaining permission from Urban Land Ceiling Authority and to execute and register the sale deed in favour of Smt.Vellampalli Krishna Kumari. The said GPA Holder executed a registered sale deed on 01.09.2000 as Document No.4762/2000 in favour of the third respondent. Finally contended that, under these circumstances, the petitioner is not entitled to question the title of the purchasers

and not entitled to seek leave of the Court to amend the plaint, as claimed in the plaint and requested to dismiss the petition.

Upon hearing argument of both the counsel, the Trial Court dismissed the petition on the ground that the amendment petition was filed subsequent to commencement of trial and in the absence of explanation for her failure to obtain leave of the Court to amend the plaint inspite of exercise of due diligence and prior to commencement of trial before the Trial Court, amendment cannot be allowed.

Aggrieved by the order passed by the Court below, the present civil revision petition is filed on various grounds, mainly contending that the proposed amendment, if allowed, would not change the nature of the suit and the suit will still remain as suit for immovable property and conversion of the suit for permanent injunction into declaration of title is permissible under law. It is also contended that, the Trial Court failed to consider the consequences in the event of failure to amend the plaint, as it will lead to multiplicity of proceedings. Apart from that, no prejudice would be caused even if the amendment is allowed at this stage. Therefore, order of the Trial Court is unsustainable under law and prayed to set-aside the order passed by the Court below, granting leave to amend the pleading, as prayed in the petition.

During hearing, learned counsel for the petitioner Sri Ramineni Satish Babu, vehemently contended that, though it is a suit for injunction, it can be converted into suit for declaration based on the subsequent events and dismissal of an application on the sole ground that the petitioner did not satisfy the Court that despite exercise of due diligence, she could not bring those facts on

record before commencement of trial. The procedure is only to do substantial justice and rejection of the relief on technical grounds is impermissible and therefore, the Trial Court committed a grave error in dismissing the petition.

Learned counsel for the petitioner placed reliance on the judgments in **Surender Kumar Sharma v. Makhan Singh¹**, **Abdul Rehman v. Mohd. Ruldh²**, **Pankaj v. Yellappa (d) by L.Rs³**, **Raghu Thilak D. John v. S. Rayappan⁴**, **L.C. Hanumanthappa (since dead) represented by his Legal Representatives v. H.B. Shivakumar⁵**, **Ramchandra Sakham Mahaja v. Damodar Trimbak Tanksale (dead) and others⁶**, **Estralla Rubber v. Dass Estate (P) Ltd⁷** and **Andhra Bank v. ABN Amro Bank N.V and others⁸** and basing on the law declared in the above judgments, learned counsel for the petitioner sought to set-aside the order passed by the Trial Court, by exercising power under Article 227 of the Constitution of India.

Whereas, learned counsel for the respondents Sri P. Ravi Kiran supported the order of the Trial Court in all respects, while highlighting the purpose of Order VI Rule 17 C.P.C and bar created under proviso to Order VI Rule 17 C.P.C thereto.

Learned counsel for the respondents also contended that, as per the admissions made in the affidavit, trial has already been commenced and P.Ws.1 to 4 were examined and written statement was filed on 17.12.2007 prior to filing of I.A.No.873 of 2017, raising a specific contention that the petitioner is not entitled to

¹ (2009) 10 Supreme Court Cases 626

² (2012) 11 Supreme Court Cases 341

³ AIR 2004 Supreme Court 4102

⁴ (2001) 2 Supreme Court Cases 472

⁵ (2016) 1 Supreme Court Cases 332

⁶ (2007) 6 Supreme Court Cases 737

⁷ (2001) 8 Supreme Court Cases 97

⁸ AIR 2007 Supreme Court 2511

claim relief in the main suit for injunction. But, the petitioner/plaintiff did not take any steps despite the objection raised by the respondents and filed the petition after ten years from the date of filing the written statement. Therefore, the claim of the petitioner by way of proposed amendment is hopelessly barred by limitation and requested to confirm the order passed by the Trial Court, as the petitioner failed to satisfy the Court that she exercised due diligence in prosecuting the proceedings and failed to bring those facts on record before commencement of trial, as mandated under proviso to Order VI Rule 17 C.P.C.

Considering rival contentions, perusing the material available on record, the point that arose for consideration is as follows:

Whether the petitioner/plaintiff is entitled to convert the suit for injunction simplicitor into suit for declaration, after commencement of trial and after examining four witnesses in the suit. If so, whether the order passed by the Trial Court be sustained?.

P O I N T:

I.A.No.873 of 2017 is filed under Order VI Rule 17 C.P.C seeking leave of the Court to amend the plaint. O.S.No.1249 of 2006 was filed by the petitioner/plaintiff for injunction simplicitor to restrain the respondents/defendants from interfering with the peaceful possession and enjoyment of the suit schedule property. The defendants filed written statement on 17.12.2007. Thereafter, I.A.No.873 of 2017 was filed before the Trial Court on 21.09.2017 seeking leave of the Court below to convert suit for perpetual injunction into suit for declaration and injunction, almost after completion of 10 years from the date of filing written statement.

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/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. However, the principles to allowing petitions under Rule 17 Order VI of C.P.C. are well settled. They are; 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 will not take away the unequivocal admissions made in the pleadings. However, by proviso to Rule 17 of Order VI of C.P.C, an interdict is created, according to it, no application for amendment shall be allowed after the trial has been 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.

It is pertinent to note that the petitioner/plaintiff filed suit for various reliefs which are as follows:

- a. To grant permanent injunction restraining the defendants, their men, agents, servants and associates from ever interfering with the peaceful possession and enjoyment of the same;***
- b. Grant costs; and***
- c. Granting all such other reliefs as the nature of the suit admits, in the interest of justice of equity.***

Virtually, the relief claimed in the plaint initially falls under Sections 38 and 39 of the Specific Relief Act. If, such relief is granted, the respondents will be restrained from interfering with the peaceful possession and enjoyment of the suit schedule property. Therefore, the proposed amendment is only for

declaration of title in addition to injunction already claimed, which falls under Section 34 of Specific Relief Act.

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

The Apex Court in **A. Krishna Rao v. A. Narahari Rao and others⁹**, while dealing with an application under Order VI Rule 17 of C.P.C., the Apex Court held as follows:

"Rejection of petition under Order VI Rule 17 of C.P.C. on the ground that proposed amendment is inconsistent with original plea and petitioner cannot be permitted to raise such inconsistent plea is not justified. Amendment of pleading cannot be rejected even if proposed amendment has effect of raising conflict in plea. It is for the plaintiff to justify his pleadings and prove the same with reference to evidence. Since the procedure being handmaid of justice, a party cannot be deprived of his right to raise pleadings by way of amendment unless proposed amendment results in failure of justice."

Thus, in view of the principle laid down by the Apex Court in the above judgment, the Court can permit amendments to avoid multiplicity of the proceedings.

Turning to the facts of the present case, the suit was filed for perpetual injunction only, whereas, in the affidavit, it is alleged that while recording cross-examination of the witnesses, the defendants denied the title of the plaintiff which compelled the petitioner to seek such relief of declaration. But, the contention of the learned counsel for the respondents was that, the title of the petitioner was denied long prior to filing of I.A.No.873 of 2017 on 21.09.2017, when the written statement was filed specifically asserting that the plaintiff has no title to the property.

⁹ 2015 (1) ALT 113

The main endeavour of the learned counsel for the petitioner is that, conversion of suit from injunction to declaration will not amount to change of nature of the suit and still it remains as a suit for immovable property. In support of his contention, learned counsel for the petitioner placed reliance on the judgment of the Apex Court in **Abdul Rehman v. Mohd. Ruldh** (referred supra), wherein the Apex Court highlighted the object and purpose of Order VI Rule 17 C.P.C and proviso thereto, amendment of plaint after commencement of trial, when permissible, making it clear and explicit that all amendments which are necessary for purpose of determining the real questions in controversy between the parties should be allowed if it does not change basic nature of suit. On facts, challenge to voidness of sale deeds was implicit in factual matrix set out in unamended plaint and therefore, relief of cancellation of sale deeds as sought by amendment does not change nature of suit and furthermore, the proposed amendment to include a relief of declaration of title, in addition to permanent injunction which was claimed in unamended plaint, to protect plaintiffs' interest and not to change basic nature or structure of suit.

In **Pankaja & Anr. vs. Yellapa (Dead) By Lrs. & Ors**¹⁰, the Apex Court held that if the granting of an amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed. In the same decision, it was further held that an amendment seeking declaration of title shall not introduce a different relief when the necessary factual basis had already been laid down in the plaint in regard to the title.

¹⁰ AIR 2004 SC 4102

In **Ramchandra Sakharam Mahaja v. Damodar Trimbak Tanksale (dead) and others** (referred supra), the Supreme Court considered the scope of Order VI Rule 17 C.P.C and concluded that, amendment seeking to make claim more precise so as to enable court to adjudicate upon it more satisfactorily ought to be allowed.

In view of the law declared by the Apex Court, amendment of plaint can be permitted for conversion of suit from injunction to declaration and other consequential reliefs, with a view to avoid multiplicity of litigation. Though, consideration for grant of permanent injunction and declaration are totally distinct, but, still remains as suit for permanent injunction. Therefore, granting permission or leave to amend the plaint for conversion of suit from perpetual injunction to injunction does not amount to change of nature of suit. Therefore, on this ground, amendment cannot be rejected.

The main endeavour of the learned counsel for the respondents is that, when the respondents denied the right and title of the plaintiff in the year 2007 when the written statement was filed, filing of an application under Order VI rule 17 C.P.C i.e. after 10 years, that too after commencement of trial is a serious illegality and such amendment cannot be permitted for two reasons. **First** reason is that, it is barred by limitation i.e. the proposed claim is barred by limitation and the **second** is that the petitioner failed to satisfy the Court that, despite exercise of due diligence, she could not bring those facts on record before commencement of trial, in view of proviso to Order VI Rule 17 C.P.C.

Whereas, learned counsel for the petitioner contended that, though the petitioner did not exercise due diligence, when the amendment is necessary for deciding other controversies and to avoid multiplicity of proceedings, the Court can permit such amendments at any stage of the proceedings and that alone is not a ground to reject the plea by way of proposed amendment and requested to allow the petition, setting-aside the impugned order passed by the Court below.

As discussed above, when the law permits amendment of pleadings at any stage of the proceedings, even in the first appellate or second appellate stage, the parties can be permitted to amend their pleadings. But, in view of the amendment to Civil Procedure Code by Act No.22 of 2002, a proviso is added to Order VI Rule 17 C.P.C, which disabled the parties to seek leave of the Court to amend the plaint as a matter of course and it appears that, the proviso is an exception to the general rule. Therefore, to claim benefit under Order VI Rule 17 C.P.C, the petitioner must prove that, despite exercise of due diligence, she could not bring those facts on record before commencement of trial.

No doubt, another controversy is; what is the stage of commencement of trial?

In **Baldev Singh v. Manohar Singh**¹¹, the Apex Court while deciding a similar issue with regard to commencement of trial, observed that, it is well settled by various decisions of this Court as well as the High Courts in India that Courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference was made to a decision

¹¹ AIR 2006 SC 2832

of the Privy Council in **Ma Shwe Mya v. Maung Mo Hnaung**¹² in which the Privy Council observed as follows:

"All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit."

In **Baldev Singh v. Manohar Singh** (referred supra), the Apex Court in the concluding paragraphs held as follows:

"Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted herein after, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings."

It appears from the principle laid down in **Baldev Singh v. Manohar Singh** (referred supra) when the issues were framed in the Trial Court after completion of pleadings by both the parties in the suit and after amendment of C.P.C by Act 22 of 2002, posting the suit for filing documents or list of documents is deleted and according to Order VII Rule 14 (1) & (2) C.P.C and Order VIII Rule 1 (a) (1) & (2) C.P.C, the parties to the suit have to file the list of documents which they are relying upon and sued upon, along with their pleadings and if any document is not available, they have to

¹² (AIR 1922 P.C. 249)

state in whose possession the document is available. Therefore, posting the suit for filing of documents, after framing issues is totally taken away by Act 22 of 2002. In any view of the matter, it is clear from the law declared by the Apex Court that commencement of Trial as used in the proviso to Order VI Rule 17 C.P.C is only in the limited sense as meaning the final hearing of the suit, examination of witness, and advancing arguments. Therefore, framing of issues is not the starting point of commencement of trial.

But, the principle laid down in **Baldev Singh v. Manohar Singh** (referred supra) was considered by the Full Bench of the Supreme Court in **Kailash v. Nankhu**¹³, wherein, it was held that, when the issues were framed, the trial is deemed to have been commenced and the same principle is reiterated in **Vidyabai & Ors v. Padmalatha & Anr**¹⁴.

In view of the law laid down by the Apex Court in the above judgments, when issues were framed and the suit is posted for trial, the trial is deemed to have been commenced. Therefore the principle laid down in **Baldev Singh v. Manohar Singh** (referred supra) is no more good law, in view of the judgment of the Apex Court in **Kailash v. Nankhu** (referred supra).

Yet, another lacuna in the present case is that, the petitioner has claimed perpetual injunction, but, by proposed amendment, the petitioner/plaintiff intended to convert the suit for perpetual injunction into a suit for declaration after ten years from the date of filing written statement. In the written statement, the respondent specifically denied the title of the parties.

¹³ (2005) 4 SCC 480

¹⁴ (2009) 2 SCC 409

Order VI, Rule 17 of the Code of Civil Procedure, 1908 deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. Subsequently, it was again restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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 the matter of ***Salem Advocate Bar Association, T.N. v. Union of India***¹⁵, the constitutionality of the Amendment Act 22 of 2002 was upheld by Supreme Court and it was held as follows:

- (a) Order XVIII of the Code of Civil Procedure, 1908 deals with “Hearing of the Suit and Examination of Witnesses”. Issues are framed under Order XIV of the Code of Civil Procedure, 1908.
- (b) At the first hearing of the suit, the Court after reading the plaint and examining the written statement frames issues under Order XIV, Rule 1 of the Code of Civil Procedure, 1908.
- (c) Order XV of the Code of Civil Procedure, 1908 deals with “Disposal of the Suit at the First Hearing”, when it appears that the parties are not at issue on any question of law or a fact.
- (d) After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of the suit commences.

¹⁵ (2005) 6 SCC 344

In ***Vidyabai & Ors v. Padmalatha & Anr*** (referred supra), it was held as follows:

(I) The date on which the issues are framed is the date of first hearing.

(II) Filing of an affidavit in lieu of examination-in-chief of the witnesses amounts to commencement of proceedings.

In Ajit Narsinha Talekar v. Nirmala Wamanrao Kekade & Ors¹⁶, following the dictum in ***Vidyabai & Ors v. Padmalatha*** (referred supra) it was held that:

“... ‘framing of issues is the first date of hearing’ but that does not mean that on framing of issues the trial has commenced. Even after issues are framed, suits often are adjourned several times because of applications for adjournment made by either of the parties. Sometimes the matter is not even called out because the Court remains busy in dealing with older matters which are on board. Though the framing of issues is the first date of hearing, the actual hearing commences only when a party files an affidavit of himself or his first witness in lieu of examination in chief. That is the commencement of the trial...”

The proviso to Rule 17 of Order VI to some extent curtails absolute discretion to allow amendment at any stage. If application is filed after commencement of trial, it has to be shown that in spite of exercise of due diligence, such amendment could not have been sought earlier. The object for adding proviso by virtue of Amendment Act 22 of 2002 to Rule 17 of Order VI was to curtail delay and expedite adjudication of the cases.

¹⁶ (2010) 5 Mah LJ 481

In **Chander Kanta Bansal v. Rajinder Singh Anand**¹⁷, taking note of the object and purpose of Amendment Act 22 of 2002, the Supreme Court held that, the entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and to ensure that one party has sufficient knowledge of the case of the other party.

Further, in **Mohinder Kumar Mehra v. Roop Rani Mehra & Ors**¹⁸, it was held that, the proviso to Order VI, Rule 17 prohibits the entertainment of an amendment application after the commencement of the trial with the sole object that once the parties proceed with the leading of evidence then ordinarily no new pleading should be permitted to be introduced.

In **Mount Mary Enterprises v. Jivratna Medi Treat (P) Ltd**¹⁹, it was held that:

“...as per the provisions of Order 6, Rule 17 of the Civil Procedure Code, the amendment application should be normally granted unless by virtue of the amendment nature of the suit is changed or some prejudice is caused to the defendant...”

But, what is required to entertain such an amendment for commencement of trial is that, the petitioner has to satisfy the Court that despite exercise of ‘due diligence’ she could not seek such relief of amendment before commencement of trial, as clarified in the long line of judgments referred supra and the petitioner has to satisfy the Court about the requirement under

¹⁷ (2008) 5 SCC 117

¹⁸ (2018) 2 SCC 132

¹⁹ (2015) 4 SCC 182

proviso to Order VI Rule 17 C.P.C. Otherwise, she is disentitled to claim relief of amendment under Order VI Rule 17 C.P.C, in view of the bar under proviso thereto.

In the present case, the trial has already commenced, as admitted by this petitioner and the petitioner's evidence was closed. At the time of defendant's cross-examination, a defect was detected and by realizing the defect, the petitioner/plaintiff filed a petition proposing to convert the suit of injunction simplicitor into suit for declaration, title to the property. When the trial has commenced and it is partly completed, the petitioner has to satisfy the requirement under the proviso to Order VI Rule 17 C.P.C.

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**²⁰, 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 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

²⁰ 2006 (6) BomCR 510

facts of each case to reach a conclusion one way or the other.”

In **J. Samuel v. Gattu Mahesh**²¹, 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:

“13. Due 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”

In view of the tests laid down by the Apex Court in the judgments referred supra as to what amounts to exercise of ‘due diligence’, the petitioner in the present case did not aver anything in the entire affidavit as to how she exercised due diligence and despite exercise of due diligence, she could not bring those facts on record before commencement of trial. When the petitioner did not raise such plea in the affidavit filed along with this petition, the question of substantiating the same does not arise and in fact, both the parties went into trial, despite denial of title of this petitioner by the respondents about 10 years ago. Suggestions were also put to the witnesses denying the title of the petitioner.

²¹ 2012 (2) SCC 300

But, they did not open their eyes and slept over for a considerable period of time and when defendants witnesses are to be cross-examined, the petitioner realized the mistake she committed in seeking relief and filed petition under Order VI Rule 17 C.P.C to convert the suit for injunction simplicitor to declaration of title without explaining as to how she exercised due diligence and failed to take such steps.

If, the tests laid down in the two judgments referred supra, are applied to the present facts of the case, this petitioner as an ordinary prudent woman failed to take necessary steps before commencement of trial. Failure to take steps at an earlier stage without exercise of due diligence, disentitled her to claim such relief. Therefore, on this ground alone, this petition is liable to be dismissed.

Of course, learned counsel for the petitioner while contending that, amendment can be claimed at any stage and delay is not a ground and placed reliance on the judgment of **Ragu Thilak D. John v. S. Rayappan**²², wherein, the Supreme Court observed that, where the question as to whether an amendment to the pleading is barred by limitation or not, is a disputed question of fact, then in such cases, the issue of limitation can be made an issue in the suit itself, and resultantly the amendment application can be disposed of as allowed.

In **L.C. Hanumanthappa (since dead) represented by his Legal Representatives v. H.B. Shivakumar** (referred supra), the Apex Court held that, in amendment of plaint, when a suit is filed

²² (2001) 2 SCC 472

for relief of permanent injunction against the defendant/respondent in appeal against the dismissal of the said suit, the Appellate Court remanded the suit to the Trial Court after allowing amendment in plaint regarding addition of further relief as to declaration of title to suit property. But, in the original written statement filed on 16.05.1990, the defendant therein clearly denied the plaintiff's possession to the suit property. Thus, in view thereof, held, right to sue for declaration of title first arose on 16.05.1990. The period of limitation of three years for filing suit for declaration of title, as provided under Article 58 of Limitation Act, 1963 continued from 16.05.1990 till 15.05.1993. Hence, the relief of declaration of title of suit was barred by limitation and the Apex Court observed that, the delay cannot be made as a ground and though proposed amendment is hopelessly barred by limitation, the Court can permit such amendments.

There is a little controversy declared by the Apex Court in various judgments, which cannot be set at naught at this stage by this Court.

In **Surender Kumar Sharma v. Makhan Singh** (referred supra), the Apex Court held that, when a petition is filed under Order VI Rule 17 C.P.C, amendment of plaint at belated stage is not liable to be rejected, merely on the ground of delay if Court finds that by allowing application real controversy between the parties may be resolved, then the Court can allow application where opposite party can be compensated by costs or otherwise, the Court has wide discretion to deal with the application in such

manner and on such terms which appear it to be just and proper and with a view to do full and complete justice.

In **Smt. Mareddy Seetharathnam v. Siruvuru Venkatarama Raju and others**²³, the learned single Judge of this Court held that delay alone is not a ground.

In **Rameshkumar Aggarwal v. Rajamala Exports Private Limited and others**²⁴, the Apex Court relying on **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**²⁵, 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 changes the 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.

²³ C.R.P.Nos.1751 of 2016 & batch dated 17.10.2016

²⁴ AIR 2012 SC 1887

²⁵ 2009(8) SCJ 401

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."

Similarly, in **Rajkumar Guruwara (dead) through LRs v. S.K. Sarwagi and Company Private Limited and another**²⁶, 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.

Thus, in view of the law declared by the Apex Court in various judgments referred supra, delay by itself is not a ground. Undoubtedly, delay is not a ground, but it is by the limitation contained under proviso to Order VI Rule 17 C.P.C. The bar

²⁶ (2008) 14 Supreme Court Cases 364

contained under proviso to Order VI Rule 17 C.P.C was considered by the Court, except the learned single Judge of this Court.

Unless the petitioner satisfied the Court that, despite exercise of due diligence, she could not have brought the facts on record before commencement of trial. The amendment cannot be allowed as a matter of routine.

In **Rameshkumar Aggarwal v. Rajamala Exports Private Limited and others**²⁷, the Apex Court relying on **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**²⁸, 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.

These are some of the important factors which may be kept in mind while dealing with application filed under

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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 declared by the Supreme Court, the petitioner failed to satisfy that despite she exercised due diligence, she could not bring those facts on record before commencement of trial and such amendment cannot be allowed, in view of the bar under proviso to Order VI Rule 17 C.P.C.

In the present case, in the entire affidavit, the petitioner did not state anything as to exercise of due diligence and her failure to bring those facts on record before commencement of trial. But, only after closure of evidence of plaintiff's side, the objection before the Trial Court came to be filed seeking amendment, the entire affidavit is silent as to exercise of due diligence and despite failure to bring those facts on record, except narrating the facts. Therefore, the petitioner miserably failed to establish that, despite exercise of due diligence, she could not bring those facts on record

before commencement of trial. In view of the law declared by the Supreme Court in the judgments referred supra, it is difficult to accept the contention that the leave granted to this petitioner to amend the plaint, though the limitation and merits of the proposed amendment cannot be decided in a petition filed under Order VI Rule 17 C.P.C, though delay alone is not a ground to deny leave to the petitioner to amend the plaint.

In view of the law laid down in **Rameshkumar Aggarwal v. Rajamala Exports Private Limited and others** (referred supra), the Apex Court relying on **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others** (referred supra), **Rajkumar Guruwara (dead) through LRs v. S.K. Sarwagi and Company Private Limited and another** (referred supra), held that, time barred amendments cannot be permitted though the intention of the legislature in incorporating Order VI Rule 17 C.P.C is to give a quietus to the litigation to avoid multiplicity of proceedings. But, if, fresh suit is filed for the same relief, it is barred by limitation, such amendments cannot be allowed. Therefore, taking into consideration of all the facts and circumstances of the case, more particularly, completion of closure of evidence of the petitioner before the Trial Court and filing petition at the stage when the defendant/respondent is to let in evidence and further failed to establish that, despite exercise of due diligence, she could not bring those facts on record.

In view of my foregoing discussion, the law laid down in other cases with regard to other decisions is not relevant at this stage. In some of the judgments, the Court dealt with amendment

of written statement which is totally different from principles relating to amendment of plaint. Moreover, the general principle is one and the same. However, in view of my foregoing discussion in earlier paragraphs, the Trial Court rightly declined to grant leave to the petitioner to amend the plaint, as the petitioner failed to comply with the requirement under the proviso to Order VI Rule 17 C.P.C, thereby the order of the Trial Court does not call for interference of this Court, as it is free from any legal infirmity, warranting interference of this Court, exercising power under Article 227 of the Constitution of India. Consequently, the civil revision petition is liable to be dismissed.

In the result, civil revision petition is dismissed.

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

JUSTICE M. SATYANARAYANA MURTHY

Date:30.11.2018

SP