

THE HON'BLE SRI JUSTICE A. VENKATESHWARA REDDY

CRP No.164 of 2021

ORDER:

1. This Civil Revision Petition is filed under Article 227 of the Constitution of India by the petitioner/first defendant assailing the order dated 12.11.2020 in IA No.726 of 2019 in OS No.20 of 2015 on the file of the file of the V Additional District Judge, Kothagudem.
2. This application in IA No.726 of 2019 was filed under Order-VI Rule-17 read with Section 151 of the Civil Procedure Code 1908 (for short 'CPC') by the first defendant for permission to amend the counter claim incorporated in the written statement.
3. Heard the learned counsel on both sides. Perused the material available on record. Detailed submissions made on either side have received due consideration of the Court.
4. For the sake of convenience, the parties are hereinafter referred to as plaintiff and defendants as arrayed in the original suit.

5. The plaintiff has filed the original suit against the defendants 1 & 2 for partition and separate possession of the suit schedule property into three equal shares and for allotment of 2/3rd share to the plaintiff. The defendants have filed their written statement. Issues settled. As per the orders impugned dated 12.11.2020, issues were settled on 02.01.2019, later evidence affidavit of PW.1 was filed on 06.02.2019 and thereafter Exs.A.1 to A.3 documents were marked on 08.04.2019, through PW.1.

6. At that stage, the present application is filed by the first defendant for amendment of the written statement alleging that he has got issued a legal notice dated 14.08.2014 to the plaintiff calling upon him to come forward to execute the registered sale deed in respect of 2/3rd share of suit schedule property after receiving the balance sale consideration. In spite of receipt of the said notice, the plaintiff has not chosen to perform his part of contract and therefore, the suit for partition and separate possession is not maintainable, the first defendant has sought for dismissal of the suit and for a decree for specific

performance of agreement of sale dated 21.02.2014 in his favour and against the plaintiff.

7. The trial Court has rejected the plea of the plaintiff on two grounds that such plea was made at belated stage after commencement of the trial, consequently the plea of the first defendant for specific performance of agreement of sale dated 21.02.2014 is barred by limitation, as the present application is filed on 30.03.2019.

8. Feeling aggrieved by the said order impugned, the present Civil Revision Petition is filed by the first defendant. The learned counsel on both sides have given written submissions, particularly the learned counsel for the first defendant strenuously contends that though the suit is filed in the year 2015, till the year 2019 the plaintiff did not chose to adduce any evidence, delay is only attributable to the plaintiff, the first defendant has made a counter claim in the written statement for specific performance of agreement of sale though he has not filed required court fee, such counter claim cannot be rejected as beyond limitation. The present application is only filed

to protect the interest of the first defendant and to bring quietus to the litigation.

9. I have carefully perused the written submissions made on either side and the principles laid in the decisions relied by the learned counsel for the first defendant, who cited on the following decisions:

- i) ***Mahendra Kumar and another v. State of M.P. and others***¹;
- ii) ***Sabhari Syndicate v. the Catholic Syrian Bank Ltd.***²;
- iii) ***B.K.N. Narayana Pillai v. P. Pillai***³.

I have given my anxious consideration to the principles laid in the above decisions. It may not be out of place to mention that all these decisions relating to the period prior to amendment of CPC by Act 22 of 2002 with effect from 01.07.2002.

10. By Act No.46 of 1999 there was a sweeping amendment by which Rules 17 and 18 of CPC were omitted so that the amendment of pleadings was not permissible.

¹ AIR 1987 SC 1395

² 2001 AIHC 1584

³ AIR 2000 SC 614

Finally, to strike a balance, the Legislature has reintroduced Rule-17 by the Act No.22 of 2002 with effect from 01.07.2002.

11. It is this proviso which falls for consideration of the Hon'ble Supreme Court of India in ***Salem Advocate Bar Association v. Union of India***⁴. In paragraph Nos.42 and 43, the Hon'ble Supreme Court has held as under:

“42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless 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 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic 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.”

⁴ AIR 2005 SC 3353

12. In ***Vidyabai and others v. Padmalatha and another***⁵ at paragraph No.14, it is held by the Hon'ble Supreme Court of India, as under:

“14. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

13. Recently, the Hon'ble Supreme Court of India in ***N.C. Bansal v. Uttar Pradesh Financial Corporation and another***⁶, while dealing with an application under Order-VII Rule-14 of CPC held that such application may be entertained or considered when the suit is at initial stage i.e., when the trial has not yet begun and when the proposed amendment would not change the nature of cause of action or when such applications are not filed at belated stage.

⁵ (2009) 2 SCC 409 = AIR 2009 SC 1433

⁶ (2018) 2 SCC 347

14. As per the proviso, it is to be established by the party that in spite of “due diligence”, the party could not have raised the matter before the commencement of trial depending on the circumstances, the Court is free to order such application. The words “*due diligence*” have 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 the 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. It means, such diligence as a prudent man would exercise in the conduct of his own affairs. Thus, it is clear that unless the party takes prompt steps, mere action cannot be accepted in filing a petition for amendment of pleadings after the commencement of trial.

15. Reverting back to the facts of the present case, it may be stated that the plaintiff has filed the original suit for partition and separate possession of his 2/3rd share. Though the first defendant has denied the claim of the plaintiff, through the proposed amendment he made a counter claim for specific performance of agreement of sale stating that the first defendant has executed the agreement of sale, dated 21.02.2014 in his favour in respect of 2/3rd share of the plaintiff and that the suit of the plaintiff for partition may be dismissed and the plaintiff may be directed to execute the registered sale deed in his favour in respect of 2/3rd share in the plaint schedule property.

16. It is true that though a legal notice was issued on 14.08.2014, the defendant has not made any counter claim within three years thereafter for specific performance of agreement of sale and the present application is only filed on 30.03.2019. Thus, the suit is barred by limitation as per Article 54 of the Limitation Act.

17. That apart, the present application is filed after commencement of trial at belated stage. There was no due

diligence on the part of the first defendant and it is not his case that despite exercising due diligence, he could not plead all these facts in the written statement, when it was filed originally.

18. Therefore, when the facts of the present case are tested on the touchstone of the principles laid by the Hon'ble Supreme Court in the above decisions, the answer is in the negative. The first defendant is not entitled for the proposed amendment in the written statement. Therefore, I do not find any jurisdictional error or infirmity in the order impugned.

19. In the result, the Civil Revision Petition is dismissed without costs, confirming the order impugned dated 12.11.2020 in IA No.726 of 2019 in OS No.20 of 2015 on the file of the file of the V Additional District Judge, Kothagudem. As a sequel, interlocutory applications, if any pending in this revision petition, shall stand closed.

A. VENKATESHWARA REDDY, J.

Date: 20.04.2022
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