

(2016) 04 KAR CK 0154

In the Karnataka High Court

Case No : Writ Petition No. 4364 of 2015 (GM-CPC)

Zareena

APPELLANT

Vs

Mohamed Haneef

RESPONDENT

Date of Decision : 11-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : (2017) 1 KantLJ 135

Hon'ble Judges : Budihal R.B., J.

Bench : Single Bench

Advocate : Sriyuths H.S. Dwarakanath, Advocate, for the Respondent No. 2; Notice, for the Respondent No. 1; Sri Udaya Holla, Senior Counsel along with Sri Krishna Kumar S.R. for Sri Brijesh Patil, Advocates, for the Petitioner; S.N. Prashanth Chandra, Advocate, for

Final Decision : Allowed

Judgement

Budihal R.B., J. - This petition is filed by the petitioner/plaintiff praying to quash the impugned order dated 21-11-2014 passed in O.S. No. 3355 of 2007 by the XL Additional City Civil Judge, Bengaluru, who rejected the application filed by the petitioner/plaintiff under Order 6, Rule 17 read with Section 151 of Civil Procedure Code, 1908, which is produced at Annexure-G.

2. Petitioner/plaintiff filed the suit seeking permanent injunction to restrain the respondents/defendants or anyone acting on their behalf from interfering with peaceful possession and enjoyment of the property or in any way carry on any excavation work by encroaching upon the property mentioned in the schedule to the plaint and to restrain defendants 1 to 4 from creating any clandestine documents such as joint development agreement, lease mortgage, sale or otherwise in respect of the property and to restrain the defendant 5 from issuing sanctioned plan and licence in favour of defendants 1 to 4 in respect of property mentioned in the schedule to the plaint.

The petitioner herein has also filed an amendment application under Order 6,

Rule 17 read with Section 151 of CPC praying the Court to permit the petitioner to add paragraphs 18-A, 18-B, 18-C and 18-D after paragraph 18, the proposed amendment, which is mentioned in the application. In the prayer column also the petitioner has sought to add paragraphs (a1) for declaration of title declaring the that plaintiff and children Neha, Anjum and Muddasir Ahmed are the absolute owner of the suit schedule property, (a2) for consequential relief of possession directing defendants 1 to 4 to deliver vacant possession of the suit schedule property to the plaintiff, failing which the possession of the property be handed over through the process of the Court, (a3) for mandatory injunction directing demolition and removal of the construction put up by defendants 1 to 4 on the suit schedule property. The said application is also supported by the affidavit of the GPA Holder of the plaintiff, wherein it is stated the that averments made in the plaint may kindly be read as part and parcel of the affidavit the that plaintiff is the absolute owner in lawful and peaceful possession and enjoyment of the suit schedule property and defendants 1 to 4 do not has e any manner of right, title and interest or possession over the same. Defendants 1 to 4 attempted to illegally and highhandedly encroach and trespass upon the suit schedule property in collusion with defendant 5 and as such, plaintiff was constrained to file the above suit.

In the amendment application, there is also pleading that recently a few weeks back taking advantage of the long pendency of the matter and various subsequent events that have transpired during the pendency of the above suit subsequent to its institution, in particular, the fact the that suit schedule property has fallen vacant, the defendants 1 to 4 have no manner of right, title interest or possession over the suit schedule property or any portion thereof, have illegally and highhandedly trespassed and encroached upon the suit schedule property and are illegally attempting to put up illegal and unauthorised construction thereon. It is further mentioned that in view of the fact that proposed amendment is necessitated on account of additional subsequent events and plaintiff was not in a position to put forth these pleadings before commencement of trial and hence, prays to allow the application.

The said application has been resisted by the defendants by filing objection statement; defendants 2 and 4 have filed their separate objection statement to the application. The sum and substance of the objection statement the that General Power Attorney holder is a name lender to prosecute the cases on behalf of Smt. Zareena and her children, this is nothing but an abuse of the Court. There are no bona fides in the application, the averment the that application is filed only to correct the error in regard to the oral gift is false and the entire claim is based on the oral gift alleged to have happened earlier to 1998 and the date of the alleged oral gift itself is doubtful. The plaintiff has not chosen to seek these amendments to overcome the objections already raised in the suit and also to overcome the difficulty in sustaining the suit. Therefore, there cannot be any amendment to revive the suit. The averment the that amendment will not charge the suit is again misleading, the amendment, if allowed will change the entire

cause of action and it revives and if it is allowed it would amount to revival of the suit, and if the amendment is not allowed the plaintiff will be put to irreparable loss and injury is false and the same is denied.

Defendant 4 filed the separate objection statement contending that plaintiff has suppressed and misrepresented the entire facts leading to filing of the present interlocutory application and hence, plaintiff is not entitled to seek any discretionary or equitable relief either on facts or on law.

Defendant 2 as an absolute owner, who was and is continued to be in possession and enjoyment of the suit schedule property for a period of about 100 years, contested the frivolous claim made in the suit by filing written statement on 7-7-2007 and additional written statement on 30-3-2010 sought for dismissal of the suit. Defendant 2 in the objection statement claims that it is the owner of the suit schedule property taken the steps to vacate the tenants. Even according to the plaintiff it is the defendants 2 to 4, who are in possession and enjoyment of the suit schedule property. There was a suit filed by plaintiff's children in O.S. No. 15053 of 2005 for partition and I separate possession of their share and in the said suit interlocutory application was filed under Order 39, Rules 1 and 2 of CPC seeking ; temporary injunction order to restrain defendant 2 from interfering with peaceful possession and enjoyment of suit schedule property; the said application came to be dismissed on merits. Even the MFA No. 7248 of 2005 also came to be dismissed. Though in the suit O.S. No. 15053 of 2005, plaintiff filed the application under Order I, Rule 10(2) of CPC to implead defendants 3 and 4 in the suit as defendants 12 and 13 in the said suit, but subsequently filed the memo seeking deletion of defendants 12 and 13 in O.S. No. 15053 of 2005. The present interlocutory application seeking amendment is a classic example of the situation which are found to be mala fide, abuse of the process of Court, hence, the amendment application is liable to be dismissed with exemplary costs. The Trial Court after considering the merits of the application was pleased to dismiss the said application.

It is further contended the that relief claimed by the petitioner/plaintiff is barred by the law of limitation, Article 58 of the Limitation Act is applicable and the limitation is three years from the date when the right to sue first accrues. An attempt is made by the plaintiff to bring about a new cause of action and to alter the cause of action by the proposed amendment, which is not permissible under law. At the belated stage plaintiff is introducing an entirely different and new case, which would fundamentally change the nature and character of the case and it is not bona fide one and same would cause prejudice to the defendants. The trial is already commenced in the suit and hence, amendment application cannot be allowed. On these grounds defendant 4 also opposed the amendment application.

The Trial Court after considering the application on merits, ultimately dismissed the application filed under Order 6, Rule 17 read with Section 151 I of CPC, so also dismissed the IA No. 1 filed by defendant 2 under Order 7, Rule 11 of CPC.

3. Heard the arguments of the learned Senior Counsel appearing for the petitioner/plaintiff, the arguments of learned Senior Counsel appearing for respondent 4, learned Counsel appearing for respondent 2 and also the learned Senior Counsel appearing for respondent 3.

4. Learned Senior Counsel for the petitioner/plaintiff during the course of his argument submitted the that petitioner is the owner in possession of the suit schedule property, earlier she has filed the suit for permanent injunction as against respondents/defendants to restrain them from causing obstruction to her peaceful possession and enjoyment of the suit schedule property. He has further submitted that during the pendency of the suit, the defendants started and attempted to trespass into the land of the plaintiff and tried to put up the construction over the suit schedule property. Few weeks back, before filing the amendment application, defendants have illegally and highhandedly trespassed and encroached upon the suit schedule property, though the petitioner gave the Police complaint, the Police Authorities have not taken any action and the defendants in collusion with defendant 5 are making a false claim over the suit schedule property. He has also submitted the that construction, which the defendants wanted to put up on the suit schedule property is highhanded and illegal and it is to be removed and an order is to be passed by the Court for demolishing the said illegal construction. He has also submitted that in view of these subsequent developments because of the conduct of the defendants, it was necessitated for the petitioner/plaintiff to file the amendment application seeking declaration of her title to the suit schedule property with consequential relief of recovery of possession and also the mandatory injunction as against the defendants. He has submitted the that proposed amendment will not change the nature of the suit and as the proposed amendment is because of subsequent events that are taken place during the pendency of the suit and for complete and satisfactory adjudication of the matter it is necessary to consider the amendment application. He has also submitted that neither the proposed amendment will cause any sort of prejudice to the other side nor it take away any accrued rights of the defendants 1 to 4. It is further submitted that in order to avoid the multiplicity of proceedings also the proposed amendment is necessary. Learned Senior Counsel has submitted that if the proposed amendment application is not allowed, the petitioner/plaintiff will be put into irreparable loss and injury. Hence, it is submitted the that Trial Court has not at all considered these factual aspects so also the legal aspects and wrongly rejected the amendment application only on the ground the that amendment application is barred by time.

He has also submitted the that relief of possession is also sought by way of proposed amendment, therefore, Articles 64 and 65 are made applicable to consider the amendment application and not Article 58 of the Limitation Act. Hence, it is his contention, the Trial Court was not supposed to consider the merits of the application while considering the amendment application and the only question is whether the proposed amendment sought by the petitioner/plaintiff is to be allowed or not. It is also submitted that even if the proposed

amendment application is allowed, the other side will not be put into any kind of hardship or injury as they are having an opportunity to file their additional written statement, if any, to meet the amended portion of the plaint during the course of trial of the case by way of cross-examination. He has also submitted even as per the amendment of Civil Procedure Code, and adding the proviso to Order 6, Rule 17 of CPC, there is no complete Bar as such to consider the amendment application and the only requirement of showing exercise of due diligence by the petitioner/plaintiff. Hence, learned Senior Counsel has lastly submitted that order passed by the Trial Court rejecting the amendment application is patently illegal and it is not in accordance with relevant provision of law. Hence, submitted to allow the writ petition and to set aside the impugned order passed by the Trial Court by allowing the amendment application.

In support of his arguments, learned Senior Counsel for the petitioner has relied upon the following decisions:

- i. Sampath Kumar v. Ayyakannu and Another, 2002 (4) KCCR 2839 (SC);
- ii. Haridas Aildas Thadani and Others v. Godrej Rustom Kermani, (1984) 1 SCC 668;
- iii. Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385;
- iv. C. Natarajan v. Ashim Bai and Another, AIR 2008 SC 363;
- v. Seshumull M. Shah v. Sayed Abdul Rashid and Others, AIR 1991 Kant. 273;
- vi. Electronics and Controls v. The Karnataka Industrial Area Development Board, Bangalore and Another, AIR 2010 Kant. 519;
- vii. Pankaja and Another v. Yellappa (dead) by L.Rs and Others, (2004) 6 SCC 415;
- viii. Agnel B. Pereira and Another v. K.A.V. Bhanu Prakash and Another, 2016 SCC (ONLINE) Kar. 246;
- ix. Mritunjoy Ganguly v. H.N. Memorial Institution, 2016 SCC (ONLINE) Cal. 206;
- x. Abdul Rehman and Another v. Mohd. Ruldu and Others, (2012) 11 SCC 341;
- xi. Mount Mary Enterprises v. Jivratna Medi Treat Private Limited, (2015)4 SCC 182.

5. Per contra, learned Senior Advocate appearing for respondent 4 made submission that amendment application is barred by the law of limitation and the Trial Court is justified in rejecting the amendment application. He further submitted that respondent 2, who is the absolute owner of the suit schedule property, had filed the written statement on 7-7-2007 itself denying the title of the petitioner herein. Respondent 2 herein was and is in continuous possession and enjoyment of the schedule property for a period of about 100 years and in

spite of the that petitioner herein filed the frivolous suit against the respondents and made the amendment application only to suit her convenience even though no such alleged trespass and putting up of the construction has taken place on the suit schedule property. The learned Senior Advocate further made submission that when respondent 2, the owner of the suit schedule property, has denied the title in the year 2007 itself, the right to sue accrues to the petitioner/plaintiff from the said year and within three years from such right to sue accrues, the petitioner/plaintiff ought to have filed the amendment application, which is not done in this case. Learned Senior Advocate further made submission that looking to the materials on record virtually the original suit ought to have been filed for declaration of title and consequential relief of injunction. Article 58 of the Limitation Act is made applicable to the present amendment application and Articles 64 and 65 of the Limitation Act are not at all made applicable to the case on hand. If the title of the petitioner/plaintiff is undisputedly admitted by the respondents/defendants, then for the relief of recovery of possession from them, in such a case, Articles 64 and 65 of the Limitation Act would have been made applicable. In the case on hand, it is not the suit for only for recovery of possession, but it is for declaration of title and for consequential relief of permanent injunction, mandatory injunction and also recovery of possession. Learned Senior Advocate also submitted that in the earlier miscellaneous proceedings that had taken place, respondent 2-trust moved an application before the Principal City Civil Judge, Bengaluru, wherein the petitioner herein with other respondents appeared and enquiry was held in the said miscellaneous proceedings and the contention of the petitioner herein that she is the owner in possession of the suit schedule property was rejected in the said miscellaneous proceedings. In the earlier suit filed by the children of the petitioner/plaintiff in O.S. No. 15053 of 2005 also, they did not succeed in getting the injunction order as against any of the respondents herein. The amendment application was filed before the Trial Court when the evidence was already commenced in the suit and hence, the Trial Court had no discretion to allow the said application. After amendment of CPC in the year 2002, proviso to Order 6, Rule 17 has been inserted and the said proviso to Order 6, Rule 17 mandates the that party seeking amendment of the pleadings has to show exercise of due diligence in the matter. In the case on hand, when the title has been denied in the year 2007 itself, even then the petitioner/plaintiff has not filed the amendment application within the period of three years from that date and hence, there is no exercise of due diligence by the petitioner/plaintiff. Hence, the learned Senior Advocate submitted that all these aspects were properly considered and appreciated by the Trial Court extensively in rejecting the amendment application. There is no illegality committed by the Trial Court in rejecting the application and accordingly, sought to reject the writ petition. In support of his contentions, the learned Senior Advocate for respondent 4 has relied upon the following decisions:

1. Anathula Sudhakar v. P. Buchi Reddy (dead) by L.Rs and Others, (2008) 4 SCC 594;

2. L.C. Hanumanthappa (since dead) represented by his L.Rs v. H.B. Shiva Kumar, AIR 2015 SC 3364;
3. Khatri Hotels Private Limited and Another v. Union of India and Another, AIR 2011 SC 3590;
4. Ashutosh Chaturvedi v. Prano Devi alias Parani Devi and Others, (2008) 15 SCC 610;
5. Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344;
6. Vidyabai and Others v. Padmalatha and Another, (2009) 2 SCC 409;
7. Rajkumar Gurawara (dead) through L.Rs v. S.K. Sarwagi and Company Private Limited and Another, (2008) 14 SCC 364;
8. State of Madhya Pradesh v. Union of India and Another, (2011) 12 SCC 268;
9. Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84;
10. Dalip Singh v. State of Uttar Pradesh and Others, (2010) 2 SCC 114.

6. Learned Counsel appearing for respondent 2 submitted the that amendment application cannot be allowed as it is barred by the law of limitation as per Article 58 of the Limitation Act. The petitioner plaintiff is claiming the that application seeking amendment is governed by Articles 64 and 65 of the Limitation Act, but the said contention can be raised only when there is pleading with regard to the adverse possession. In this case, neither the petitioner/plaintiff nor the respondents/defendants have claimed the adverse possession over the suit schedule property. Hence, the Trial Court is justified in coming to the conclusion that Article 58 of the Limitation Act is made applicable and not Articles 64 and 65. The learned Counsel further submitted that it is respondent 2 herein is the owner in possession of the suit schedule property and the petitioner/plaintiff is not at all in possession of the suit schedule property at any time. In the earlier proceedings i.e., the suit filed by the children of the petitioner in O.S. No. 15053 of 2005, the children of the petitioner were not succeeded in getting the temporary injunction order as against the respondent 2-owner of the suit schedule property. Even in another suit filed by the petitioner's son in O.S. No. 9552 of 2005 also, the plaintiff in the said suit was not able to get any orders as against respondent 2 herein. It is the further submission of the learned Counsel that looking to the amendment application, the date of the alleged encroachment and putting up of the construction by the respondents is not specifically mentioned in the application seeking amendment or in the affidavit supporting the said application. In this connection, the learned Counsel drew the attention of this Court to the amendment application at para 18-C, wherein it is mentioned "the plaintiff submits that recently a few weeks back, taking advantage of the long pendency of the matter and various subsequent events that have transpired

during the pendency of the above suit subsequent to its institution, in particular, the fact that suit schedule property has fallen vacant, defendants 1 to 4, who have no manner of right, title or interest over the suit schedule property or any portion thereof, have illegally and highhandedly trespassed and encroached upon the suit schedule property and are illegally attempting to put up illegal and unauthorised construction thereon". The averments made in the application are vague and bald. Hence, it is submitted that there is no merit in the writ petition, there are no legal and valid grounds for this Court to interfere with the order of the Trial Court and therefore, submitted to dismiss the writ petition. In support of his contentions, the learned Counsel for respondent 2 has relied upon the following decisions:

1. Dada Jinnappa Khot v. Shivalingappa Ganapati Bellanki, ILR 1989 Kar. 993;
2. Khatri Hotels Private Limited's case;
3. Basavaraj Basavanneppa Pattan v. Government of Karnataka, ILR 2014 Kar. 5111;
4. Union of India and Others v. Azmathulla Mekhri and Another, 2014(2) Kar. L.J. 372;
5. L.C. Hanumanthappa's case;
6. Ramaiah v. N. Narayana Reddy (dead) by L.Rs., AIR 2004 SC 4261;
7. The Golden Valley Educational Trust Oorgam represented by its President v. The Vokkaligara Sangha represented by its Secretary ;
8. T.L. Muddukrishana and Another v. Smt. Lalitha Ramchandra Rao, AIR 1997 SC 772;
9. Chowdappa and Another v. Munivenkatappa by L.R., 2001(2) KCCR 1229;
10. Shiv Gopal Sah alias Shiv Gopal Sahu v. Sita Ram Saraugi and Others, AIR 2007 SC 1478;
11. Chander Kanta Bansal v. Rajinder Singh Anand, AIR 2008 SC 2234;
12. Sri Ramoji Rao and Another v. M.A.E. Kumar Krishan Varma and Another, 2012(1) ALD 259;
13. J. Samuel and Others v. Gattu Mahesh and Others, (2012)2 SCC 300;
14. Vidyabai's case;
15. Dalip Singh's case.

7. Learned Senior Advocate appearing for respondent 3 made submission that in the earlier suit in O.S. No. 15053 of 2005, the plaintiffs therein, who are the children of the petitioner herein, passed a memo requesting the Court to delete defendants 3 and 4 in the said suit and accordingly, their names were deleted

from the cause title and they were dropped from the proceedings. Hence, it is submitted that since the rights, if any, as against respondent 3 herein has been waived by the children of the petitioner herein, they cannot claim any relief in the subsequent suit i.e., O.S. No. 3355 of 2007 filed by the present writ petitioner.

Hence, sought to dismiss the writ petition.

8. I have perused the averments made in the amendment application, objection statement filed by the contesting respondents, pleadings of the parties i.e., plaint and written statement, and also the decisions relied upon by the learned Counsel on both sides which are referred above.

9. The suit was filed by the plaintiff in the year 2007 for bare injunction against the respondents in respect of the suit schedule property. The amendment application came to be filed in the year 2013 i.e., after the lapse of six years. The main contention of the petitioner/plaintiff is that as the defendants encroached the suit schedule property and attempted to put up the construction illegally and high handedly, she filed the amendment application seeking her title to the suit schedule property with the consequential relief of recovery of possession so also the mandatory injunction to remove the obstruction. It is the contention of the petitioner that these are the subsequent events that took place during the pendency of the suit. Therefore, the amendment application may be allowed. The amendment application was resisted by respondents 2 to 4 herein. The main contention of the said respondents is that Article 58 of the Limitation Act is applicable and hence, the amendment application is barred by the law of limitation and such amendment application cannot be allowed at all. It is also their contention that Articles 64 and 65 are not made applicable to the case on hand.

10. Perusing the decision of the Hon'ble Supreme Court relied upon by the learned Senior Advocate for the petitioner/plaintiff in Sampath Kumar's case. Their Lordships in the said decision have laid down the proposition at Head Note A as under:

"A. Code of Civil Procedure, 1908, Order 6, Rule 17 - Amendment of plaint - Suit for permanent injunction against dispossession - Pending suit, plaintiff was dispossessed - Plaintiff seeking amendment to plaint to include relief for declaration of title to suit property and consequential relief of delivery of possession - Rejection on grounds of delay and it would change the cause of action."

The Hon'ble Supreme Court in the said decision at para 7 has observed as under:

"In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of the relief sought for by the plaintiff. In the opinion of the Trial Court, it was open to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the Trial

Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings."

In another decision in Rajesh Kumar Aggarwal's case, the Hon''ble Apex Court has held as under:

"The object of Order 6, Rule 17 is the that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court. The Court always gives leave to amend the pleadings of a party unless it is satisfied that a party applying was acting mala fide. The amendment to pleading should be liberally allowed since the procedural obstacle ought not to impede the dispensation of justice. The Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both the parties and to sub-serve the ends of justice."

The Hon''ble Apex Court has also held in the said decision that while considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

In another decision in Seshumull M. Shah's case, this Court held as under:

"(A) Limitation Act (36 of 1963), Articles 58 and 65 - Suit for declaration - Plaintiff was owner of property - Plea taken - Sale deed executed by defendant in respect of the disputed property was void - Relief for possession of suit lands and damages for cutting standing tree on the land also claimed - Held, that such suit where possession was claimed as a consequence of declaration would be governed by Article 65 and not Article 58 of Act."

In another decision of this Court in Electronics and Controls case, dated 6-8-2010 rendered in W.P. No. 90 of 2008, this Court has laid down the proposition as under:

"Civil Procedure Code, 1908 (CPC), Order 6, Rule 17 -Limitation Act, 1963 Sections 58 and 65 Amendment of pleading - Whether the suit is barred by limitation period - Whether the Trial Court was correct in holding the that suit is not barred by limitation by answering issue 4 in the negative, by its order dated

3-8-2007 - Where possession is claimed in a suit as a resultant consequence of declaration, it would be governed by Article 65 and not Article 58 of the Limitation Act."

In the decision of the Hon''ble Supreme Court in Pankaja's case, their Lordships of the Hon''ble Supreme Court have laid down the proposition as under:

"Civil Procedure Code, 1908 (CPC), Order 6, Rule 17 -Amendment of pleadings - Delays and latches - Discretion of Court - Always open to Court to allow amendment applications in spite of delay and latches in moving such applications.

Civil Procedure Code, 1908 (CPC), Order 6, Rule 17 -Amendment of pleadings - Denial of relief on ground proposed amendment barred by limitation - Dispute between parties regarding applicability of Entry 58 or 64 or 65 of Limitation Act - In the circumstances, conclusion that by amendment, plaintiff introducing a different relief, not correct."

Further, in another decision in Abdul Rehman's case, the Hon''ble Supreme Court has laid down the proposition as under:

"Civil Procedure Code, 1908 (CPC), Order 6, Rule 17 proviso (as amended by CPC Amendment Act 22 of 2002) and Order 7, Rules 1 and 7 - Object and purpose of Order 6, Rule 17 , proviso - Amendment of plaint after commencement of trial - When permissible - Matters to be considered - Relief claimed by way of amendment if time barred.

Held, if such amendment application is made after commencement of trial, Court has to arrive at a conclusion that in spite of due diligence, plaintiff could not have raised matter before commencement of trial - Order 6, Rule 17 , proviso to some extent curtails absolute discretion to allow amendment at any stage - Object of Order 6, Rule 17 that Court should try merits of case that comes before them and should, consequently, allow all amendments that may be necessary for determining real question in controversy between the parties, provided it does not cause injustice or prejudice to the other side - Main purpose of allowing amendment is to minimise litigation and plea that relief sought by way of amendment was barred by time is to be considered in light of facts and circumstances of each case."

11. With regard to the contention of respondents 2 to 4/defendant 2 to 4 is concerned, I have already observed above the thaty have opposed the amendment application mainly on two grounds:

1. The proposed amendment is barred by the law of limitation as Article 58 will be made applicable to the case;

2. The evidence was commenced in the matter and hence, the petitioner/plaintiff has not made out a case of exercise of due diligence and in spite of such diligence, the petitioner was not able to file the application at the earliest.

12. Perusing the decisions on the side of the respondents, which are also

referred above, before considering the aspect as to whether the decisions relied upon by the learned Senior Advocates and also the learned Counsel for the respective respondents will come to the aid and assistance of their contention, while opposing the amendment application, let me consider that in reality, what is the suit filed by the plaintiff at the first instance. Whether it is a suit for bare injunction or is it a suit for declaration and the consequential relief of injunction when it was filed originally in the year 2007. To ascertain this fact, I have carefully gone through the pleadings of both sides i.e., the plaint and written statement filed in the suit. Looking to the plaint and perusing the relief column in the plaint, three prayers of permanent injunction are sought by the plaintiff as against the defendants. However, the averments made in the entire plaint, the plaintiff has contended that she is the absolute owner in possession of the suit schedule property and she got the property under the Hiba from her cousin brother. Let me refer to the relevant portions in the plaint (page 7) wherein it is stated "plaintiff states further that donee, Mansoor Hussain Sait was in exclusive enjoyment of the property right from 1964 till 1988 without interference or hindrance from anybody subsequently, Mansoor Hussain Sait gifted the property in favour of his cousin sister Smt. Zareena as well as her four children viz., Kaleed Ahmed, Asif Ahmed, Mudaseer Ahmed and Neha Anjum; by way of an oral Hiba on 27-2-1998 and put them in physical possession and enjoyment of the same by exercising ownership as contemplated under Mohammedan Law.

So by making such pleadings, the plaintiff claims that she along with her children is the owner in possession of the suit schedule property. This averment of the plaintiff was denied by defendants 2 to 4 by filing the written statement and defendant 2 claims that he is the owner in possession of the suit schedule property. Defendant 3 is the tenant under defendant 2 and defendant 4 is the sub-tenant under defendant 3. When this is the pleading of the parties in the suit, the Court has to look into the entire pleadings of the parties and not only the relief column of the plaint. When the plaintiff claims her title over the suit schedule property which is denied by the defendant, under such circumstances, it is the duty of the Court to decide the title by collecting the necessary Court fee and the Court cannot dismiss the suit on the ground that prayer for declaration is not sought for and it was only a suit for bare injunction. In this connection, I am referring to the decision of the Hon'ble Apex Court in case of Corporation of the City of Bangalore v. M. Papaiah and Another, AIR 1989 SC 1809, wherein their Lordships of the Apex Court have laid down the proposition as under:

"(A) Specific Relief Act, 1963 Section 34 Suit for decree of perpetual injunction restraining defendant from interfering with possession - Relief of declaration of title not specifically mentioned in relief portion of plaint-Suit could not be dismissed on that ground.

A suit was filed for a decree of perpetual injunction restraining the defendant-Corporation from interfering with possession of plaintiff over the land in dispute. The case of Corporation was the that disputed area was acquired for using it as

burial ground under Government Order and compensation was paid to plaintiff out of municipal funds and the land was in possession of defendant since then. The plaintiff's case was the that alleged Government Order was cancelled and land was settled under another Government Order with persons who subsequently sold it to plaintiff. The plaintiff also got his name entered in revenue records. The suit was decreed by Trial Court but the decision was reversed in first appeal. The plaintiff's second appeal was allowed by High Court and the decree of Trial Court was restored.

Held, that foundation of claim of plaintiff was title which was pleaded in earlier part of plaint and for deciding the nature of a suit the entire plaint has to be read and not merely the relief portion. The plaint in the present case does not leave any manner of doubt the that suit has been filed for establishing the title of the plaintiffs and on that basis getting an injunction against the Corporation. The Court fee payable on the plaint has also to be assessed accordingly."

13. Therefore, looking to the principle enunciated in the said decision, the Court has to consider the entire averments in the plaint to know as to what is the suit for. As I have already observed above, the suit filed by the plaintiff virtually was for declaration of title and consequential relief of injunction when it was originally filed in the year 2007 itself. Therefore, the Court has to decide the title on the basis of the said pleadings. Even in the Karnataka Court Fees and Suits Valuation Act, 1958, as per Section 26, under clause (c) which the suit for injunction will be valued for the purpose of payment of Court fee, if we look into the said provision also, the Court can decide even the title in respect of immovable property as it is mentioned in Section 26(a) which reads as under:

"26. (a) where the relief sought is with reference to any immovable property; and
(i) where the plaintiff alleges that his title to the property is denied."

So this provision also makes it clear that when the title of the plaintiff is denied even in injunction suit, the Court has to decide the title. Therefore, in my opinion, the suit originally brought by the plaintiff was not a bare suit for injunction, but in reality and virtually, it was a suit for declaration and consequential relief of injunction. When that is so, the contention of respondents 2 to 4 that Article 58 is applicable and the prayer for amendment regarding the title of the plaintiff is barred by the law of limitation will not sustain at all. So far as the title of the plaintiff is concerned, even if it is not sought for by the plaintiff by filing such amendment application, it is the duty of the Court to decide the title of the plaintiff in view of the rival contentions by the plaintiff and defendants in their pleadings, as laid down by the Hon'ble Apex Court in the above mentioned decision in M. Papaiah 's case.

14. Regarding the amendment application so far as the recovery of possession as a consequential relief to the prayer of declaration is concerned, it is the contention of the plaintiff that in the year 2013, few weeks earlier to filing of the amendment application, defendants 2 to 4 trespassed into the suit schedule

property and they tried to put up construction over the suit schedule property high handedly and illegally. Therefore, she sought consequential relief of possession and mandatory injunction also. According to the plaintiff, it is a subsequent event that taken place during the pendency of the suit and the amendment application was filed within 12 years from the date of the alleged encroachment and putting up of the construction. In view of my above discussion, I am of the opinion that the decisions relied upon by the learned Senior Advocates for respondents 3 and 4 and also the decisions relied upon by the learned Counsel for respondent 2 will not come to the aid and assistance of the contentions of the said respondents/defendants in opposing the amendment application. It is true that amendment application was filed after the commencement of the evidence in the suit. As I have already held that it was the suit filed by the plaintiff originally for declaration and consequential relief of injunction and so far as recovery of possession is concerned, the amendment application was filed immediately after the alleged encroachment and putting up of the construction, the application of the petitioner/plaintiff cannot be rejected in view of the facts and circumstances in the case on hand.

15. Even if the amendment application is allowed, it will not cause any sort of prejudice to the case of respondents/defendants 2 to 4, who are the contesting defendants. It is why because, it is not the case of defendants that after filing the suit and before filing the amendment application, right was accrued to them in respect of the suit schedule property and if the amendment application is allowed, their accrued right will be taken away. But it is the defence of defendants 2 to 4 in the original written statement itself that defendant 2 is the owner in possession of the said property and total denial of case of the plaintiff. Even in the suit, perusing the issues framed by the Trial Court, there is an issue regarding the limitation as per the contentions raised by the defendants. The proposed amendment will not change the nature of the original suit and it is in respect of the subsequent events alleged to have taken place during the pendency of the suit. While considering the amendment application, the Court need not go in to the truth or falsity of the averments made in the amendment application and the merits of the amendment application cannot be adjudged by the Court at that stage as laid down by the Hon'ble Apex Court in the decisions which are referred above. Further, even if the amendment application is allowed, the defendants are having an opportunity to file the additional written statement to the amended portion of the plaint and they are also having an opportunity to cross-examine the plaintiff during the course of the trial on such amended portion of the plaint. If the amendment application is rejected, it is having far-reaching consequences that plaintiff cannot raise such contentions subsequently as it is barred under Section 11, Explanation IV of CPC and even Order 2, Rule 2 of CPC will also come into play as against the plaintiff. As per the decisions of the Hon'ble Apex Court which are referred above, the Courts have to try the merits of the suit. It is necessary to allow the proposed amendment in order to avoid the multiplicity of proceedings. Considering all

these aspects of the matter, I am of the opinion that the petitioner/plaintiff has made out a case to allow the application for amendment. The Trial Court has not at all considered all these aspects while rejecting the amendment application.

16. Hence, the writ petition is allowed. The order dated 21-11-2014 passed by the XL Additional City Civil Judge, Bengaluru on the amendment application filed by the petitioner under Order 6, Rule 17 read with Section 151 of CPC in O.S. No. 3355 of 2007, is set aside and the amendment application filed by the petitioner/plaintiff is allowed. The petitioner/plaintiff is at liberty to carry out the amendment to the plaint and to produce the amended plaint copy before the concerned Trial Court within thirty days from the date of receipt of a copy of this order.