

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) No.1436/2007 with CM No.14793/2007**

Reserved on: March 03, 2009

Date of Decision: March 31st 2009

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SATISH KUMAR JAIN

Through

..... Petitioner

Mr.Kailash Sharma, Advocate

Versus

RAJ SINGH YADAV

Through

..... Respondent

Mr. Naveen Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest?Yes

J U D G M E N T

MANMOHAN,J

1. Present petition under Article 227 of Constitution of India has been filed seeking to set aside order dated 27th August, 2007 passed in Suit No.802/2006 whereby Additional District Judge has dismissed petitioner's two applications filed under Order 6 Rule 17 CPC and under Order 7 Rule 11 CPC respectively. Relevant observations in the impugned order are reproduced hereinbelow for ready reference:

"9. In the present case the written statement of the defendant is to be carefully seen. In the written statement the defendant has more or less generally denied the whole of the plaint. There is no specific denial of the allegations made in the plaint. Due to this fact there has been a deemed admission on the part of the defendant to the several allegations made in the plaint. Not only this, a right has accrued to the plaintiff because of the deemed admissions.

10. In this regard the law is settled that admissions cannot be withdrawn by way of amendment but can be explained away. Now, it is to be further seen that whether the proposed amendments are merely explanation to the admissions. In the written statement

the defendant has taken the objection that the plaintiff is not the landlord of the property and one Smt. Yashwanti Devi is the landlady. By way of proposed amendment the defendant has stated that Smt. Yashwanti Devi is a landlady.

11. In the plaint the plaintiff in Para-4 has specifically averred that the defendant is a chronic defaulter in payment of rent and he is in arrears of rent w.e.f. February, 2002, however, there has been no specific denial of this fact in the original written statement. By way of proposed amendment the defendant wants to put forward that the defendant has made a payment of rent upto December, 2004. Vide the amendment the defendant wants to specifically deny that the defendant is in arrears of any rent. In my opinion there had been deemed admission on the part of the defendant to almost all allegations made in the plaint and the proposed amendments are not mere explanation to the admissions but an entirely a new case is being put forth. The proposed amendments are not only amounting to withdrawal of admission but also has the effect of disturbing the right accrued to the plaintiff on account of the previous admissions. This is further fortified by the rejoinder to reply filed by the defendant/applicant wherein in Para-1 to 4 on merits, applicant himself states that the present application would change entire subject matter of the suit.

12. It is settled law that all amendments shall be allowed which are necessary for determining the real question in controversy. It is equally settled law that amendments should not take away the right accrued to the other party and should not amount to withdrawal of admission. The proposed amendments are clearly withdrawal of admissions.

13. Another aspect which is to be dealt with is as regards of proviso appended to Rule-17 after the CPC amendment of 2002 which provides as follows:-

“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.”

14. Ld. Counsel for the defendant submits that previously this fact could not be pleaded due to inadvertence, oversight of the erstwhile counsel of the defendant. This argument carries no conviction. The facts which are incorporated in the pleadings are always supposed to be the facts stated and disclosed by the party pleading them and not their counsel. It is noteworthy at this stage that a notice U/S 106 of Transfer of Property Act had been served upon the defendant and was replied

by the defendant. It is inconceivable that at two stages i.e. one at the time of replying the legal notice and one at the time of filing the WS, the defendant's counsel omitted to incorporate the material facts and that too because of inadvertence and oversight. No plausible explanation has been given by the defendant as to what prevented him from seeking this amendment earlier. In my opinion the whole object of incorporating the proviso to Rule-17 shall be defeated if such amendments are allowed to be permitted. Ld. Counsel for the defendant has also sought to derive strength from the judgments of Apex Court in case titled as Andhra Bank Versus ABN Amro Bank N.V. & Others cited as 'VI(2007) SLT 653', however, the facts in that case are clearly distinguishable from the facts of the present case. In the case of Andhra Bank (Supra) the application for amendment was rejected mainly on the ground of delay in filing the amendment application. This is not the case here. In the present case it is not only belated application but the application is without merits on many other accounts as elaborated herein above. The above discussion persuades me to hold that the application under order VI R. 17 CPC is without any merits and deserves dismissal. The application is accordingly dismissed.

15. Now, I shall proceed to decide the application under order 7 R.11 CPC filed on behalf of defendant.....

It is clear from the law laid down in this regard that to find out the cause of action the court is required to go through and consider the contents of plaint only. In the present case the plaint disclosed sufficient cause of action for proceeding with the case and on the averments made in the plaint the bar of Delhi Rent Control Act does not seem to be attracted in the present case. The application under order VII R.11 CPC is accordingly dismissed."

2. Learned Counsel for petitioner contended that by way of his amendment application, petitioner/defendant was only seeking elaboration of his defence by incorporating a legal plea that trial court had no jurisdiction to try respondent/plaintiff's suit. He further submitted that trial court should have rejected respondent/plaintiff's plaint and allowed petitioner/defendant's application filed under Order 7 Rule 11 CPC as respondent/defendant's suit did not disclose any cause of action.

3. I am of the opinion that as neither the objection relating to jurisdiction of trial Court nor the fact of payment of rent was taken in the initial written statement or in the reply to legal notice, the same cannot be allowed to be incorporated by way of amendment in the written statement and that too, after trial has commenced. In my view, application for amendment in the present case was not an elaboration of defence set up by petitioner/defendant as suggested by petitioner's Counsel, but was an attempt to wriggle out of an admission by amending his pleading – which is clearly impermissible in law.

4. The approach of a Court while dealing with an application under Order 7 Rule 11 of CPC has been well-settled by a number of judgments of Hon'ble Supreme court as well as this Court. In ***Raj Narain Sarin (Dead) through LRs and others v. Laxmi Devi and others***, reported in ***(2002) 10 SCC 501***, it was held that, “ *it has also been the well-settled principle of law that the law court should be rather hesitant to exercise the jurisdiction under Order 7 Rule 11 unless the factual score warrants such exercise and the matter in issue falls within the four corners of the requirement of the statute.....*”. In ***Popat and Kotecha Property v. State Bank of India Staff Assn.***, reported in ***(2005) 7 SCC 510***, Hon'ble Supreme Court held that, “ *Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.*”

5. Keeping in view the averments made in the present plaint, I am of the view that at this stage respondent's suit cannot be said to be not

disclosing any cause of action.

6. I am further of the view that trial Court has given cogent reasons for rejecting the two applications filed by petitioner. According to me, the impugned order is neither in excess of jurisdiction nor suffers from any material irregularity and it calls for no interference in Article 227 jurisdiction.

7. I may also mention that vide my order dated January 30, 2009, I had directed the petitioner to pay admitted sum of Rs.2,500/- per month as rent from 2004 to till date within a period of four weeks. It was made clear that in case said payment was not made within the stipulated period, interim order in petitioner's favour would stand vacated. But admittedly the petitioner has not complied with said order. In my opinion, non-compliance of order of deposit of rent also disentitles the petitioner to seek any relief from this Court. I may mention that Article 227 jurisdiction is a discretionary and an equitable remedy and no party can claim relief under it, as a matter of right. Consequently, present petition and pending application are dismissed with costs of Rs. 7,500/-.

MARCH 31st, 2009
js/rn

MANMOHAN, J