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

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DECIDED ON: 18.12.2013

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RFA (OS) 153/2013
CAV 1109/2013
CM APPL.19342, 19343/2013

SH SUBHASH ARORA Appellant
Through: Mr. Mohit Chaudhary with
Ms. Damini Chawla, Advocates.

versus

MS MEENA CHAWLA Respondent
Through: Mr. Vinay Bhasin, Sr. Advocate
with Mr. H.L. Raina, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. This is an appeal against an order of a learned Single Judge dated 29.10.2013 dismissing CS (OS) No. 1613/2010, for delay in compliance of an order dated 15.10.2012, by which the Court granted permission to the appellant to implead his son as a co-plaintiff. Thereafter, a review application bearing No. IA No. 593/2013 was preferred by the appellant, against the order dated 29.10.2013, which was dismissed by the learned Single Judge by an order dated

25.11.2013. The present appeal is against both orders dated 29.10.2013 and 25.11.2013.

2. Briefly, the facts that gave rise to the impugned orders are that the plaintiff/appellant, (Subhash Arora, hereafter “the plaintiff”) claimed to have entered into an agreement to sell on 6.10.2009 with Ms. Meena Chawla, the defendant/respondent, in respect of an immovable property. Due to the defendant’s alleged failure to perform as per the terms of that agreement, the plaintiff filed Suit No. 1613/2010 before this Court for specific performance of the agreement. Based on an accompanying interim application, IA No. 10452/2010, the Court issued an *ad interim* order restraining the defendant from creating any third party interest in respect of the title as well as possession of the suit property. By an order dated 20.3.2012, the Court permitted the plaintiff to file a replication to the written statement filed by the defendant, which argued, *inter alia*, that the suit was not maintainable as there was no privity of contract between the two parties. This was because, as the written statement notes, the vendee in the agreement to sell was Ankur Arora, and not Subhash Arora, the plaintiff. In response, in his replication, the plaintiff did not deny that the agreement to sell recorded the name of Ankur Arora, but stated as follows:

“That the contents of para I are wrong and denied. It is wrong and denied that there is no privity of contract between the Plaintiff and the Defendant. It is submitted that the said Agreement to Sell dated 06.10.2009 was executed between the defendant and plaintiff, the name of Subhash Arora S/o Sh J.R.

Arora who signed the agreement and also made payment. By mistake it was typed as Sh. Ankur Arora S/o Sh J.R Arora. It is pertinent to point out that Sh. Ankur Arora is the son of the plaintiff. It is also pertinent to mention that all payments were made from the account of the plaintiff only. It is further submitted that this can be proved from the fact that plaintiff gave a public notice dated 12.06.2010 with regard to the suit property in his own name only. It is wrong and denied that plaintiff is not entitled to any relief or is a stranger to the said agreement. Averments made in this regard aforesaid may kindly be referred to. It is wrong and denied that the present suit is not maintainable on any ground.”

3. In this background, the learned Single Judge, by an order dated 15.10.2012, granted permission to the plaintiff to implead his son as a co-plaintiff. The order states as follows:

“Learned Counsel for the plaintiff states that though it was on account of a typographical error that the name of Ankur Arora, S/o the plaintiff was mentioned as a contracting party, though the contract was between the plaintiff and the defendant, he would implead him as a co- plaintiff so as to take care of the plea of the defendant that the suit by him is not maintainable. The plaintiff is permitted to implead Sh. Ankur Arora as a co-plaintiff and make such amendments as are necessary for his impleadment alone. The amended plaint be filed within a week. Written statement to the amended plaint would be filed within four weeks and thereafter. Replication, if any, be filed within two weeks after filing of the amended written statement.”

4. Subsequently, the plaintiff failed to amend the plaint in terms of the above order. Thus, the learned Single Judge, by an order dated 29.10.2013, dismissed the suit in the following terms:

“2. More than a year has elapsed since then but the plaintiff has not filed any application for amendment. Learned Counsel

for the plaintiff seeks some more time to file an application. Considering that one year has elapsed, the Court is not inclined to grant any further indulgence to the plaintiff. It may also be noted that between 15th October 2012 and today there has been one more adjournment on 12th April 2013 and, therefore, there was enough time for the plaintiff to have taken steps in that regard.

3. The suit itself, therefore, is not maintainable at the instance of Subhash Arora who is not even a party to the agreement to sell.

4. The suit is accordingly dismissed.

5. The application is disposed (sic) of.”

5. The plaintiff filed a review application (Rev. App. No. 593/2013, under Order 47, Code of Civil Procedure (“CPC”), read with Section 151), accompanied with an application under Order 1, Rule 10, CPC for impleadment and amendment of the plaint so as to include Ankur Arora (IA 18945/2013). The review application stated as follows:

“4. It is true that no steps could be taken to implead Mr. Ankur Arora and file an amendment to that effect within the time frame as ordered. However, in order to avoid the grave injustice to the plaintiff, present review is preferred along with an application for amendment of the suit plaint and for impleadment of party as co-plaintiff ... In any event of the matter an issue with regard to the 'privity of contract' , between the parties could have been adjudicated in trial, more particularly, in view of the pleading in para 1 of replication and dismissal of suit would cause grave injustice to the plaintiff. Thus, with great respect it is submitted that the finding at para 3 of the order under review appears to be an error apparent on record.”

6. However, the learned Single Judge dismissed the review by an order dated 25.11.2013, in the following terms:

“2. The fact remains that for one over year no steps were taken by the plaintiff to correct the obvious error pointed out by the Court in its order dated 15th October 2012. The explanation regarding the alleged typographical error is not a simple defect that can be overlooked or casually as is sought to be done by the plaintiff.

3. No ground is made out to review the order dated 29th October 2013.

4. The application is dismissed.”

7. Learned Counsel for the plaintiff impugns both orders of the learned Single Judge. It is argued that the learned Single Judge erred in dismissing the suit solely on the ground of delay in compliance of the order permitting impleadment. It is argued that such a hyper-technical view should not inhibit otherwise established rights under law. Learned Counsel argues that procedural technicalities should not hamper the administration of justice, and the interests of justice in this case dictate that the delay in presenting the application for amendment be condoned, so as to ensure that the parties' rights are not frustrated. Further, learned Counsel argues that the issue as to privity of contract could have been adjudicated at trial, in view of the pleadings in paragraph 1 of the replication. Here, learned Counsel argues that a replication does form part of the pleadings, and thus, may be read in determining whether the present suit is maintainable or not. Reliance is placed on the decision of the Supreme Court in *K. Laxmanan v.*

Thekkayil Padmini and Others, (2009) 1 SCC 354, and especially on the following observations:

“Pleadings as understood under CPC and as defined under Order 6 Rule CPC, consist only of a plaint and a written statement. The Respondent-plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the Court would have become the part of the pleadings, but mere non-filing of a replication does not and could not mean that there was admission of the facts pleaded in the written statement.”

8. Learned Counsel argues that given the categorical denial of the defendant’s plea that there is no privity between the parties, and the plea that the agreement to sell merely records the incorrect name as a typographical error, the learned single judge ought to have let the issue of maintainability be determined at trial, in light of both parties’ contentions. The failure to allow the litigation to pursue its natural course, and the dismissal of the suit purely on grounds of delay, thus, it was argued, call for interference in the present proceedings.
9. The defendant argues on the other hand, that the impugned order does not call for interference. It was submitted that the previous order in the suit had permitted impleadment of the plaintiffs, but the failure of the plaintiff to implead the necessary party even after the passage of one year meant that no further indulgence is to be granted, especially given the fact that as it stands the suit is not maintainable as the parties mentioned in the agreement to sell are not present before the Court.

10. It is undisputed that the plaintiff did not file an application for amendment, after the order of this Court to that effect. Neither is it claimed by the plaintiff/appellant that any justifiable excuse for such a delay exists in law. However, despite the plaintiff's inadvertence, or even negligence, to file an application for amendment, the Court recognizes that the substantive rights of parties ought not to be frustrated on such accounts. While adherence to the timelines and schedules mandated by the Court is crucially important, and no litigant or lawyer must flout the orders of the Court, at the same time, the Court must not *punish* parties for such negligence, and deny a remedy for violation of their civil rights, if such carelessness can be rectified without injustice to the other party, either through imposition of costs or other means. Indeed, Order 6, Rule 17, CPC records the power of the Court to allow such amendments in order to ensure justice between the parties, and to allow the real issues to emerge between the parties:

“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.”

11. In fact, the Supreme Court in *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91, has construed Order 6, Rule 17, and more generally, the broad power of the Court to permit amendments in the following words:

“4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.

5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation; to be put on every defective state of pleadings. Defective pleadings are generally curable, if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.”

12. Thus, unless the error in preferring an application cannot be rectified, or if the passage of time has barred the legal rights underlying the matter itself, the carelessness to take the matter forward by filing the necessary applications should not defeat the legal right involved itself. In this case, given that the plaintiff/appellant has preferred an application to make the necessary amendments in this case, so as to implead Ankur Arora, and given that no injustice will result to the defendant/respondent – nor has any been convincingly argued – that cannot be cured by costs and other monetary sanctions on the plaintiff/appellant, the amendment must be permitted.
13. Reliance has been for the contrary proposition on the decision of the Supreme Court in *Union of India v. Pramod Gupta (D) by L.R.s and Others*, AIR 2005 SC 3708, to argue that the Court does not possess any power to extend the period specific in its earlier order. In considering whether the Court is bound by the period prescribed in Order 6, Rule 18, the decision does clearly suggest that if a party defaults in placing amended pleadings before the Court, no further extensions ought to be granted by the Court. However, the Court also notices the decision of the Supreme Court by a larger bench of three judges in *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, AIR 2005 SC 3353, which was pronounced in close proximity of the decision in *Pramod Gupta*, i.e. only one month before it. In *Salem Advocate Bar Association*, the Supreme Court held as follows:

“44. The amendment made in Section 148 affects the power of the Court to enlarge time that may have been fixed or granted by the

Court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the Court has no inherent power to extend the time beyond 30 days is the question. We have no doubt that the upper limit fixed in Section 148 cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151. We are dealing with a case where the time is fixed or granted by the Court for performance of an act prescribed or allowed by the Court.

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46. There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice.”

14. The decision in *Pramod Gupta*, however, did not consider the *Salem Advocate Bar Association* case. Given that the question in the present case is the extension of the time period fixed by the Court, rather than any statutorily prescribed time limit, on the strength of the decision in *Salem Advocate Bar Association* and in order to ensure that justice is done between the parties by providing redressal for the legal rights involved, this Court finds that there exists no bar in law to granting a further extension.

15. In view of the above discussion, having regard to the overall facts and circumstances of this case, this Court is of the opinion that the larger

interest of justice would have been served in permitting the plaintiff/appellant to make necessary amendments. Accordingly, the impugned order of the learned Single Judge rejecting the plaint on 29.10.2013 as well as the order dated 25.11.2013 rejecting the Review Petition are set aside. The amendment application made by the plaintiff – though belatedly – is hereby allowed. The parties are directed to be present before the learned Single Judge on 10th February, 2014, for further hearing when the proceedings shall continue in accordance with law. Having regard to the circumstances of the case, the appellant shall bear the costs quantified at Rs. 1.5 lakhs to be paid to the defendant/respondent within four weeks.

16.The order dated 12.8.2010 of the learned Single Judge restraining the transfer of the suit property and the further statement made by the counsel for the defendant shall continue to bind the parties till disposal of the case.

17.Learned counsel for the defendant sought time to file written statement to the amendment plaint. The defendant shall file their amendment written statement within four weeks.

18.List before Single Judge on 10.02.2014.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

DECEMBER 18, 2013
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