

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Civil Revision No. 4132 of 2012 (O&M)
Date of decision: 4.8.2015

Jagdev Singh

.. Petitioner

v.

Gursewak Singh

.. Respondent

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Arun Jindal, Advocate for the petitioner.
Mr. Amar Vivek, Advocate for the respondent.

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Rajesh Bindal J.

Challenge in the present petition is to the order dated 1.6.2012, passed by the learned court below, whereby the application for amendment of the suit filed by the respondent-plaintiff, was allowed.

Brief facts, as are available on record, are that respondent No. 1-plaintiff filed a suit for recovery of ₹ 37,00,000/-, i.e., ₹ 18,50,000/- paid as earnest money and ₹ 18,50,000/- as damages in terms of the agreement to sell dated 28.5.2007, executed by the petitioner in favour of the respondent. Further prayer was made for permanent injunction restraining the petitioner from alienating the suit property. The suit was filed on 14.1.2008. In the aforesaid suit, the respondent-plaintiff filed application for amendment seeking to claim relief of possession by way of specific performance of agreement to sell. The amendment having been allowed by the court below, the order has been impugned in the present petition.

Learned counsel for the petitioner submitted that execution of the agreement to sell dated 28.5.2007 is not in dispute. In terms thereof, last date for execution of the sale deed was 30.11.2007. The respondent-plaintiff

filed the suit for recovery of earnest money and damages and further for permanent injunction on 14.1.2008. No relief of possession by way of specific performance of agreement to sell was claimed. The application seeking amendment of the plaint was filed on 18.3.2011. The relief of possession by way of specific performance of agreement to sell was time-barred on that day, hence, the plaint could not be permitted to be amended for claiming a time-barred relief. The limitation to file a suit for possession by way of specific performance of agreement to sell expired on 29.11.2010. In support of his plea, reliance was placed upon K. Raheja Constructions Ltd. v. Alliance Ministries, AIR 1995 SC 1768; Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) v. Ramesh Chander and others, (2010) 14 SCC 596; Smt. Krishna Rani v. Ram Kishan, 2002(4) RCR (Civil) 373 and Madan Lal v. S. L. Maloo and others, 2012(3) PLR 221.

On the other hand, learned counsel for the respondent submitted that the base for claiming the relief either of recovery, injunction or specific performance of agreement to sell is the agreement dated 28.5.2007. In fact, the respondent herein is an illiterate person, who had entrusted the case to his counsel for claiming the relief of possession by way of specific performance of agreement to sell, however, he inadvertently filed a suit for refund of earnest money along with damages only. A litigant should not be made to suffer on account of fault of the counsel. No prejudice as such is going to be caused to the petitioner.

Heard learned counsel for the parties and perused the paper book.

An issue as to whether amendment of plaint should be allowed, where the claim sought to be added is barred by limitation, was considered by this court in Madan Lal's case (supra), where law on the subject was considered. The relevant parts thereof are extracted below:

“9. In T. L. Muddukrishana v. Smt. Lalitha Ramchandra Rao, 1997(2) RCR (Civil) 154, while considering an issue as to whether a party should be permitted to amend pleadings to claim certain relief which is apparently time-

barred, it was opined that in case the relief sought to be claimed is barred on the date the application is filed, the amendment should not be permitted. It was a case in which an agreement to sell was executed on 16.3.1989. The last date for execution of sale deed was fixed on 28.5.1989. Initially the vendee filed a suit for mandatory injunction on 21.4.1992 seeking a direction against the vendor to comply with the terms of agreement. During the pendency of the suit, an application was filed on 5.11.1992 seeking to amend the plaint praying for relief of specific performance of agreement to sell. The application was rejected by the trial court. The order was upheld by the High Court and Hon'ble the Supreme Court. Relevant paragraphs 5 and 7 thereof are extracted below:

“5. It is seen that limitation under Section 3 of the Limitation Act is one of the defences available to the defendant. Article 54 of the Schedule to the Limitation Act postulates that for specific performance of a contract the period of limitation is three years from the date fixed for the performance, or, if no such date is fixed, from the date the plaintiff has notice that performance is refused. Under first part of Article 54, once date for performance of the contract has been fixed by the parties the limitation begins to run from that date and specific performance of the contract could be had within three years from that date unless the parties by an agreement extend the fixed time. In this case, date was fixed for performance, i.e., May 28, 1989. The question whether or not the time is the essence of the contract is not of much relevance since the falls in first part of Article 54. The decision relied on by the learned counsel for the appellant in *Smt. Chand Rani (dead) by LRs v. Smt. Kamal Rani (Dead) by Lrs*, JT 1993(1) SC 74: 1993(2) RRR 46 (SC) of the Constitution Bench does not help the learned counsel for the

appellant. In that case, this court has reviewed the entire case law and need for reiteration is obviated. The court held thus:

“It is well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. The principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed with that reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.”

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7. Under these circumstances, it must be held that for the purpose of limitation, what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit is required to be filed within three years from the date fixed by the parties under the contract. Since the application for amendment of the plaint came to be filed after the expiry of three years, certainly it changed the cause of action as required to be specified in the plaint. The suit for mandatory injunction is filed and the specific performance was sought for by way of an amendment. The cause of action is required to be stated initially in

the plaint but it was not pleaded. It was sought to be extended, along with an application for specific performance which, as stated earlier, was rejected. Under these circumstances, even by the date of filing of the application, namely, November 5, 1992, the suit was barred by limitation. The High Court, therefore, was right in refusing to permit the amendment of the plaint.”

10. To similar effect is the judgment of Hon'ble the Supreme Court in State Bank of Hyderabad v. Town Municipal Council, 2007(1) RCR (Civil) 415.

11. In Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350, Hon'ble the Supreme Court opined as under:

“28..... The purpose of the provision enabling filing of a counterclaim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counterclaims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counterclaim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counterclaim. The framers of the law never intended the pleadings by way of counterclaim being utilised as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counterclaim not contained in the original written statement may be refused to be taken on record if the

issues have already been framed and the case set down for trial, and more so when the trial has already commenced.”

12. In Rohit Singh v. State of Bihar, (2006) 12 SCC 734, Hon'ble the Supreme Court held as under:

“18..... A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counterclaim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so-called counterclaim of respondents 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction.”

13. The principles of law laid down in the aforesaid judgments was followed by Hon'ble the Supreme Court in Gayathri Women's Welfare Association v. Gowramma and another, (2011) 2 SCC 330.

14. In South Konkan Distilleries and another v. Prabhakar Gajanan Naik and others, JT 2008(10) SC 405, Hon'ble the Supreme Court considered the issue that question of limitation would be relevant to be considered where a counter-claim is sought to be filed belatedly after the written statement had already been filed and the amendment thereof is sought for the purpose. In case a fresh suit for the relief sought to be claimed by way of counter-claim is time-barred, the amendment should be declined. Relevant paragraphs 16 and 17 thereof are extracted below:

“16. In view of our discussions made hereinabove that there was no dispute on the question of limitation, it would not be fit and proper to hold that the courts below had acted illegally and with material irregularity in the exercise of their jurisdiction in rejecting the application for amendment of the written statement and the counter claim. The learned counsel for the appellants, however,

relied on a decision of this court reported in **A. K. Gupta & Sons Ltd. v. Damodar Valley Corporation** [AIR 1967 SC 96] in order to satisfy us that the prayer for amendment for a sum already specified in the plaint or such other amount as was to be determined after accounts, ought to be allowed though the suit for recovery of money was barred when the amendment was sought. In our view, that decision of this court stands on a different footing altogether and will not be of any help to the appellants. In that decision, it was made clear that the amendment of pleadings introducing new case cannot be allowed, if suit on such case is barred. In that decision also, it was made clear that in the matter of allowing amendment of pleadings, the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action, particularly when a suit on the new cause of action is barred. However, an exception was given in that decision saying where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed even after expiry of the statutory period of limitation. We have already observed that there is no quarrel on the proposition enunciated by this court in the aforesaid decision. As held hereinabove, the date on which the application for amendment of the written statement and the counter claim was filed, the claim was already barred by limitation. Therefore, if a fresh suit was filed on the amended claim, there cannot be any dispute that the same could also be barred by the law of limitation. Under these circumstances and applying also the principles laid down in the aforesaid decision in the case of **A. K. Gupta (supra)**, in the facts of this case, we

are of the view that since even on the date of filing of the application for amendment of the written statement and the counter claim, the claim was barred and no fresh suit could be filed on such amended claim and, therefore, the two courts below had acted within their jurisdiction in rejecting the prayer for amendment of the written statement and the counter claim. It may not be out of place to mention that following the principle laid down in **A.K. Gupta's** case (supra), this Court again in **Vineet Kumar v. Mangal Sain Wadhera** [1984 (3) SCC 352] expressed the same view to which we have already adhered to.

17. Considering the facts of the case and the nature of amendment claimed and the principles laid down by this court in **L. J. Leach's** case (supra) and other decision of this court, as referred to herein earlier, we are of the view that if a suit was filed on the amended claim, it was an admitted position that the said claim was barred by limitation, the question of allowing the amendment of the written statement and the counter claim, in the facts and circumstances of the case, could not arise at all. Accordingly, the courts below were fully justified in rejecting the application for amendment of the written statement and the counter claim.”

15. In Revajeetu Builders and Developers v. Narayanaswamy and sons and others, (2009) 10 SCC 84, Hon'ble the Supreme Court opined that while allowing or rejecting the application for amendment, some basic principles should be kept in mind. The same are as under:

“Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both English and Indian cases, some basic principles emerge which ought to be

taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (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.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

16. In Rakesh Ahuja v. Jagan Nath, 2004(3) RCR (Civil) 707, this court considered a petition filed by a defendant, whose prayer for amendment of the written statement to add counter-claim therein was declined. It was opined therein that counter-claim has the same effect as a cross suit. Counter-claim can be filed even after filing of the written statement provided that such counter-claim is within the period of limitation. Relevant paragraphs thereof are extracted below:

“6. After hearing learned counsel for the parties and going through the case law cited by the counsel for the parties, I am of the opinion that the amendment in the written statement to seek counter claim is clearly beyond

the period of limitation. In terms of sub-rule (2) of Rule 8(6)(a), the counter claim has the same effect as a cross-suit so as to enable the Courts to pronounce the final judgment in the same suit both on the original claim and on counter claim. The liberty to file counter-claim is given to the defendant in addition to this right of pleading a set off under Rule 6 so that all the questions between the parties are decided in one and the same proceedings.

7. In terms of Section 3(2)(b) of the Limitation Act, the counter claim is to be treated as a separate suit on the date on which the counter claim is made in Court. Section 3(2)(b) of the Limitation Act reads as under:

“3. *Bar of limitation.* (1) Subject to the provisions contained in Section 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has been set up as a defence.

(2) For the purpose of this Act, -

(a)

(b) any claim by way of a set-off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-

(i) in the case of a set-off, on the same date as the suit in which the set-off is pleaded;

(ii) in the case of a counter-claim on the date on which the counter-claim is made in court.”

8. The counter-claim is nothing but a separate suit which is appended to the written statement to facilitate the trial of all the issues between the parties. Therefore, it is not correct to state that there is no limitation for filing a counter-claim. Similarly, for raising the counter-claim, the limitation is one as provided under the Limitation

Act. This Court has held that the defendants can file counter-claim even after filing of the written statement provided such counter-claim is within the period of limitation. Such is the view taken by the Calcutta High Court in M/s Oriental Ceramic Products Pvt. (supra).

In Vinod Kumar's case (supra), this court has found on fact that the limitation for claiming the possession is twelve years and there is nothing on record to show that the period of twelve years has expired. However, it may be stated that the attention of the Court was not drawn to the earlier judgments referred to by this court as well as to the Statutory provisions contained in Section 3 of the Limitation Act, according to which, the period of limitation for filing of counter claim is one which is provided under the Limitation Act.

9. Since the petitioner has claimed counter-claim in respect of amount spent on the construction of the house in the year 1989-90, the said claim is clearly barred by limitation so as to be included by way of counter-claim.

10. Consequently, I do not find that the order passed by the learned trial court suffers from any irregularity or illegality warranting interferences in exercise of revisional jurisdiction under Article 227 of the Constitution of India.”

In Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.)'s case (supra), Hon'ble the Supreme Court opined that for filing a suit for specific performance of agreement to sell, the limitation is 3 years from the date fixed for the performance and if no such date is fixed, when the plaintiff has notice that performance is refused.

The undisputed facts available on record in the present case are that agreement to sell is dated 28.5.2007. The last date for execution of the sale deed was 30.11.2007. Initially, suit for recovery of earnest money along

with damages was filed on 14.1.2008. The application for amendment of the plaint was filed on 18.3.2011 seeking to claim the relief of possession by way of specific performance of agreement to sell dated 28.5.2007. In terms of Article 54 of the Limitation Act, a suit for specific performance could be filed within 3 years from the date fixed for performance. Three years in the present case expired on 29.11.2010. By way of amendment, nature of the suit was sought to be changed to recover possession by way of specific performance of agreement to sell. If an independent suit is filed on the date the application for amendment was filed, the same would have been clearly time-barred. Once that is so, the court below has committed grave error in permitting the respondent-plaintiff to amend the suit by permitting him to add the relief of possession by way of specific performance of agreement to sell, which was a time-barred claim.

For the reasons mentioned above, the present petition is allowed. The impugned order 1.6.2012, passed by the court below, is set aside. Consequently, the application for amendment filed by the respondent-plaintiff is dismissed.

The petition stands disposed of, accordingly.

(Rajesh Bindal)
Judge

4.8.2015
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(Refer to Reporter)