

A.No.7241 of 2018
in C.S.No.654 of 2011

PUSHPA SATHYANARAYANA, J.

The defendants instituted this application seeking permission to file an additional written statement, which will have a bearing in the disposal of the suit.

2. The suit was filed by the respondent/plaintiff for recovery of money on various heads, including the liquidated damages, differential escalation between frozen indices, the extra expenditure incurred, final bill amount, etc.

3. The second applicant/second defendant has filed the written statement on behalf of the other applicants/first, third and fourth defendants in August, 2012. The said written statement itself was filed with a delay and the same was condoned by this Court, upon which, the written statement was taken on file on 18.09.2013. Thereafter, the matter was referred to mediation in vain and later issues were framed on 20.11.2015 and the parties were sent for trial.

4. The trial commenced by filing proof affidavit of the respondent/plaintiff on 02.02.2017, wherein, 142 documents were

marked and it was posted for cross-examination of P.W.1 by the applicants/defendants. The trial itself was said to be time-bound. As the time schedule could not be kept up, an extension was granted by this Court to complete the cross-examination of P.W.1. It is stated that as P.W.1 had to travel from Chandigarh every time, the cross-examination was fixed on a day-to-day basis from 11.09.2017 to 15.09.2017. Despite the same, it could not be completed for various reasons attributable to the applicants/defendants. Time was further extended by this court and P.W.1 was partly cross-examined. While so, P.W.1 died on 02.03.2018 and the respondent/plaintiff had decided to close their part of evidence, as they could not substitute a witness having knowledge about the facts of the case. Thereafter, the suit was posted for the evidence of the applicants/defendants, at which point of time, the instant application is filed by the defendants for receiving the additional written statement.

5. The applicants/defendants stated in the affidavit filed in support of the above application that there was an earlier suit in C.S.No.27 of 2000 filed by the respondent/plaintiff, wherein, certain claims were made by the respondent/plaintiff against the defendants. A compromise was arrived at between the parties and the same was recorded and the suit was dismissed as settled out of court. It is now

stated by the applicants/defendants that while recording the said compromise, the respondent/plaintiff had given a categorical undertaking that it will not make any further claim. Notwithstanding the said undertaking given by the respondent/plaintiff herein at the time of withdrawing the earlier suit, the present suit has been filed, which according to the applicants/defendants, is for the very same claim. It is further stated by the applicants/defendants that at the time, the written statement was filed in the year 2013 in the present suit, the above facts were not readily available, because the earlier suit was withdrawn in the year 2005 and the present suit was filed on 16.08.2011. It is their case that the officials, in-charge of the previous suit, had retired and the facts about the earlier suit was only within their knowledge at the time of filing of the written statement.

6. The applicants/defendants went on to reiterate that the present suit is barred by Order 2, Rule 2 of the Code of Civil Procedure (in short, "CPC") and wanted to bring in the pleadings qua the previous suit by filing the additional written statement. It is also specifically stated that the respondent/plaintiff had not stated in the plaint about the filing of the earlier suit in C.S.No.27 of 2000 and also about the withdrawal of the same. In this regard, the applicants/defendants also wanted to mark certain documents, of which, P.W.1

claimed ignorance. As already P.W.1 was confronted with these documents, the respondent/plaintiff cannot have any serious objection for the receipt of those documents, which were sought to be filed along with the written statement. Hence, according to the applicants/defendants, it is just and necessary to allow them to file the additional written statement along with the documents relevant to the suit pleadings.

7. This application is stiffly opposed by the respondent/plaintiff contending that the act of the applicants/defendants to file the additional written statement after the commencement of trial and closure of the plaintiff's witness is an abuse of process of Court and the reasons assigned therefor are vague, frivolous and misleading. It is stated that the attempt to file an additional written statement is only a dilatory tactic to further delay the suit, which is of the year 2011. According to the respondent/plaintiff, the additional written statement sought to be filed is devoid of any new facts, which could not have been ascertained by the applicants/defendants at the time of filing the original written statement. The main reason for filing the additional written statement, as stated in the same, is that the respondent/plaintiff suppressed the fact that there was an earlier suit in O.S.No.27 of 2000, which was compromised and dismissed as

settled out of Court, as it was not mentioned in the present plaint. Admittedly, the applicants/defendants were the defendants in the said suit also and the suit was compromised and withdrawn only to their knowledge. Therefore, the fact that the respondent/plaintiff had not mentioned the same in the present plaint cannot be the reason for filing the additional written statement, as it is always open to the applicants/defendants to bring in those facts also in the written statement filed by them earlier.

8. Learned counsel for the respondent/plaintiff contended that it is not the case of the applicants/defendants that they could get the knowledge about those facts narrated in the additional written statement only subsequently. In other words, those facts were not within their knowledge on the date of filing of the original written statement. Even presuming that the attempt of the applicants/defendants is genuine, whether the same could be permitted post commencement of trial. Learned counsel also pointed out that the reliefs in both the suits are totally different, though the claim is against the same defendants. The contention of the learned counsel for the applicants/defendants that the applicants/defendants became aware of the previous suit only during the course of the cross-examination of P.W.1 in the present suit is false, frivolous and malicious, as the

second applicant/second defendant herein was a party to the suit in O.S.No.27 of 2000 and the said defendant was involved in the correspondence with respect to the settlement between the parties also.

9. Learned counsel for the respondent/plaintiff pointed out that the proviso to Order 6, Rule 17 of the CPC states that no application for amendment shall be allowed after the trial had 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 the trial. There is a distinction between Order 6, Rule 17, which speaks about the amendment of the pleadings and the Order 8, Rule 9 which provides for subsequent pleadings. Admittedly, when the trial has commenced, filing of additional written statement is usually not granted.

9.1. The learned counsel for the respondent/plaintiff relied upon the following decisions in support of her submissions :

- (i) P.A.Jayalakshmi V. H.Saradha, (2009) 14 SCC 525 ;
- (ii) An unreported order of this Court dated 08.12.2016 in CRP (PD) No.214 of 2014 (K.Sheela Rani V. Nayagam and Others) ;
- (iii) Valli V. Kandasamy, 2018 (6) CTC 273 ; and

(iv) M.Revanna V. Anjanamma (dead) by LRs, 2019
(2) CTC 474.

10. Heard the learned Senior Counsel appearing on behalf of the applicants/defendants on the above submissions and perused the materials placed before this Court. It is the submission of the learned Senior Counsel that since the earlier suit in O.S.No.27 of 2000 was dismissed as settled out of Court and the respondent/plaintiff had not specifically taken leave of this Court to file a fresh suit, it is estopped from instituting the instant suit.

10.1. The learned Senior Counsel relied on the following judgments of this Court to drive home the prayer of the applicants/defendants :

- (i) Subramanian V. Jayaraman, 1999 (III) CTC 52 ;
- (ii) Thiyagarajan V. Manivannan, 2007-1-L.W. 429 ;
- (iii) S.Suresh V. Sivabalakannan, 2007 (3) CTC 554;

and

- (iv) Jonh C.Christian V. R.Adhikesavan, 2009 (5) CTC

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11. The argument of the learned Senior Counsel for the applicants/defendants is that when the earlier suit in O.S.No.27 of 2000 was dismissed, the respondent/plaintiff had not specifically taken

leave of this Court to file a fresh suit. The said argument is liable to be rejected, as admittedly, the earlier suit was dismissed as settled out of court and that there is no necessity for seeking the leave of the Court to file a subsequent suit on a different claim.

12. Further, the proposed amendment to the written statement, which has been sought for now pertains to the facts, which pre-date to the filing of the original written statement in the above suit and also pertains to the facts forming basis of the claim of the plaintiff in C.S.No.27 of 2000. Thus, at the time of filing of the written statement in the year 2013, all the facts now sought to be introduced were not only pre-existing, but also were well within the knowledge of the applicants/defendants. Even otherwise the amendment application seeking amendment to the written statement is filed after the trial was commenced. It is not the case of the applicants/ defendants that the facts now sought to be pleaded by way of amendment could not be pleaded before the commencement of the trial despite due diligence. When the trial had already commenced, the date, on which the issues were framed, is deemed to be the date of first hearing. Various provisions in the CPC envisages the conduct of trial and filing of petitions at each stage of the proceedings. On the date of filing of the proof affidavit by the respondent/plaintiff, the chief examination of the

witness is deemed to have commenced. Thereafter, the respondent/plaintiff was examined in full and the cross-examination was in progress, at which point of time, P.W.1 died. Therefore, P.W.1 could not be further cross-examined by the applicants/defendants.

13. Before the proviso to Order 6, Rule 17 was added by way amendment, it was common to allow any amendment application filed by the litigants for one reasons or the other, who intend to protract the proceedings. The prolonging of the proceedings by the litigants by filing the frivolous amendments had to be put an end by the Legislature, which introduced the amendment in the year 2002. The said amendment was remedial measure to put an end to the mischief of the litigants in thwarting expeditious disposal. Therefore, the intent of the Legislature has to be given a meaningful effect and unless the amendment falls within the four corners of the legal provision, the same cannot be allowed. सत्यमेव जयते

14. It is apposite to refer to the judgment of the Hon'ble Apex Court in **Revajeetu Builders & Developers v. Narayanaswamy & Sons, (2009) 10 SCC 84**, wherein, the Hon'ble Apex Court culled out the basic principles which ought to be taken into consideration while dealing with the applications for amendments in the following manner:

"Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing 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."

15. The Hon'ble Apex Court in **M.Revanna V. Anjanamma (dead) by LRs., 2019 (2) CTC 474**, upon which reliance was placed by the learned counsel for the respondent/plaintiff, upheld the order of the High Court quashing the order of the trial Court, which had allowed the application for amendment of the plaint after the commencement of the trial observing :

"5. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from 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 the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

16. A careful analysis of the facts of the case in the light of the judgment of the Hon'ble Apex Court would go to show that the amendment, as sought for under Order 8, Rule 9 does not fall within the four corners of the factors set out as above by the Hon'ble Apex Court in the above referred judgments. Thus, the Legislature intention cannot be frustrated by the Courts by giving liberal interpretation to allow the amendments.

17. On the other hand, it is to be stated that the judgments of the learned Single Judges of this Court, which were relied on by the learned Senior Counsel for the applicants/defendants, are factually distinguishable, more particularly, when there is no reference to the amendment brought about by insertion of proviso to Order 6, Rule 17 of the CPC in those judgments, and hence, they render no assistance to advance the cause of the applicants/defendants.

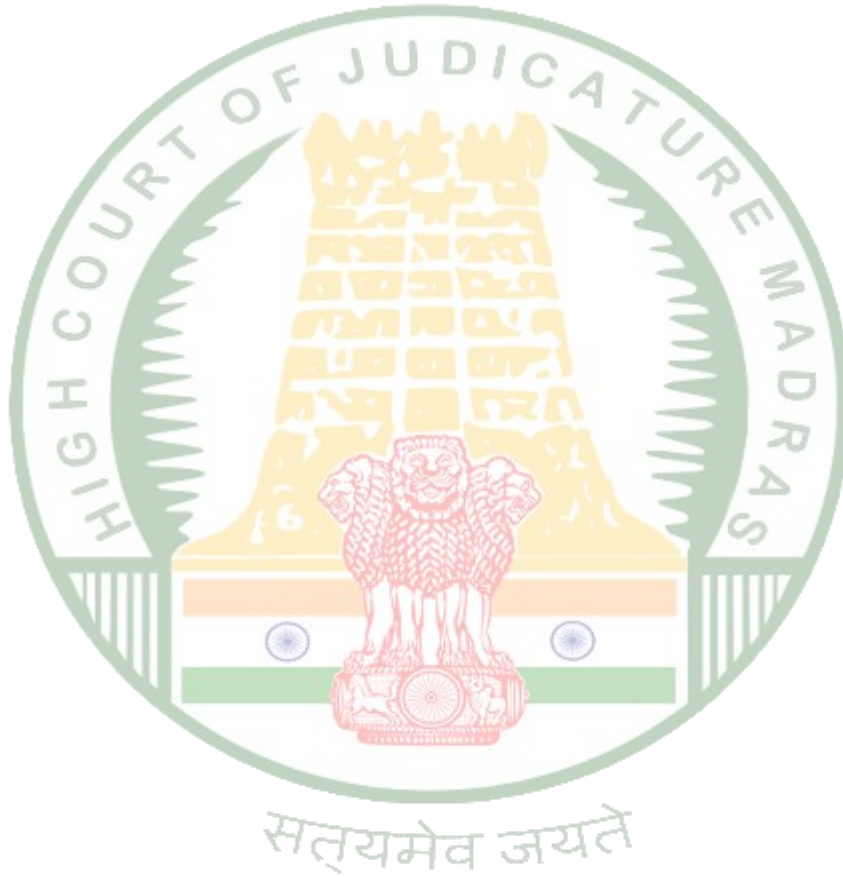
18. Admittedly, when P.W.1 was cross-examined, the applicants/defendants have already marked and confronted with the questions relating to the previous suit, which is also not seriously disputed by the respondent/plaintiff. Therefore, having failed to include the pleadings even at the time of filing the original written statement, the applicant cannot be allowed to include the same by way of additional written statement, after the commencement of the trial and after lapse of four years.

19. In the result, the permission sought for by the applicants/defendants to file the additional written statement cannot be granted and accordingly, this application is dismissed.

20. Post the suit before the concerned Additional Master for continuation of evidence on 06.11.2019 for completing the trial on or before 31.01.2020.

01.11.2019

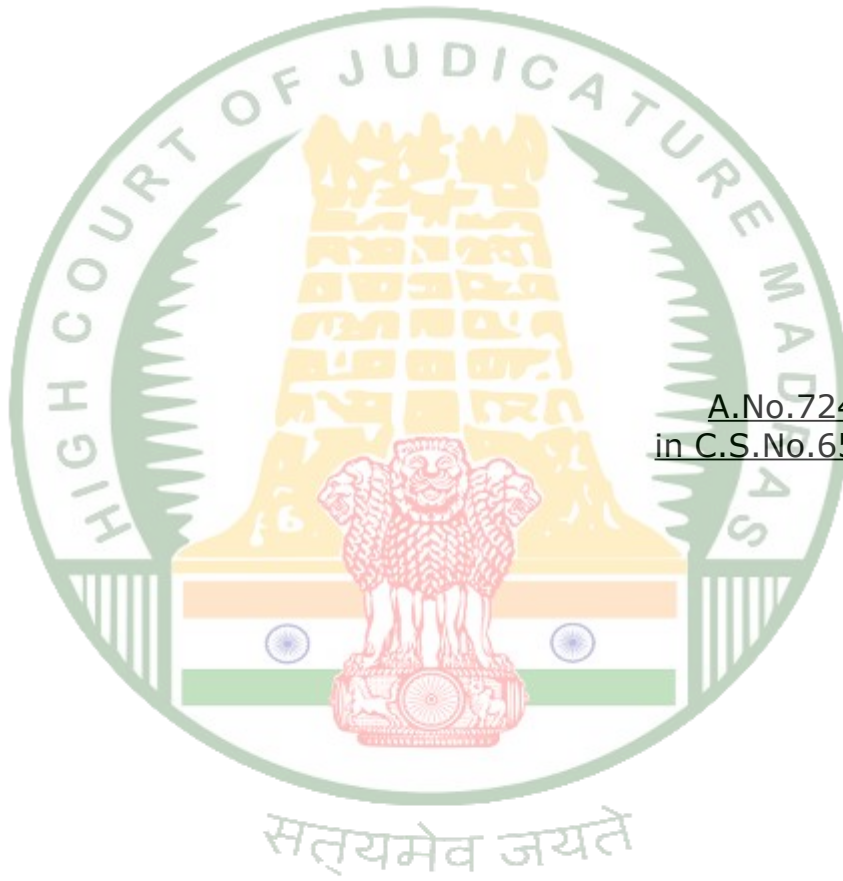
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