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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Revision No.3295 of 2013
Reserved on : 08.05.2015
Date of decision: 15.05.2015

Shiv Kumar Bhandari

....Petitioner

Versus

Kailash Soni and another ...Respondent

CORAM: HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr. M.S.Sachdev, Advocate for the petitioner.

Mr. Arun Jain, Senior Advocate with
Mr. Sudhir Pruthi, Advocate and
Mr. Sunil Verma, Advocate for respondent No.1.

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G.S.Sandhawalia J.

1. The present revision petition has been filed by the petitioner/defendant no.1 aggrieved against the order dated 11.04.2013 (Annexure P/1) wherein the application under Order 6 Rule 17 read with Section 151 CPC for amendment of plaint filed by the plaintiff/respondent no.1 has been allowed.

2. The reasoning which has prevailed with the trial Court is that there is no withdrawal of admission and by the proposed amendment only an elaboration of pleadings regarding forgery and fabrication of the documents is sought to be highlighted. In what circumstances the document was obtained by defendant no.1 and whether it was by playing fraud upon the plaintiff and that the proposed amendment would not change the nature of the suit and would rather facilitate the Court to decide the real controversy between the parties weighed with the Court. The fact that inconsistent pleas could be taken and admission could be explained and therefore on the ground that no prejudice would be caused to the rights of the petitioner who would have right to rebut the same, the application was allowed even after framing of issues subject to payment of ₹ 2,000/- as costs.

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3. Counsel for the petitioner has thus argued that once the issues had been framed and trial has commenced, the trial Court was not justified in allowing the amendment especially once the replication had also been filed by plaintiff/respondent no.1 and in the absence of any due diligence pleaded in the application. It was submitted that admission regarding giving of the power of attorney was there and therefore, by virtue of amendment that was being retracted by taking the plea that petitioner had not appeared before the Indian High Commission keeping in view the fact that embossing had already been done by the Commissioner at Jalandhar before the sale deed was executed in favour of the present petitioner at the behest of respondent no.2.

4. Counsel for the respondent no.1/plaintiff on the other hand submitted that once the costs have been accepted by the petitioner, he was estopped from challenging the order on merits even though he had filed an application subsequently for withdrawal of statement whereby costs have been accepted on account of the fact that he wanted to file revision petition before this Court. It was further contended that the suit was at an initial stage and only issues had been framed and no evidence had been led when the application for amendment was filed and the amendment would only facilitate the trial Court to decide the controversy in issue. The amendment would help the Court to come to a correct conclusion especially keeping in view the fact that there was allegation of fraud against the petitioner and his brother who was arrayed as respondent no.2 and in what circumstances the power of attorney was obtained from the plaintiff/respondent no.1. It was further submitted that attorney was not signed on all pages and had only been given for the purpose of managing the property and not for sale.

5. To appreciate the real controversy, it is necessary to examine the dispute between the parties as such. The dispute revolves around the sale deed dated 19.2.2007 executed in favour of the present petitioner by his brother/respondent no.2 who is also arrayed as defendant in the said suit and

who was the alleged attorney of respondent no.1/plaintiff which is pertaining to House No.210, New Jawahar Nagar, Jalandhar. The plaintiff is stated to be Non Resident Indian and settled in UK whereas the petitioner and respondent no.2 are her near relations being nephews. Admittedly on 16.3.2004 half share of the house was sold to the present petitioner and respondent no.2 was appointed as caretaker at the instance of the present petitioner and proforma of power of attorney was sent to her and she signed blank stamp papers in favour of respondent no.2 for the purpose of maintaining her half share of the house as per the case of the plaintiff. The said attorney was embossed on 19.2.2007 on the date on which the sale deed was executed in favour of the present petitioner. The said sale deed was then challenged by filing the suit for declaration on 17.4.2008 on the ground that allegedly a sum of ₹ 38 lacs was paid to respondent no.2 whereas the value of the said property was more than ₹ 6 crores as it is situated on the main road in the posh locality of Jalandhar. No sale consideration had been received by the plaintiff and a fraud had been played to cause wrongful gain to the plaintiff in connivance with each other by the defendants.

6. The suit was contested on the ground that an earlier sale deed had been executed regarding half portion of the house and remaining could not be registered due to some technical reason and that it had been agreed that remaining property would be sold later on. The plaintiff had received amount at UK from the present petitioner partly through cheque and partly through cash on 7.2.2007 after proper receipt and then the power of attorney was posted to India which was received by respondent no.1 and after getting the same embossed it was produced for registration of sale deed. It had been mentioned in the sale deed that sale consideration had already been paid and that the power of attorney was executed on 3.2.2007 by the plaintiff at UK and had been got countersigned from the official in Indian Embassy and the same had been sent to India finally in the name of respondent no.2. It was thereafter duly embossed

as per law and sale deed was executed and the plaintiff wanted to wriggle out of the said sale deed. The suit was alleged to be not properly valued for the purpose of Court fees as admittedly the plaintiff herself claimed that value of the property was ₹ 6 Crores.

7. The replication was filed controverting the said allegations without any specific denial regarding fact of counter signature by the officials of the Indian Embassy at UK and taking the plea that the power of attorney was only for the purpose of maintenance of the house and there was an inducement and the signature of the plaintiff was obtained fraudulently and the power of attorney had never been given for the purpose of sale of the house.

8. Thereafter, issues were framed and application for amendment was filed thereafter wherein specific plea was sought to be taken that it was only for the purpose of elaboration of the plea already taken and she had never appeared before the Indian High Commission for the purpose of attesting the said attorney. Allegations were also made that the present petitioner has succeeded in his evil design to get the impugned power of attorney fabricated and evidence of the plaintiff was yet to commence. The application was opposed by taking the plea that since issues had been framed and the application was not maintainable at this stage. The plaintiff/respondent no.1 had appeared before the Indian High Commission for attesting the power of attorney and once the trial had commenced, the amendment was not permissible.

9. The first issue which arises for consideration is as to whether once the issues have been framed, the application for amendment was maintainable. It has been very vehemently argued by the counsel for the petitioner to submit that once the trial had commenced in view of proviso to Order 6 Rule 17 CPC, the Court could not have permitted the amendment in the absence of due diligence and that the parties could have raised the matter at an earlier stage. Reliance has also been placed upon the judgment of this Court in **Sharanjit**

Kaur Vs. Kulwant Singh and others 2015(1) ICC 193 apart from the judgment of the Apex Court in **Vidyabai and others Vs. Padmalatha and another (2009) 2 SCC 409** and other judgments of this Court in **Bahadur Singh and another Vs. Avtar Singh 2007(3) PLR 628** and **Jaspal Kaur and another Vs. Mohinder Kaur and others 2014(9) R.C.R. (Civil) 2935.**

10. A perusal of the said judgments would go on to show that meaning of word commencement of the trial has been interpreted to be that it would be by way of tendering affidavits and documents. The bar as such in the proviso to Order 6 Rule 17 CPC in the absence of due diligence would not come in the way. Reference can be made to the judgment of the Apex Court in **Baldev Singh and others Vs. Manohar Singh and another (2006) 6 SCC 498** wherein it was held that where the parties are yet to file documentary evidence, amendment could be allowed. Reference can be made to the observations wherein it has been held so. Relevant observations read as under:-

> "Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted herein after, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings."

11. The said judgment was thereafter referred to in **Vidyabai's** case (supra) to hold that filing of affidavit in lieu of examination-in-chief would amount

to commencement of proceedings especially in the absence of due diligence not having been pleaded which is an admitted fact in the present case. Relevant observations read as under:-

> "7. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:
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> > "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."
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> It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.
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> 8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition.
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> 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 of 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'."

12. Thus in the present case as noticed though issues have been framed but before the evidence could be led application for amendment came in place and therefore, in spite of the fact that there was no explanation given regarding the due diligence the same was not required.

13. Secondly, this Court is of the opinion that the amendment would only help the Court to adjudicate upon the controversy in question to find out as to in what circumstances the attorney was given and as to whether any sale consideration had actually passed as pleaded since it is a matter of dispute between the parties and the amendment does not fundamentally change the nature and character of the suit. It is settled principle that it is mandatory for the

Court to allow amendments which are necessary to determine the real controversy in question and decline amendment only when there was malafide and other party seeks to gain. The principles were laid down in **<u>Revajeetu Builders & Developers Vs. Narayanaswamy & sons and others</u> (2009) 10 SCC 84** wherein it was held that as long as the material pleadings are not altered or substituted and not got rid off and the amendment is bonafide refusing amendment would lead to injustice. The principles laid down read as under:-

> "67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.
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> (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
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> (2) Whether the application for amendment is bona fide or mala fide?
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> (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
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> (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
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> (5) Whether the proposed amendment constitutionally or fraudulently changes the nature and character of the case? and
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> (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
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> 68. These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.
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> 69. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner.
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> 70. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

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14. Similarly in **<u>Ramesh Kumar Agarwal Vs. Rajmala Exports Pvt. Ltd. and others</u> 2012(2) Apex Court Judgments 71,** the same view has been taken wherein the amendment was allowed and it was held that the Court should not take hyper technical approach and liberal approach should be the general rule specially where other side could be compensated with costs. In the said case the plaintiff wanted to explain how the money was paid though the averments had already been made.

15. Similarly in the present case, dispute pertains to in what circumstances the power of attorney was given to respondent no.2 herein and whether the same was only for the purpose of managing the balance amount of property which was still in the name of the plaintiff/respondent no.1 and whether the same was obtained by fraud and misrepresentation as the parties are closely related to each other. Counsel for the respondent was justified by placing reliance upon the provisions of Order 6 Rule 4 CPC which specifically provide that where the party pleads misrepresentation, fraud, breach of trust, wilful default or undue influence particulars have to be exemplified with dates and items. The factum whether the plaintiff was present in the Indian High Commission when the attorney was attested would be a necessary fact. In such circumstances, it would be required to be pleaded especially in view of the fact that attorney was thereafter got embossed by the defendants from the Commissioner, Jalandhar on the ground that it has been duly attested by the official of the Indian High Comission. It is the duty of the Court to find out the truth and the amendment would only facilitate the Court to come to the correct conclusion as to whether the plaintiff was being dishonest having received the balance amount earlier in UK or whether it was the defendants who were misusing their fiduciary relationship. Thus this Court is of the opinion that the trial Court was well justified in allowing the amendment especially keeping in view the fact that the case is at initial stage and the parties have yet to lead their

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evidence.

16. Reliance upon **Sharanjit Kaur's** case (supra) would be of no avail since in the said case, apart from the fact that issues had been framed and plaintiff's evidence had been recorded and the case was fixed for cross-examination when the application for amendment of written statement of facts which were in the knowledge of the petitioner had been filed. It is in such circumstances this Court held that in the absence of due diligence, the plea of money lending could not be set up as the defence of the defendants would totally change.

17. Similarly in **Bahadur Singh's** case (supra), amendment was denied since the trial had already commenced. Similarly in **Jaspal Kaur's** case (supra), it was noticed by this Court that four opportunities had been availed for leading evidence and one witness had already been examined before filing the amendment application. Accordingly order declining the amendment was upheld. Thus, the petitioner cannot draw any benefit from the same.

18. Resultantly, keeping in view the above observations, the present revision petition being bereft of merit is dismissed.

15.05.2015 (G.S.SANDHAWALIA)
Pka JUDGE