

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

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Date of decision: 2nd July, 2014

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FAO(OS) 178/2014 & CM No.6231/2014 (for stay)

SMT SUMITRA PARASHAR & ANR

..... Appellants

Through: Ms. Amrit Kaur Oberai with Mr.
Aman Singh, Advs.

Versus

SMT RAJ RANI & ANR

..... Respondents

Through: Mr. Ravi Gupta, Sr. Adv. with Mr.
Lalit Gupta, Mr. Ajay Gulti, Ms.
Garima Goel & Mr. Saharsh Bhalla,
Advs.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra-court appeal impugns the order dated 24th January, 2014 of the learned Single Judge of this Court (exercising ordinary original civil jurisdiction in CS(OS) No.2154/2010 filed by the respondents) of allowing IA No.8419/2013 of the respondents / plaintiffs for amendment of the plaint. Notice of the appeal was issued and vide *ad interim* order dated 4th April, 2014 which continues to be in force, the operation of the impugned order was stayed. We have heard the counsel for the appellants / defendants and the senior counsel for the respondents / plaintiffs.

2. The two respondents / plaintiffs instituted the suit from which this appeal arises, (i) for recovery of possession of property No.53, Sector-12, Block-B, Dwarka, New Delhi *ad measuring* 334 sq. mtrs. together with *mesne* profits / damages for use and occupation from the date of institution of the suit till the date when the possession is handed over; (ii) for permanent injunction restraining the two defendants / appellants from raising any further construction on the suit property and/or selling, alienating, encumbering, disposing of or otherwise dealing with the said property; (iii) for permanent injunction restraining the appellants / defendants from misusing the original title documents of the said property; and, (iv) for mandatory injunction directing the appellants / defendants to deliver original documents of the property, pleading,

(a) that the respondent/plaintiff No.2 Sh. Bhagwan Sharma and the appellant/defendant No.2 Sh. Ramphal Parasar are brothers, being the sons of Sh. Ramdhan Sharma; the respondent/plaintiff No.1 and the appellant/defendant No.1 are the wives of respondent/plaintiff No.2 and appellant/defendant No.2 respectively;

(b) that the subject property was allotted by Delhi Development Authority (DDA) to one Sh. Ishwar Singh;

- (c) that the appellant/defendant No.2 was working in the Land & Building Department of Delhi Government and by virtue of his said employment, was aware of the allotment in favour of Sh. Ishwar Singh;
- (d) that the appellant/defendant No.2 informed the respondents/plaintiffs of the desire of the said Sh. Ishwar Singh to sell the said property;
- (e) that the respondents/plaintiffs approached the said Sh. Ishwar Singh for purchasing the property and after paying the entire sale consideration thereof, got the documents with respect thereto executed in their favour from Sh. Ishwar Singh on 25th January, 1994;
- (f) that the appellant/defendant No.2 offered to get the property converted into freehold and the respondents/plaintiffs for the said purpose handed over all the original documents of the property to the appellant/defendant No.2;
- (g) that the appellant/defendant No.2 however informed the respondents/plaintiffs that the said documents had been misplaced by him and the respondents/plaintiffs lodged FIR dated 20th August, 2001 thereof;

(h) that in September, 2009, the respondents/plaintiffs learnt that the appellant/defendant No.2 was raising construction on the said property and upon the appellants/defendants failing to deliver possession of the property to the respondents/plaintiffs, the suit was filed.

3. Needless to state the appellants / defendants contested the suit by filing written statement, on the grounds:

(a) that the appellants/defendants had purchased the said property vide Agreement to Sell and other documents dated 11th July, 2001 from the erstwhile owner Sh. Ramdhan Sharma, being the father of the appellant/defendant No.2 and the father-in-law of the appellant/defendant No.1;

(b) that thereafter the said property was got converted into freehold and a Conveyance Deed was duly executed in favour of the appellants/defendants by DDA on 17th October, 2005;

(c) that Sh. Ramdhan Sharma in turn had purchased the said property vide documents executed in his favour on 27th May, 1994 by Sh. Ishwar Singh, the original allottee of the land underneath the said property.

4. On 28th November, 2011, the following issues were framed in the suit:-

- “1. Whether the plaintiffs had purchased the suit property vide documents dated 25.1.1994? (OPP)
2. Whether Sh. Ram Dhan Sharma had purchased the suit property vide documents dated 27.5.1994? (OPD)
3. Whether the defendants had purchased the suit property from Sh. Ram Dhan Sharma vide documents dated 11.7.2001? (OPD)
4. Whether the suit is not maintainable without challenging the Conveyance Deed executed by DDA in favour of the defendants? (OPD)
5. Whether the suit is barred by limitation? (OPD)
6. Whether the plaintiffs are entitled to possession of the suit property? (OPP)
7. Whether the plaintiffs are entitled to mesne profits/damages for the use and occupation from the defendants and, if so, at what rate and for which period? (OPP)
8. Whether the plaintiffs are entitled to mandatory/permanent injunction as sought by them? (OPP)
9. Relief.”

5. After the witness of the respondents / plaintiffs had been partly examined, the respondents / plaintiffs filed an application under Order 14 Rule 5 of the CPC for deletion of issue No. 4. supra but which was dismissed vide order dated 18th February, 2013 observing that though in the written statement of the appellants / defendants the objection, as to the legal effect of the respondents / plaintiffs not challenging the Conveyance Deed, had not been taken in so many words but the factum of execution of the Conveyance Deed

had been explicitly set out; moreover the same was a legal plea which in any case arose for consideration in the facts and circumstance of the case and it was appropriate that attention of the parties be invited thereto by framing an issue, to enable proper adjudication thereof. However on the request of the counsel for the respondents / plaintiffs it was clarified that dismissal of the application will not come in the way of the respondents / plaintiffs seeking amendment of the plaint.

6. Thereafter the application for amendment of the plaint to incorporate the relief of declaration that the documents dated 27th May, 1994 allegedly executed by Sh. Ishwar Singh in favour of Sh. Ram Dhan Sharma and dated 11th July, 2001 allegedly executed by Sh. Ram Dhan Sharma in favour of appellants/defendants and the Conveyance Deed dated 17th October, 2005 of freehold rights in land underneath the property executed by DDA in favour of appellants/defendants are false/forged/fabricated/manipulated and for cancellation thereof, came to be filed and which has been allowed as aforesaid.

7. The appellants / defendants contested the application aforesaid for amendment.

8. The learned Single Judge has however allowed the amendment, finding / observing / holding:-

- (i) that though the proviso to Order 6 Rule 17 provides that no application for amendment shall be allowed after the trial had 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, but the respondents / plaintiffs had given a plausible explanation to show that despite due diligence they could not have inserted the amendment as subsequently sought at an earlier stage i.e. prior to the commencement of trial;
- (ii) that even otherwise the amendment sought could not be shut out;
- (iii) that merely because a affidavit by way of examination-in-chief had been filed and had also been tendered in evidence and examination-in-chief had been partly recorded on one date of hearing, it would not mean that respondents / plaintiffs had been knocked out from being able to amend the plaint; such an interpretation of the proviso to Order 6 Rule 17 could clearly not have been envisaged;
- (iv) else it was not in dispute that the amendment sought was necessary for the purposes of determining the real question in controversy between the parties and refusing the amendment

would amount to actually knocking out the case of the respondents / plaintiffs in as much as without setting aside the Conveyance Deed in favour of the appellants / defendants, the relief claimed by the respondents / plaintiffs, even if they were to be found entitled thereto, could not be granted; and,

- (v) procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

9. The counsel for the appellants / defendants argued, (i) that the respondents / plaintiffs filed the suit from which this appeal arises on 23rd October, 2010; (ii) the appellants / defendants filed their written statement thereto on 3rd January, 2011, setting up title in the property, of which possession was claimed in themselves; (iii) the respondents / plaintiffs filed a replication in May, 2011; (iv) issues were framed on 28th November, 2011; (v) the respondents / plaintiffs filed affidavit by way of examination-in-chief of their witness on 19th January, 2012; (vi) that the said witness of the respondents / plaintiffs was partly examined on 2nd May, 2012; (vii) that the respondents / plaintiffs filed the application aforesaid under Order 14 Rule 5 on 14th February, 2013 which was dismissed on 18th February, 2013; (viii) that it is

only three months thereafter on 17th May, 2013 that the application for amendment of the plaint was filed.

10. It is argued that the respondents / plaintiffs, became aware of the documents culminating in the Conveyance Deed dated 17th October, 2005 in favour of the appellants/defendants on the filing of the written statement on 3rd January, 2011. It is further contended, that the respondents / plaintiffs should have applied for amendment of the plaint for claiming the relief of cancellation of the said Conveyance Deed at that stage but did not do so; they did not so apply, not even when a specific issue in this regard was framed on 28th November, 2011. It is argued that even thereafter no such amendment was claimed; rather affidavit by way of examination-in-chief was filed. It is yet further contended that thereafter also, the misconceived application for deletion of issue no.4 was filed and the application for amendment, filed after three months of dismissal of the application for deletion of issue no.4, was highly belated.

11. The counsel for the appellants / defendants relies on:-

- (a) ***Kailash Sharma (Smt.) Vs. Sh. Jagdish Lal Sharma*** 2010 X AD (Delhi) 622 laying down that legislative intent in introducing the proviso to Order 6 Rule 17 cannot be frustrated by giving liberal

interpretation thereto and by allowing amendments when the same could have been applied for earlier, on exercise of due diligence;

(b) ***Vidyabai Vs. Padmalatha Vs. Padmalatha*** (2009) 2 SCC 409

laying down that the proviso to Order 6 Rule 17 is couched in a mandatory form, unless the jurisdictional fact, as envisaged in the proviso to Order 6 Rule 17, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint;

(c) ***Ajendraprasad N. Pandey Vs. Swami Keshavprakeshdasji N.***

(2006) 12 SCC 1 laying down that the trial is deemed to commence when issues are settled and case is set down for recording of evidence;

(d) ***Mahadeo Maruti Bhanje Vs. Balaji Shivaji Pathade*** 2012 AIR

CC 3080 (Bom) laying down that commencement of trial would be from date of filing of affidavits in lieu of examination-in-chief and not from date of framing of issues;

(e) ***Chander Kanta Bansal Vs. Rajinder Singh Anand*** AIR 2008 SC

2234 laying down that due diligence means such diligence as a prudent man would exercise in the conduct of his own affairs;

- (f) *Mashyak Grihnirman Sahakari Sanstha Maryadit Vs. Usman Habib Dhuka* (2013) 9 SCC 485 where the order of the High Court of allowing the amendment was set aside; and,
- (g) *Rajkumar Gurawara Vs. K. Sarwagi and Company Private Limited* (2008) 14 SCC 364 where amendment was disallowed owing to not satisfying the conditions of the proviso for the reason of the plaintiff having notice from the pleadings of the defendant and from the framing of issues.

12. Per contra, the senior counsel for the respondents / plaintiffs has relied on *Smt. Rekha Bansal Vs. Mr. Ajay Kumar Bansal* MANU/DE/8621/2006 where amendment was allowed and *Pradeep Singhvi Vs. Heero Dhankani* (2004) 13 SCC 432 but which pertains to pre-amendment w.e.f. 1st July, 2002 of Order 6 Rule 17 and is thus not relevant.

13. There can be no manner of doubt that the trial in the present case had commenced on the date when the application for amendment was filed and also of the fact that the respondents / plaintiffs, if not earlier, at least on receipt of copy of the written statement on 3rd January, 2011 had notice of the title being set up by the appellants / defendants in themselves on the basis of the documents culminating in the Conveyance Deed dated 17th October, 2005

supra. The respondents / plaintiffs thus, if at all required to seek the relief of declaration and cancellation of / with respect to the said documents, to be entitled to the reliefs claimed in the plaint, could indeed have claimed the amendment immediately thereafter. On the contrary the application for amendment was filed more than two years thereafter, only on 17th May, 2013 and after the trial had commenced. There was thus indeed delay on the part of the respondents / plaintiffs.

14. However what has to be considered is whether the said delay disentitles the respondents / plaintiffs to the amendment.

15. According to the appellants / defendants also, the respondents / plaintiffs gained knowledge of the documents culminating in the Conveyance Deed dated 17th October, 2005 in favour of the appellants / defendants, and for cancellation whereof the amendment was subsequently sought, from the written statement filed by the appellants / defendants on 3rd January, 2011. At least as of today it is not the case of the appellants / defendants that the respondents / plaintiffs knew of the said documents prior to the institution of the suit. We had during the hearing categorically enquired from the counsel for the appellants / defendants whether there was anything to show that the respondents / plaintiffs knew of the said documents prior to the date of institution of the said suit.

Nothing was pointed out. We have perused the written statement of the appellants / defendants. We do not find any such plea in the written statement also. The cause of action for the relief claimed by way of amendment of the plaint, of cancellation of the said documents and / or declaration of the same as bad, can thus be said to have accrued to the respondents / plaintiffs only on 3rd January, 2011, when the written statement was filed.

16. We have wondered whether the proviso inserted w.e.f. 1st July, 2002 to Rule 17 of Order 6 would apply also to amendments qua the facts / reliefs, cause of action wherefor has accrued after the institution of the suit.

17. In our opinion it cannot be said to be applying to such amendments. Pleadings are allowed to be amended, to incorporate pleas which could have been taken on the date when the pleadings were drafted but which were not taken. However incorporation / addition of what could not have been pleaded on the date of original filing would, strictly speaking in our view, not qualify as amendment. The reasoning, running through all the judgments cited by the counsel for the appellants / defendants, for the incorporation of the proviso to Order 6 Rule 17 is to prevent delays. In fact, in *Rajkumar Gurawara* supra it was held that pre-trial amendments are to be allowed liberally because the opposite party is not prejudiced since it will have an opportunity of meeting the

amendment; on the contrary after the commencement of trial, particularly after completion of evidence, question of prejudice to opposite party may arise. The proviso was inserted to fix a last date by which amendments could be made. The proviso in effect introduces a limitation for correction of errors, mistakes, inadvertences, unless the same were inspite of due diligence. However the same as aforesaid can have no application to what could not have been said in the pleading as originally filed.

18. We had for this reason only further enquired from the counsel for the appellants / defendants whether not the respondents / plaintiffs could have instituted another suit for the relief sought by way of amendment of cancellation of the documents culmination in the Conveyance Deed dated 17th October, 2005 and the cause of action wherefor had accrued to the respondents / plaintiffs only on 3rd January, 2011. No answer was forthcoming.

19. We had in the same vein enquired from the counsel for the appellants / defendants, whether not the relief sought to be added by way of amendment, howsoever belated was not within limitation. As aforesaid, the written statement which furnished cause of action for the said relief was filed on 3rd January, 2011 and the application for amendment was filed on 17th May, 2013 i.e. within about 2 ½ years therefrom. The limitation prescribed for such a

relief is three years from the date of cause of action. Reference in this regard can be made to Articles 58 & 59 of the Schedule to the Limitation Act, 1963.

20. Once it is held that the second suit could have been filed for seeking the relief which had been claimed by way of amendment, the entire conspectus changes. The two suits entailing the same question of law and fact, in most likelihood would then have been consolidated for trial. Thus, by allowing the amendment, the delays have been curtailed rather than caused. In these circumstances, no question of any prejudice to the appellants/defendants also arises. Unfortunately none has looked into matter in the said perspective.

21. We may however notice ***Rajkumar Gurawara*** supra in this respect. Though the Supreme Court in that case gave the reasoning of the plaintiff who was seeking the amendment having notice of facts entitling the plaintiff to the amendment, from the pleadings of the defendant and from framing of issues from those pleadings and being thus not entitled to the amendment claimed after the commencement of trial but a reading of the said judgment shows that the plaintiff in the said case was also aware of the said facts from the reply of the defendant to the legal notice preceding the institution of the suit. On the contrary here we are concerned with a situation of the respondents / plaintiffs

becoming aware of the facts forming the basis of the amendment, for the first time from the pleadings of the appellants / defendants.

22. There is another aspect of the matter. Though the appellants / defendants in their written statement pleaded the documents in their favour but did not expressly take the plea that the respondents / plaintiffs were not entitled to the reliefs claimed without claiming the relief of cancellation / setting aside of the said documents. The respondents / plaintiffs were thus not aware of the said defence of the appellants / defendants from the filing of the written statement, though their Advocate with his legal acumen ought to have deduced the same. However it is a settled principle of law that litigants ought not to suffer for the acts of their Advocate. The respondents / plaintiffs however became aware of the said obstacle in their way from the issue framed. They could have applied for amendment at that stage. However the legal advice received by them was, to have the said issue deleted. It is only after they failed in the said effort did they apply for amendment. The entire facts are not such so as to penalize the respondents / plaintiffs for the acts of their Advocate.

23. We are conscious that the proviso to Order 6 Rule 17 bars amendments to raise the matters which could have been raised before the commencement of trial. Though it is capable of being read as also prohibiting amendments to add

matters the cause of action wherefor had accrued albeit after the institution of suit but before the commencement of trial but we are of the view that as long as the matter so sought to be added by way of amendment is within the prescribed period of limitation, it has to be held that such amendment cannot be denied, particularly in light of use of the wide words “at any stage of the proceedings” in Rule 17.

24. Thus, though for reasons different than those given by the learned Single Judge, we find no error in the order allowing the amendment of the plaint. Resultantly the appeal is dismissed.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

JULY 02, 2014

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