

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Revision No.1388 of 2014

Date of Decision: 24.12.2015

Ram Niwas Rustogi

.....Petitioner

Vs

Ashok Kumar and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Ajay Jain, Advocate
for the petitioner.

Mr. N.S. Shekhawat, Advocate
for the respondents.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed order dated 11.02.2014 passed by Civil Judge (Jr. Divn.) Rewari, vide which an application under Order 6 Rule 17 CPC was allowed.

[2]. Plaintiffs/petitioner filed a suit for partition against the defendants/respondents in respect of plot No.41, situated at Model Town, Rewari. It was purchased by Smt. Maya Devi mother of the parties vide sale deed dated 24.07.1985. Thereafter Smt. Maya Devi constructed a house after obtaining

sanction from Municipal Committee, Rewari.

[3]. Maya Devi died on 20.09.1998. Jagan Nath, father of the parties died on 14.12.2003. Parties are heirs of Maya Devi and Jagan Nath. After the death of parents they became joint owners in possession of the property in equal shares. Litigation started between the parties.

[4]. In a suit for partition, an application under Order 6 Rule 17 CPC came to be filed by defendants/respondents for amendment of the written statement.

[5]. It has been claimed by the defendants that the mother of the parties i.e. Smt. Maya Devi had executed a Will on 17.03.1997 out of her free Will and sound disposing mind in the presence of Jagan Nath father of the parties. The Will was drafted by Sh. M.L. Rustogi, Advocate on instructions of Maya Devi. The said Will was retained by Sh. M.L. Rustogi, Advocate, who left the practice and shifted to Gurgaon in January 2013 and he handed over the aforesaid Will to the defendants at Rewari only on 17.01.2014. With this background amendment was sought in the written statement.

[6]. The application was contested by the plaintiffs, asserting that the application is highly belated and the story propounded on the basis of alleged Will is false and concocted story. The proposed amendment will cause serious prejudice to

the plaintiffs and would amount to *de novo* trial and would also change the nature of the suit.

[7]. Plaintiffs claimed that the mother of the parties died intestate and she never executed any Will during her lifetime. Defendants never rendered any service to the mother and, therefore, there was no question for the mother to execute the alleged Will in favour of the defendants. The Will itself was claimed to be forged and fabricated.

[8]. The trial Court admitted that no doubt the amendment will start *de novo* trial, but learned counsel for the defendants made a statement before the trial Court that he will not re-examine the plaintiffs' witness, if the application is allowed. The burden of proving the Will lies upon the defendants.

[9]. Trial Court allowed the amendment subject to payment of cost vide the impugned order dated 11.02.2014.

[10]. Learned counsel for the petitioner contends that on an earlier occasion, defendants themselves filed suit for permanent injunction on 19.10.2011 and Will in question was never made basis of the said suit, rather family settlement was pleaded in the said suit. Now in the present suit for partition filed by the petitioner/plaintiffs, defendants have not taken any plea of Will in the written statement, rather pleaded family settlement between them.

[11]. Issues were framed on 06.01.2010 and the plaintiffs' evidence has been concluded to some extent. The application for amendment in question came to be filed on 12.01.2015 only. The alleged Will in question is of dated 17.03.1997. The mother Maya Devi died on 20.09.1998 and father Jagan Nath died on 14.12.2003. The Will is alleged to have been executed in the presence of witnesses Tek Chand Gaur, Manager Mandir Thakurji Maharaj and Om Parkash, and in the presence of Jagan Nath father of the parties. The Will was drafted by Sh. M.L. Rustogi, Advocate on instructions of Maya Devi.

[12]. It is also pleaded case of the defendants that the parents of the parties resided with the defendants No.1 and 2 till their death because plaintiff No.2 Ram Niwas was in service since 1975. Similarly Plaintiff No.3 Ajay Rustogi was also in service since 1984 and Plaintiff No.1 Smt. Parkashwati was married in the year 1970, whereas Plaintiff No.4 Smt. Nirmal was married in the year 1983.

[13]. If the father of the parties was alive on the date of execution of alleged Will and he lived with the defendants till his death on 14.12.2003, the factum of acquiring knowledge of the alleged Will is a far fetched phenomenon. Insertion of Will change the nature of the litigation and would result in *de novo* trial. This fact has been admitted by the defendants at the time

of passing of the impugned order, but the amendment has been allowed only on the premise that the defendants will not re-examine the plaintiff's witnesses. If the amendment is allowed to be inserted and Will is allowed to be pleaded in the written statement, then the execution of Will, will be required to be proved and the nature of the suit itself will be changed which would prejudice the case of the plaintiffs.

[14]. Before the amendment can be allowed, the Court should satisfy itself where such an amendment is necessary for determining real issues in controversy. If such condition is not satisfied, the amendment cannot be allowed. This is the basic test which governs the discretion of the Court in granting or refusing the amendment. The other consideration which governs the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to other side. Ordinarily, if other side is compensated with cost, then there is no injustice, but if irreparable loss is caused to the opposite side, then such amendment cannot be granted. Amendments of written statement is more liberally construed than the amendment in the plaint. The purpose for imposing cost is to discourage *mala fide* amendments which are designed to delay the legal proceedings. Secondly the cost is to compensate the opposite party for the delay and inconvenience caused to it. In a way it is

intended to send a message to the parties to be careful while drafting the original pleadings. While granting or rejecting the amendment following principles are required to be taken into consideration:-

- a. Whether the amendment sought to be made is imperative for effective adjudication of the matter?
- b. Whether the amendment is *bona fide* or *mala fide*?
- c. The amendment should not cause such prejudice to the opposite party which cannot be compensated in terms of adequate cost.
- d. Whether the proposed amendment changes the nature and character of the suit?

As a Rule the Court should reject such amendments if fresh suit on intended cause of action is barred by limitation on the date of filing of application of such amendment. The provisions are only illustrative and not exhaustive. It is a very serious judicial exercise and should not be undertaken in a casual manner. The Court should not refuse *bona fide* and legitimate amendment and at the same time should not allow *mala fide* or dishonest amendment. The stage of the litigation is also a relevant factor for allowing or rejecting the amendment in the pleadings. This is one of the most misused provision in the civil code for dragging the proceedings indefinitely, particularly

in the Indian Courts which are otherwise heavily burdened with pending cases. That is why the exercise in terms of Order 6 Rule 17 CPC should be done with a great caution and should be exercised sparingly. In **Revajeetu Builders and Developers vs. Narayanaswami and sons and others, 2010(1) RCR (Civil) 27**, the Hon'ble Apex Court highlighted the aforesaid principles to be followed meticulously.

[15]. In **Abdul Rehman and another vs. Mohd. Ruldu and others, 2012(4) RCR (Civil) 481**, the Hon'ble Apex Court held that the power to allow amendment is wide enough to be exercised at any stage of the proceedings in the interest of justice. The basic purpose of allowing the amendment is to minimise the litigation. However, the relief which has become time barred cannot be inserted by way of amendment. The power of amendment should be exercised in the larger interest for doing full and complete justice to the parties and it should be allowed if the same subserves the cause of justice and avoids further litigation. The original provision was deleted by the Amendment Act 46 of 1999, however it was again restored by the Amendment Act 22 of 2002, wherein a proviso was added to prevent application for amendment after the trial has commenced, unless the Court is satisfied that inspite of due diligence, the parties could not have raised the matter before

the commencement of trial. The proviso to some extent curtails absolute discretion of the Court to allow the amendment at any stage. If the application is filed after commencement of the trial, it has to be shown that inspite of due diligence, it could not have been filed earlier. The object of the Rule is that the Court should try the merits of the case for determining the real issue between the parties provided it does not cause prejudice to the opposite party. The power to allow the amendment is wide and can be exercised at any stage of litigation. The principles were reiterated by the Hon'ble Apex Court in **J. Samuel and others vs. Gattu Mahesh and others, 2012(1) RCR (Civil) 903.**

[16]. The amendment sought by the party should not be based on falsehood. If the basis for seeking amendment is proved to be false, such an amendment cannot be allowed. If *prima facie*, the statement made in the application for amendment is not proved to be correct, then such disputed pleadings cannot be allowed to be inserted in the pleadings by way of amendment. The Hon'ble Apex Court in **Mashyak Grihnirman Sahakari Sanstha Maryadit vs. Usman Habib Dhuka, 2013(2) RCR (Civil) 965,** held that if *prima facie* the statement made in the application for amendment is proved to be incorrect the amendment should be rejected.

[17]. However, it is equally important to see that the

amendment can be allowed before the commencement of trial and not after that in routine manner. It is the primary duty of the Court to decide as to whether the amendment sought after commencement of the trial goes to the roots of the case or are *mala fide* in nature? The proviso inserted by way of amendment has to be meticulously followed and the Court should allow the amendment before the commencement of the trial. The proviso of Order 6 Rule 17 CPC has been couched in a mandatory form. In **Vidyabhai and others vs. Padmalatha and another, 2009(1) RCR (Civil) 763**, the Hon'ble Apex Court while relying upon **Baldev Singh vs. Manohar Singh, 2006(3) RCR (Civil) 844**, **Kailash vs. Nanhku and ors., (2005) 4 SCC 480**, and **Rajesh Kumar Aggarwal vs. K.K. Modi, 2006(2) RCR (Civil) 577 and AIR 2006 SC 1647** reiterated the aforesaid facts. However, the jurisdiction of the Court to allow amendment has to be based on the condition precedents that it must come to the conclusion that inspite of due diligence, the parties could not have raised the matter before commencement of the trial. In a way conditional reservoir exists in the form of due diligence, if the party is sufficiently prevented from raising the matter before commencement of the trial. The restriction provided by the proviso is an embargo on the exercise of jurisdiction by the Court. Thus, unjust jurisdictional fact, as envisaged therein is

found to be existing, the Court will have no jurisdiction to allow amendment in the plaint. The proviso has already been upheld in **Salem Advocate Bar Association vs. Union of India, 2005(3) RCR (Civil) 530**. The amendment at a belated stage cannot be declined merely because it is sought at a belated stage. The amendment can be allowed, if it satisfies the aforesaid ingredients and is found to be necessary for deciding the real controversy between the parties. The Hon'ble Apex Court in **Surinder Kumar vs. Makhan Singh, 2010(1) Apex Court Journal 0078** held that the discretion under Order 6 Rule 17 CPC is an unfettered discretion conferred upon the Courts to allow amendment in the pleadings on such terms and conditions as it appears to the Court to be just and proper. The delay in making the application for amendment cannot be a ground to refuse. The Court must do full and complete justice to the parties subject to payment of adequate cost to the party opposite, if no prejudice beyond repair is caused to the opposite party. The Hon'ble Apex Court held in the aforesaid manner while relying upon **B.K.N. Pillay vs. P. Pillay, (2013) CCC 165, Supreme Court**.

[18]. Since the date of acquiring knowledge about the Will appears to be based on falsehood as the Will was allegedly executed in the presence of father Jagan Nath, who remained

with the defendants till 14.12.2003 i.e. for more than four years after execution of alleged Will and the defendants never acquired any knowledge about the Will in question. Moreover the suit for partition with the insertion of Will in question would be changed in terms of its nature and serious prejudice is going to be caused to the plaintiffs/petitioner.

[19]. The amendment which has been sought in the year 2014 appears to be barred in terms of relief. The amendment which has become time barred cannot be inserted. The date of acquiring knowledge by the defendants cannot be accepted as a gospel truth.

[20]. In view of aforesaid impugned order is proved to be in utter conflict with the propositions of law held in the aforesaid precedents.

[21]. In view of above, impugned order dated 11.02.2014 passed by the Civil Judge (Jr. Divn.) Rewari is set aside. Revision petition is allowed, dismissing the application for amendment of the written statement.

December 24, 2015
Atik

(RAJ MOHAN SINGH)
JUDGE