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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11045 OF 2012

Felix D'Souza … Petitioner

Vs.

Amit Ashok Tekchandani … Respondent

Mr.S.M.Oak i/b Mr.Sagar Joshi, Advocate for the Petitioner.
Mr.Prashant Chavan, Mr.Rajmani Varma, Ms.Anuja Karia i/b Navdeep Vora & Associates, Advocate for Respondent.

CORAM : R.G.KETKAR, J.
DATE : 21st DECEMBER, 2015

P.C. :

. Heard Mr.S.M.Oak, learned Counsel for the petitioner and Mr.Prashant Chavan, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 06/10/2012 passed by the learned 3rd Joint Civil Judge, Senior Division, Thane, below Exhibit 17 in Summary Suit No. 71 of 2011. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff for amending the plaint under Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. Mr.Oak strenuously contended that the plaintiff has

instituted Suit under Order 37 of C.P.C. for recovery of amount of Rs.1,16,83,151/- together with interest @ 13.25 per annum on the principal amount of Rs.87,50,000/-. In paragraph 10, the plaintiff has asserted thus :

> 10. Though the first installment was payable on or before 2.7.2008, the Defendant paid the said amount to the Plaintiff on the date of execution of the said Memorandum of Understanding dated 25.1.2008 and as regards the balance three installments, the Defendant issued in favour of the Plaintiff three post dated cheques as under :

Cheque No.	Date	Amount	Drawn on
729324	31/08/08	Rs.25,00,000/-	State Bank of India, Konkan Bhavan (Navi Mumbai)Branch
729325	30/09/08	Rs.25,00,000/-	State Bank of India, Konkan Bhavan (Navi Mumbai)Branch
729326	30/11/08	Rs.37,50,000/-	State Bank of India, Konkan Bhavan (Navi Mumbai)Branch

4. He submitted that the plaintiff filed application for deleting the following words

> " as regards the balance three installments, the Defendant issued in favour of the Plaintiff three post dated cheques as under."

and for substituting following words

> "The Plaintiff states that at the time of the execution the said MOU dated 25th January 2008, the Defendant had mentioned that he would make the payments of Rs.87,50,000/- by way of three cheques being Nos. 834916, 834917 and 834918 drawn upon the Account of Leena Powertech Engineers Pvt.Ltd and accordingly, it was incorporated in the MOU dated 25.01.2008. However, there was also a typographical mistake in the said MOU dated 25.01.2008 and the cheque No. 834918 was wrongly mentioned as cheque No. 834917. However, the Defendant did not make the physical delivery of the said cheques Nos. 834916, 834917 and 834918 to the Plaintiff.

> Thereafter, in the month of June 2008, the Defendant stated that since all the said cheque Nos. 834916, 834917 and 834918 were drawn upon the account of M/s.Leena Powertech Engineers Pvt.Ltd., and since the transaction was a personal transaction between the Plaintiff and the Defendant, it was more suitable that the cheques were drawn from the personal account of the Defendant. Accordingly, the Defendant issued and handed over the said chdques (i). 729324 dated 31.08.2008, 729325 dated 30.09.2008 and (iii) No. 739326 dated 30.11.2008, all drawn on State Bank of India, C.B.D-Belapur Branch, to the Plaintiff. The Plaintiff states that, accordingly, the MOU dated 25.01.2008 was altered and modified by the Defendant himself, to the extent of the details of the cheques issued by the Defendant to the Plaintiff. The details of the post dated cheques issued and delivered by the Defendant to the Plaintiff are tabulated hereinunder"

5. Mr.Oak submitted that the proposed amendment is absolutely necessary for deciding the real controversy between the parties. The proposed amendment is not inconsistent or contradictory to the case made out by the plaintiff. The amendment is necessitated by the fact that he inadvertently omitted to mention the circumstances in more detail. Mr.Oak submitted that if the amendment is allowed, no prejudice will be occasioned.

6. On the other hand, Mr. Chavan submitted that in paragraph 10 of the unamended plaint, it is stated that Memorandum of Understanding (for short 'MOU') was entered into on 25/01/2008 and defendant issued cheques Nos. 729324 on 31/08/2008, 729325 on 30/09/2008 and 729326 on 30/11/2008. He invited my attention to MOU dated 25/01/2008 (running pages 40 to 48 and in particular internal page 4 (running page 43). He

submitted that in internal page 4 (running page 43) in clauses (b), (c) and (d), cheque numbers were blank. In other words, cheque numbers were not mentioned. On this MOU, signatures of plaintiff and defendant appeared on internal pages No. 1 (running page 40), 2 (running page 41), 3(running page 42), 4 (running page 44), 6 (running page 46) & 7(running page 47) and internal page 8 (running page 48). However, signatures of the defendant do not appear on internal pages 4 (running page 43) and 5 (running page 45).

7. He submitted that in fact cheque book containing cheques Nos. 739324, 739325 and 739326 was issued by the State Bank of India in May 2008. He, therefore, submitted that while executing MOU on 25/01/2008, reference to cheques Nos. 739324, 739325 and 739326 issued in May 2008 could not have been made. That apart, defendant's signatures do not appear on internal pages 4 (running page 43) and 5 (running page 45) and only the signature of the plaintiff appears. In short, he submitted that the said cheque numbers have been subsequently incorporated in the MOU. In paragraph 4 of the impugned order, the learned trial Judge observed thus :

> "After perusing the pleading of the plaintff, it is found that he pleaded that the defendant paid first installment on date of MOU dated 25/01/2008 and regarding balance 3 installments issued 3 post dated cheque Nos. 729324, 729325 and 729326 and accordingly, the details of these three cheques were incorporated in MOU dated 25/01/2008. However,

> after appearance the defendant filed application for leave to defend at Exh.13, wherein he stated that cheque book containing the cheques which according to the plaintiff had been paid by the defendant was taken by the defendant from the State Bank of India in month of May 2008 and the plaintiff misused said cheques. It appears that after filing of said application for leave to defend, the plaintiff wants to delete the earlier plea that the defendant issued 3 post dated cheques at the time of MOU dated 25/01/2008 and instead of it wants to add that in fact cheque Nos. 834916, 834917 and 834918 incorporated in MOU dated 25/01/2008 were in fact not physically delivered by the defendant and the defendant handed over cheque Nos. 729324, 729325 and 729326 in June 2008. It shows that when plaintiff came to know from the application for leave to defend of defendant at Exh.13 that actually the cheue book containing said cheques delivered in May 2008, then he wants to correct his stance by way of amendment to hide the defect and falsity in his initial pleading that said cheques were issued and incorporated in MOU dated 25/01/2008. It shows that the applicant not seeking amendment for adding to the facts already on record. But amendment seek by him constitute an addition of new case. The proposed plea is repugnant to the pleas already raised and brought completely contrary facts about issue of cheques. The plaintiff wants to withdraw his pleading which may be admission likely to be used against him and wants to brought the facts more suitable to him and to justify his case in background of facts stated by the defendant in his application for leave to defend about issue of cheque book by the bank in May 2008 to him. So, the plaintiff cannot be allowed to set up an inconsistent plea or entirely different case by way of amendment, as it affect the valuable right of defendant. Hence, the application is deserves to be rejected.

8. Perusal of the extracted portion shows that the learned trial Judge noted that defendant filed the application for leave to defend at Exhibit 13 wherein it was stated that cheque book containing the cheques which according to the plaintiff had been paid by the defendant was taken by defendant from the State Bank of India in the month of May 2008 and the plaintiff misused the cheques. It is only after filing of the application for leave to defend,

the plaintiff wants to delete the earlier plea of the defendant issuing 3 post dated cheques at the time of MOU entered into on 25/01/2008 and wants to add cheques Nos. 834916, 834917, 834918 which were not in fact physically delivered by the defendant. The learned trial Judge, therefore, held that plaintiff came to know from the application for leave to defend that actually the cheque book containing the said cheques delivered in May 2008 and therefore, he wants to amend plaint.

9. After considering the material on record as also having regard to the fact that internal pages 4 (running page 43) and 5 (running page 45) do not bear the signatures of the defendant and these cheques have been written in handwriting which is not counter signed by defendant as also having regard to the fact that cheque book was issued in the month of May 2008, I do not find that the learned trial Judge has committed any error in observing that MOU dated 25/01/2008 could not make reference to cheques Nos. 739324, 739325 and 739326. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R.G.KETKAR, J.)