

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

C.R. No. 4589 of 2013 (O&M)

Date of decision:- 11.08.2015

M/s Kamal Enterprises

...Petitioner

Versus

M/s Sigma Moulds & Stamping Pvt. Ltd.

...Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. John Kumar, Advocate
for the petitioner.

Mr. S.K. Dhiman, Advocate
for the respondent

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RITU BAHRI J.

Plaintiff/Petitioner (for short 'the petitioner') has filed the instant revision petition under Article 227 of the Constitution of India assailing order dated 24.08.2012 (Annexure P-3) passed by learned Addl. Civil Judge (Senior Division) Faridabad whereby an application under Order 6 Rule 17 of the Code of Civil Procedure (for short 'the Code') filed by the petitioner for amendment of plaint, was dismissed.

The petitioner filed a suit for recovery of an amount of Rs.3,19,411.19/- on 21.04.2010 against the respondent and thereafter, the case was fixed for the evidence on behalf of the petitioner. While

preparing the evidence, it transpired that the petitioner could not include the entire claim of the petitioner in the plaint, as some bills were left out to be included in the final claim of the petitioner. This was the clerical mistake and there was no mala fide intention on the part of the petitioner for not including these bills in the plaint. The application filed by the petitioner will not change the nature of the suit and the amendment is only for explanatory in nature.

I have heard learned counsel for the petitioner and perused the case file.

The issues were framed on 21.04.2010 and thereafter, the petitioner filed the above mentioned application for amendment of the plaint, which was dismissed by the Court below on the ground that the said application is hit by the proviso given in Order 6 Rule 17 of the Code. After commencement of the trial, the application should show some reasonable cause for allowing the amendment. The petitioner has not mentioned any fact which shows that inspite of due diligence, the relief sought in the present application could not be raised at the time of filing of the plaint. Reference was made to a case law titled as ***Ajendraprasadji N. Pande and another v. Swami Keshayprakeshdasji N. and others 2007(1) RCR (Civil) 481*** wherein it was held that the trial is deemed to commence when the issues are settled, the case is set down for recording of evidence.

Order 6 Rule 17 of the Code reads as under:-

“17. Amendment of Pleadings.-the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

By reason of the Civil Procedure Code (Amendment Act), 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as unde:-

“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.”

It is couched in a mandatory form. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore are satisfied viz, it must come to a conclusion that in spite of due diligence that parties could not have raised the matter before the commencement of the trial.

Learned counsel for the petitioner has argued that even though the proceedings in the trial were deemed to have commence after framing of the issues on 21.04.2010 but the Court as per proviso added to Order 6 Rule 17 of the Code can still allow amendment in

the suit after it was satisfied that ***in spite of due diligence that parties could not have raised the matter before the commencement of the trial.***

Learned counsel submits that while calculating the recovery amount, some bills were left out to be included in the final claim of the petitioner, due to clerical mistake and there was no mala fide intention on the part of the petitioner for not including these bills in the plaint. The application for amending the suit will not change the nature of the suit, as the amendment is only for explanatory in nature. The object of adding proviso to order 6 Rule 17 was to avoid unnecessary delay in a litigation and time taken by the Court in examining and re-examining the witnesses.

Learned counsel for the respondent has referred to the judgment of Hon'ble the Supreme Court in a case of ***Vidyabai and others v. Padmalatha and another, 2009 (1) R.C.R (Civil) 763*** to contend that the Court can allow the amendment application under Order 6 Rule 17 of the trial before the commencement of the trial but not after the commencement of the trial. The proviso to Order 6 Rule 7 is couched in a mandatory form. He further submits that the issues in this case have already been framed and the case has been fixed for the evidence and once the trial has commenced, no amendment can be allowed as per proviso of Order 6 Rule 17 of the Code. The

amendment will change the nature of the suit.

Reference at this state can be made to Order 18 Rule 4(1) of the Code, which reads as under:-

4. Recording of Evidence

(1) In every case, the examination-in-chief of a witnesses shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who call him for evidence.

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility and of such documents, which are filed along with affidavit shall be subject to the orders of this Court.”

After the amendment in the year 2002, 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.

In the present case, after the issues were framed on 21.04.2010, the petitioner came to know that certain bills were left out and not included in the recovery amount due from the respondent. Thereafter, he filed an application for amendment of the plaint, which was dismissed. Since the petitioner had not given his examination in chief under order 18 Rule 4, he was required to file an affidavit under Order 18 Rule 4 along with copies, he is required to give necessary

documents to the opposite side. Before his examination in chief was tendered, he filed the above application for amendment of the plaint. The petitioner is having business transaction with the respondent from 2006 till 2008 and some bills were made as per the details of cheques given in the plaint. In para 5 and 6 of the application, it has been stated that Rs.402146.88 paise were due upon the defendant on account of supply of metal insert and Rs.3119611.60 paise are due on account of supply of diet set. The amount of Rs.602146.88 was finally due up on the defendant in the month of March, 2008 and after that, the defendant paid Rs.2 lacs in the month of July, 2008 and the respondent is liable to pay the interest to the tune of 18% on the balance of Rs.402146.88 paise as well as interest from the due date of the bills.

Reference at this stage can be made to a judgment titled as ***Kailash v. Nanhku, 2005(2) RCR (Civil) 379*** wherein it has been held that the trial begins when issues are framed and the case is set down for recording of evidence and all the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. This rule is not applicable in election petitions.

Thus, in the present case, after framing of charges, for all intents and purpose, the trial had commenced.

Now the question for consideration before this Court

whether under Order 6 Rule 17, the application filed by the petitioner for amendment of the plaint should have been allowed or not?

The Court while dismissing the application of the petitioner had relied upon the Pande's case (supra) wherein it has been held that the trial is deemed to commence when the issues are settled, the case is set down for recording of evidence.

Reference at this stage can be made to a judgment of ***Salem Advocate Bar Assn. v. Union of India [(2005) 6 SCC 344]*** wherein in para 41 to 43, it has been held as under:

“41. We have carefully considered the submissions made by the respective Senior Counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter-affidavit filed by Respondent 1, various dates of hearing with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.

42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the 10 matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief.”

In the present case, on account of business transactions, some amount was due from the respondent. However, while calculating the recovery amount, certain bills were left out and were not included. Despite due diligence, the petitioner made the mistake in calculating the amount due from the respondent. The respondent will not suffer any prejudice, as he will have the opportunity to contest the bills.

In view of the above, the petition is allowed, subject to deposit of Rs.5000/- as costs to be deposited before the District State Legal Services Authority, Faridabad. Order dated 24.08.2012 (Annexure P-3) passed by learned Addl. Civil Judge (Senior Division) Faridabad is hereby set aside.

August 11, 2015
G Arora

(**RITU BAHRI**)
JUDGE