

## **J.Samuel & Ors vs Gattu Mhesh & Ors on 16 January, 2012**

**Equivalent citations: 2012 AIR SCW 1035, 2012 (2) SCC 300, 2012 (2) AIR KAR R 162, AIR 2012 SC (CIVIL) 811, (2012) 4 MAH LJ 40, (2012) 3 MAD LJ 159, (2012) 1 MAD LW 910, (2012) 1 CURCC 126, (2012) 115 REVDEC 533, (2012) 1 CAL LJ 84, (2012) 3 MPLJ 37, (2012) 1 RECCIVR 903, (2012) 1 SCALE 330, (2012) 2 WLC(SC)CVL 320, (2012) 1 CLR 366 (SC), (2012) 90 ALL LR 897, (2012) 2 ALL WC 1854, (2012) 5 CAL HN 1, (2012) 1 CALLT 29, (2012) 3 CIVLJ 286, (2012) 2 CIVILCOURTC 252, (2012) 3 PUN LR 93, (2012) 3 UC 1991, (2012) 110 ALLINDCAS 24 (SC), (2012) 1 ALL RENTCAS 461, 2012 (1) KLT SN 103 (SC), (2012) 5 BOM CR 90**

**Author: P. Sathasivam**

**Bench: J. Chelameswar, P. Sathasivam**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 561 OF 2012

(Arising out of SLP (C) No. 8985 of 2011)

J. Samuel and Others

.... Appellant (s)

Versus

Gattu Mahesh and Others

.... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

- 1) Leave granted.
- 2) This appeal is filed against the final judgment and order

dated 08.02.2011 passed by the High Court of Andhra Pradesh at Hyderabad in Civil Revision Petition No. 5162 of 2010 whereby the High Court while setting aside the order dated 20.10.2010 passed by the II Additional District Judge, Karimnagar at Jagtial, allowed the revision petition filed by the respondents herein.

- 3) Brief Facts:

- a) The Diocese at Karimnagar was incorporated on 12.03.1978 from its parent Diocese of Dornakal. On

22.08.1985, the Retired Diocesan Treasurer and Property Secretary, Karimnagar, issued a publication in the paper to auction the land bearing Survey No. 43, admeasuring Ac. 3.31 gts. situated at Mission Compound, Dharmapuri Road, Jagtial and the last date to receive the tenders was fixed as 05.09.1985. On 13.09.1985, the sealed tenders were opened and Gattu Mahesh-Respondent No. 1 herein and Kotha Mohan-Respondent No. 2 herein, Managing Partners in M/s Jagath Swapna & Co. put tenders for an amount of Rs. 24,55,569/- along with a DD for an amount of Rs.2,45,556/- which is 10% of the EMD. They being the highest bidders, their tenders were accepted.

b) The contract for sale of property was entered into between the Respondent Nos. 1 and 2 herein with Karimnagar Diocese on 27.09.1985. It was mentioned in the contract that Karimnagar Diocese agreed to receive Rs. 2,50,000/- on or before 08.11.1985 because the land under sale was under

dispute and the balance amount was to be paid by the respondents herein only after getting final dropping of the land acquisition proposal by the Municipality, Jagtial and sanction of layout by the Municipality, Jagtial. On 03.04.2003, Respondent Nos. 1 and 2 herein issued a legal notice to Karimnagar Diocese informing that the land

acquisition proceedings were dropped on 05.05.1986 and the sanction of layout by the Municipality, Jagtial was completed on 28.12.1989 and to execute and register the sale deed in their favour as per the agreement dated 27.09.1985.

c) In the absence of adequate response from Karimnagar Diocese, Respondent Nos. 1 and 2 filed O.S. No. 9 of 2004 in the Court of II Additional District Judge, Karimnagar at Jagtial for specific performance of the contract of sale and for perpetual injunction. During the pendency of the suit, Karimnagar Diocese filed written statement pointing out the inherent defects, namely, absence of mandatory requirements of Section 16(c) of Specific Relief Act and Form 47, Appendix 'A' of the Code of Civil Procedure, 1908. On 24.09.2010, respondent Nos. 1 and 2 herein filed I.A. No. 1078 of 2010 in O.S. No. 9 of 2004 under Order VI, Rule 17 of the Code seeking amendment of the plaint to incorporate specific pleading in compliance of the above section of the Specific Relief Act and the Code on the ground that the same was missed due to typographical error. On 04.10.2010, Karimnagar Diocese filed counter affidavit resisting the application.

d) By order dated 20.10.2010, the II Additional District Judge dismissed the application for amendment filed by the Respondent Nos. 1 and 2 herein. Aggrieved by the order, the Respondents herein approached the High Court by filing Civil Revision Petition being No. 5162 of 2010. The High Court, by impugned order dated 08.02.2011, allowed the amendment sought for by the Respondent Nos. 1 and 2 herein.

e) Aggrieved by the said decision, the respondents have preferred this appeal by way of special leave petition before this Court.

4) Heard Mr. A. Subba Rao, learned counsel for the appellants and Mr. K. Swami, learned counsel for the respondents.

5) The only point for consideration in this appeal is whether the High Court is right in allowing the application filed under Order VI Rule 17 CPC for amendment of the plaint which was filed after conclusion of trial and reserving the matter for orders.

6) Based on the agreement dated 27.07.1985 which relates to sale of 3 acres and 31 gunthas of land in Survey No. 43 situate in Mission Compound, Dharmapuri Road at Jagtial for a consideration of Rs.24,55,569/-, the respondents/plaintiffs filed the said suit for specific performance. Since we have already mentioned factual details, there is no need to refer the same excepting the details relating to the petition filed under Order VI Rule 17. After filing written statement by the contesting defendants, the trial of the suit commenced and admittedly both parties adduced the evidence on their behalf and arguments on behalf of both the sides were heard and completed on 22.09.2010. On that day, the Court reserved the matter for orders. Meanwhile, on 24.09.2010, the respondents herein filed a petition praying for amendment of the plaint. In support of the said application, plaintiff No.2 has filed an affidavit stating that in para 11 of the plaint he has stated about the legal notice issued on 03.04.2003 to defendant Nos. 1 to 7 for specific performance of agreement of sale dated 27.09.1985 and there was no reply for it. In para 3 of the affidavit, the deponent has stated that by type mistake, the following sentences have missed. After para 11 of the plaint, the following

para 12 may be added. "We are and has been and still is ready and willing specifically to perform the agreement of sale dated 27.09.1985 on our part of which the defendants have, had noticed. I am ready with the balance amount as per agreement of sale dated 27.09.1985. I submit the para nos. 12-18 of the plaint may be changed as 13 to 19."

The only reason given by the plaintiffs praying for amendment and inclusion of the above averment in the plaint is "type mistake". It is also stated that it happened in spite of their due diligence.

7) The above claim was resisted by the appellants herein by filing detailed counter affidavit. Apart from disputing the merits of the claim of the plaintiffs, with regard to the petition under Order VI Rule 17 they specifically stated that after passing several stages in the protracted trial, the final arguments of the plaintiff in the suit were heard on 20.09.2010. The defendants have also filed their written arguments on 22.09.2010 wherein the inherent defect of plaintiff i.e. absence of averments of mandatory requirements of Section 16(c) Explanation (ii) and Form 47 Appendix A of CPC was pointed out. Even after this, further argument was made by both the parties and the counsel for the plaintiff informed the court that no further time is required and the matter may be posted for judgment. In view of the same, the learned trial Judge posted the matter to 04.10.2010 for judgment. Only at this juncture i.e. on 24.09.2010, plaintiffs came up with the present petition seeking amendment to incorporate specific pleading in compliance with Section 16 (c) of the Specific Relief Act and Form 47 of Appendix A CPC on the ground that the same was missed due to "type mistake" in spite of due diligence. Though the said claim was not acceptable by the trial Court, the High Court allowed the plaintiff to amend the plaint as prayed for.

8) Before considering the acceptability or otherwise of the reasoning of the High Court, it is useful to refer Order VI Rule 17 CPC.

"17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

The said provision was omitted by the Civil Procedure Code (Amendment) Act, 1999. Section 16 of the Amendment Act reads as under:

"16. Amendment of Order 6 - In the First Schedule, in Order 6,--

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(iii) Rules 17 and 18 shall be omitted."

After stiff resistance by the litigants and the members of the bar, again Order VI Rule 17 was re-introduced with proviso appended therein. As per the said proviso, no application for amendment shall be allowed after the trial has commenced.

However, there is an exception to the said rule, i.e., if 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, such application for amendment may be allowed.

9) Before proceeding further, it is also useful to refer Section 16(c) of Specific Relief Act which reads as under:

"16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) xxx

(b) xxx

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

It is clear that in a suit for specific performance of a contract, unless there is a specific averment that he has performed or has always been ready and willing to perform the essential terms of the contract, the suit filed by him is liable to be dismissed. In other words, in the absence of the above said claim that he is always ready and willing to perform his part of the contract, the decree for specific performance cannot be granted by the Court.

10) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential

ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when 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.

11) As stated earlier, in the present case, the amendment application itself was filed only on 24.09.2010 after the arguments were completed and the matter was posted for judgment on 04.10.2010. On proper interpretation of proviso to Rule 17 of Order VI, the party has to satisfy the Court that he could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the court to amend the pleadings at any stage of the proceedings. However, proviso restricts that power once the trial has commenced. Unless the Court satisfies that there is a reasonable cause for allowing the amendment normally the court has to reject such request. An argument was advanced that since in the legal notice sent before filing of the suit, there is reference to readiness and willingness and the plaintiff has also led in evidence, nothing precluded the court from entertaining the said application with which we are unable to accept in the light of Section 16(c) of the Specific Relief Act as well as proviso to Order VI Rule 17.

The only reason stated so in the form of an affidavit is omission by "type mistake". Admittedly, it is not an omission to mention a word or an arithmetical number. The omission is with reference to specific plea which is mandated in terms of Section 16(c) of the Specific Relief Act.

12) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their complaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be 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.

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.

15) In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term typographical error is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.

16) The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip. Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order VI Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [vide Aniglase Yohannan vs. Ramlatha and Others, (2005) 7 SCC 534, Ajendraprasadji N. Pandey and Another vs. Swami Keshavprakeshdasji N. and Others, Chander Kanta Bansal vs. Rajinder Singh Anand, (2008) 5 SCC 117, Rajkumar Guraward (dead) through LRS. vs. S.K.Sarwagi and Company Private Limited and Another, (2008) 14 SCC 364, Vidyabai and Others vs. Padmalatha and Another, (2009) 2 SCC 409, Man Kaur (dead) By LRS vs. Hartar Singh Sangha, (2010) 10 SCC 512.

17) In the light of the above discussion, we are in entire agreement with the conclusion arrived by the Trial Court and unable to accept the reasoning of the High Court. Accordingly, the order dated 08.02.2011 passed in Civil Revision Petition No. 5162 is set aside.

18) The civil appeal is allowed with no order as to costs.

.....J. (P. SATHASIVAM) .....J. (J. CHELAMESWAR) NEW DELHI;

JANUARY 16, 2012.