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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision :15th February, 2013**

+ **CM(M) 576/2012**

RUMAJHUMA BHAUMIC

..... Petitioner

Through : **Mr.P.K.Maitra, Advocate**

versus

DEV RAJ ARORA

..... Respondent

Through : **Mr.Rajeshwar Kumar Gupta and
Ms.Sumati Sharma and
Ms.Ambika Singh, Advocates.**

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

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PRATIBHA RANI, J. (ORAL)

CM.Nos.8784-85/2012 (Exemption)

1. Allowed subject to all just exceptions.
2. Applications stand disposed of.

CM.(M).No.576/2012 & CM.No.8786/2012

1. The petitioner has filed the present petition under Article 227 of the Constitution of India, impugning the order dated 17th April, 2012, passed by Addl. District Judge-03, South District, Saket.
2. Petitioner is aggrieved as her prayer to amend the plaint has been declined by the Court on the following grounds:-

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(a) the case set up in the plaint and prior to filing of the suit, the facts were referred in notice dated 18.04.2007 by the plaintiff, particularly paragraph 7 alleging that the premises is not just encumbered but is also embroiled in litigation with occupants of floor above the suit property'

(b) neither in the notice nor in the suit, there is any reference of either demand of sanctioned building plan, however, paragraph 3-A is projected that for want of providing of building site plan, the plaintiff could not get finance from the bank;

(c) the proposed paragraph 3-A is contrary to the facts stated in reasons (a) and (b) above;

(d) the proposed paragraph 3-A is a new ground, firstly, proposed in the application and there is no iota of reference in any other record of plaintiff; and

(e) the trial has commenced and in terms of proviso to Rule 17 of Order VI CPC as well as the nature of proposed amendment, as set up in the application is a new ground as compared to the case set up in the plaint on the basis of notice."

3. Petitioner is invoking the inherent jurisdiction of this Court, claiming that grave injustice has been caused to the plaintiff/petitioner by dismissing her application, as in this case the trial has not even commenced. Further admission/denial of the documents was not done and apart from that on 14th December, 2010, the case was listed for replication and arguments on the application under Order XXXIX Rules 1 and 2 CPC.

4. It is submitted on behalf of counsel for the petitioner that on 14th December, 2010, the learned Presiding Officer was on leave. The date was given by the Reader and without any authority, he adjourned the

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matter for admission/denial of documents and for framing of issues. When the Judge was on leave, the Reader had no authority to change the stage from the stage of replication and arguments on injunction application to that of admission/denial of documents and framing of issues. It is further submitted that on 18th January, 2011 issues were framed in this case without any admission/denial of documents and this fact can be seen from the fact that subsequently on the application of the plaintiff/petitioner the Court has fixed the case for 25th May, 2012, on her request to provide an opportunity to carry exercise of admission/denial of documents, as it may shortcut the trial.

5. Learned counsel for the petitioner has submitted that the amendment sought by the plaintiff/petitioner is necessary for just decision of the case and grave illegality has been committed by the learned trial court in dismissing the application, when the Court had now fixed the date for the said purposes.

6. Learned counsel for the petitioner has relied upon *Baldev Singh and Others Vs. Manohar Singh and another- (2006) 6 SCC 498*, *Surender Kumar Sharma Vs. Makhan Singh (2009) 10 SCC 626*, *Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (D) and Ors. – JT 2007 (9) SC 439* and *Rajkumar Gurawara (dead) through LRs. Vs. S.K.Sarwagi and Company Pvt. Ltd. And Another- (2008) 14 SCC 364* in support of his submissions.

7. I have considered the submissions made by learned counsel for the petitioner. The case law *Baldev Singh and Others Vs. Manohar Singh and another (Supra)*, *Surender Kumar Sharma Vs. Makhan Singh (Supra)*, and *Ramchandra Sakharam Mahajan Vs. Damodar Trimbak*

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Tanksale (D) and Ors. (Supra) relied upon by learned counsel for the petitioner were also referred by him before learned Trial Court.

8. In the case *Baldev Singh and Others Vs. Manohar Singh and another (Supra)* relied upon by learned counsel for the petitioner, the Apex court has held that wide power and unfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such manner and on such terms as it appears just and proper to the Court. It was further held that while dealing with the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal of suit can be avoided and that the suit can be disposed of expeditiously.

9. In the report *Surender Kumar Sharma Vs. Makhan Singh (Supra)*, it was held that in a eviction suit on grounds of non-payment of rent, belated application for amendment can be allowed by compensating the opposite party with cost if the amendment does not change the nature of the suit.

10. Learned counsel for the petitioner has also relied upon *Ramchandra Sakham Mahajan Vs. Damodar Trimbak Tanksale (D) and Ors. (Supra)*, it was held that belated second amendment could be allowed in view of the fact that amendment sought would enable the Court to pin pointedly consider the real issue between the parties and render a decision more satisfactorily to its conscience.

11. In the case *Rajkumar Gurawara (dead) through LRs. Vs. S.K.Sarwagi and Company Pvt. Ltd. And Another (Supra)* relied upon by learned counsel for the petitioner, it was held that during trial, amendment could have been allowed liberally as it would not cause

prejudice to the opposite party who will have an opportunity of meeting the amendment sought to be made.

12. So far as the proceedings dated 18th January, 2011 are concerned, a bare perusal of the same reveal that on that date learned counsel for the plaintiff/petitioner was present, defendant was present in person and he was supplied copy of the replication. The learned trial court after perusing the pleadings of the parties framed the issues. The learned trial court also took note of the draft issues, filed by the defendant/respondent and further mentioned that considering the lis, which emerged for adjudication, issues have been framed. Thereafter, the case was listed for plaintiff's evidence on 15th March, 2011 with direction to the plaintiff to send advance copy of the affidavit along with list of witnesses to the defendant within reasonable time. The proceedings dated 15th March, 2011 reveal that on that date affidavit along with list of witnesses was filed by the plaintiff/petitioner and copy was given to the defendant/respondent. Thereafter, plaintiff wanted to file original documents, which was opposed. Thereafter, plaintiff expressed the intention to file application under Order XIII Rule 1 CPC along with documents. The Court observed that till specific directions in this case are given, the original record filed on that date would not construe part of the record.

13. Instead of filing application under Order XIII Rule 1 CPC plaintiff/petitioner preferred to file application under Order VI Rule 17 CPC, which was dismissed by the impugned order. The certified copy of the proceedings before the learned trial court established the following facts:

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(i) On 18th January, 2011, replication was filed by the plaintiff, which was taken on record. Issues were framed in presence of learned counsel for the plaintiff and thereafter the case was adjourned for plaintiff's evidence.

(ii) In compliance of the order dated 18th January, 2011, evidence by way of affidavit was filed on 15th March, 2011 by the plaintiff, which makes it clear that till that stage, plaintiff was not aggrieved by the order of the Court or by the issues framed in the case.

10. Learned counsel for the plaintiff did not raise any objection either on the issues framed or that admission/denial of documents was required to be done before the framing of issues. It is not out of place to mention here that original documents were sought to be filed by the plaintiff only on 15th March, 2011 when evidence by way of affidavit was filed. The learned trial court has already allowed the parties to get the admission/denial of documents so that evidence can be cut short.

14. No doubt, the Reader had no authority to list the case for admission/denial of documents and framing of issues but at the same time, it cannot be ignored that pleadings were complete. We have to take note that pleadings were complete and the trial court had the duty to frame the issues, which have been framed in presence of the learned counsel for the plaintiff/petitioner.

15. So far as the amendment sought by the plaintiff is concerned, Order 6 Rule 17 CPC proviso provides 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."

16. Though the law with regard to the amendments is liberal and amendments can be allowed widely at any stage, but it is also settled law that exercise of such far-reaching discretionary powers is to be governed by judicial considerations and wider the discretion, the greater ought to be the care and circumspection on the part of the court. The amendments cannot be claimed as a matter of right and under all circumstances. Exercise of discretion of the court in accepting or rejecting an amendment would depend upon the fact and circumstances of the case and has to be exercised on judicial evaluation.

17. Before considering the submissions made by learned counsel for the petitioner as to whether the proposed amendment should have been allowed by the Court as the trial is yet to commence or the proposed amendment is necessary to determine the real question of controversy between the parties, it is important to keep in mind that the power of this Court under Article 227 of the Constitution is not in the nature of appellate jurisdiction and so, the extent and scope of power with this Court is limited and restrictive in nature, and in the normal circumstance, it is exercised where there is want of jurisdiction, error of law or perverse findings by the trial Court. Such power is to be exercised to keep the subordinate court within limits of their jurisdiction and authority and it is not to act as an Appellate Court for correcting the decisions of the subordinate courts. This court would not substitute its opinion or interfere with the findings of the facts of the trial Court, if there was no infirmity or perversity. Thus, in the absence of there being any material illegality or perversity, the order of the court below is not to be faulted

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with or interfered with by this court in its supervisory power under Article 227. Reference in this regard can be made to the decisions of the Supreme Court in **Waryam Singh and Anr. Vs. Amarnath and Anr., AIR 1954 SC 215** and **Mohammed Yusuf Vs. Faij Mohammad and Ors., I (2009) CLT 153 (SC)**.

18. The agreement to sell dated 21.03.2007 entered into between the parties as well the legal notice dated 18.04.2007 have been made the foundation of the suit filed by the petitioner against the respondent for recovery of Rs.8,65,952 with future and pendent lite interest. The agreement to sell (copy of which is placed on record at pages 21 to 24) nowhere incorporates any clause that it has been entered into by the parties with clear understanding that the respondent would provide all the documents including sanction plan to enable the petitioner to avail loan to purchase the property. The legal notice dated 18.04.2007 (para 3) also speaks of the representation made by the respondent to the effect that he was absolute owner of the property agreed to be purchased by the petitioner. Para 5 of the legal notice talks about the representation made by the respondent to the petitioner to the effect that the said property is free from all sorts of encumbrances, including charges, disputes, court injunctions, attachments, etc. and that if the same is proved otherwise, the respondent shall be liable and responsible for all such representations and shall be liable to return the entire advance earnest money/part payment of Rs.5 lacs alongwith damages suffered/sustained by the petitioner and respondent shall make good the same at the earliest.

19. Para 7 of the legal notice contains the grievance of the petitioner and the same is extracted as under :-

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'7. That after entering into the said agreement to sell with you the Addressee above, and after making the initial advance payment of Rs.5.00 lacs, my clients got suspicious and made efforts to get the title verified. She conducted some preliminary inspection and on queries from the other occupants of the said properties, it is revealed, to her utter shock and disbelief, that the said premises is not just encumbered but is also embroiled in litigations with the occupants of the above floors over the premises in the said property. It is further revealed that there is in fact a dispute to the title of the premises itself.'

20. In para 8 of the notice, the petitioner has expressed that she is no more interested to purchase the said premises as the belief and representation made by the respondent to her has turned out to be completely incorrect, false and contrary to the actual facts.

21. Vide this notice dated 18.04.2007, while terminating the agreement to sell with immediate effect, the petitioner directed the respondent to return with immediate effect the entire advance earnest money/part payment of Rs.5 lacs alongwith interest at the rate of 18% p.a. till the date of realisation alongwith liquidated damages limited to Rs.1 lac by 25th April, 2005, failing which the petitioner would be constrained to initiate legal action against the respondent as per law.

22. The amendment proposed to be made in the plaint by inserting para 3A, reads as under :

'Paragraph 3A — That the plaintiff had repeatedly asked the defendant to provide the copy of the sanctioned plan. The defendant could not provide the copy of the sanction plan to hide the facts of unauthorized construction of the suit property. It is pertinent to mention that the owner / builder constructed the Basement, Lower Ground Floor (height of the lower ground floor is approximately about 9'6" from the ground floor), Upper

ground floor (height of the upper ground floor is approximately about 19 feet from the lower ground floor) from the road level including lower ground floor, First floor and second floor in the year 1992/1993. Owner / Builder made approx. about full coverage of the plot. At that time only 60% coverage was permissible. FAR was far above the permissible limit. It is an unauthorized construction.

Under the instruction of the plaintiff, counsel of the plaintiff had applied under RTI Act, 2005 for obtaining the sanctioned building plan of upper ground floor in respect of suit property – P. No. N6, CR Park, New Delhi 110019. Municipal Corporation of Delhi, Office of the Executive Engineer (Building) 1, Central Zone, Lajpat Nagar, Shiv Mandir Marg, New Delhi 110024 in its reply No. 1605/EE(B)/Cent.Zone/2011 dated 07.12.2011 inter alia mentioned that “In this regard, it is informed that copy of sanctioned building plan cannot be provided to the applicant being third party involvement. Moreover, sanctioned building plan is a personal property of the owner as well as of the qualified / licensed / approved architect prepared based upon his expert knowledge and skills for which the charges from his clients. Hence, supplying copy of the same is a violation of Sections 8(e) and 8(d) of the RTI Act”.

It was / is difficult for the plaintiff to get any loan from any financier / Bank without showing the sanctioned plan for buying the said suit property. Any unauthorized construction shall invite the penal action including demolition according to the Delhi Building Byelaws 1983. The defendant was / is intentionally and deliberately not providing the sanctioned plan to hide the unauthorized construction in the suit property. Original copy of the reply / order No. 1605/EE(B)/Cent.Zone/2011 dated 07.12.2011 of the Municipal Corporation of Delhi, Office of Executive Engineer (Building), 1, Central Zone, Lajpat Nagar, Shiv Mandir Marg, New Delhi 110024 is annexed herewith and marked as Annexure P1”.

23. A bare reading of the proposed amendment makes it clear that the petitioner wants to take entirely different plea for terminating the

agreement projecting it to be a case where the transaction allegedly failed for want of sanction plan and unauthorised construction of the suit property. This amendment is sought to be made when the trial has already commenced.

24. In the case ***Vidyabai vs. Padmalatha AIR 2009 SC 1433***, it was observed as under :

'The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code or Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to commencement of proceeding.'

25. In the instant case also, the petitioner has already filed her evidence by way of affidavit and the trial has already commenced.

26. In the case ***Just Lifestyle Pvt. LTd. vs. Advance Magazine (MANU/DE/0082/2013)***, it was observed as under :

'44. It was felt that the provision for amendment of pleadings was one of the significant sources of delay in the judicial process. In the year 1999, as per the recommendations of Law Commission, the provision for amendment of pleadings was altogether deleted by Amendment Act No.46 of 1999. The deletion of the provision led to widespread protests by lawyers and different legal bodies and as a result in the year 2002 the provision was once again introduced, albeit with a rider, by Amendment Act No.22 of 2002. By virtue of said amendment, a proviso was appended to Rule 17, which reads as under :-

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.'

27. It has already been referred to above that neither in the agreement to sell, there was any clause in respect of sanction plan nor in the notice or in the suit filed, it was the case of the petitioner that the agreement was terminated by her because of the reasons now sought to be incorporated by amending the plaint and inserting para 3A. The facts now sought to be incorporated, if existed, the same were well within the knowledge of the petitioner and could have been incorporated in the legal notice as well as in the complaint. Since the trial has commenced, in view of the proviso to Order 6 Rule 17 CPC, the petitioner is disentitled to claim the relief sought. Reliance can be placed on *Surya Sikander and Ors. Vs. Netha Spinning Mills and Ors. JT 2002 (8) SC 287* and also *Bibi Zubaida Khatoon Vs. Nabi Hassan Saheb and Anr. JT 2003 (8) SC 478*, wherein it was held that the discretion for allowing or disallowing an amendment should be exercised as per the settled norms of civil jurisprudence and where the applicant has acted callously and without due diligence, the court should dismiss such application.

28. The learned trial court has rightly disallowed the amendment as none of the amendments sought for was the fact which was not within the knowledge of the plaintiff when suit was filed. Further, the trial commenced when the issues were framed and the case was listed for evidence. The case is already at the stage of evidence as evidence by way of affidavit has been filed by the plaintiff and she is required to be cross-examined.

29. In view of the above discussion, I do not find any illegality or infirmity in the discretion that was exercised by the learned Addl.

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District Judge in the entire scenario of facts and thus, do not intend to interfere with the same. The petition merits dismissal and is hereby dismissed.


PRATIBHA RANI, J

February 15, 2013
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