

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: September 29, 2015

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Judgment Delivered on: October 12, 2015

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CM(M) 790/2015

SUBHASH CHAND SETHI

..... Petitioner

Through: Mr.G.P.Thareja, Advocate

versus

J K JAIN

..... Respondent

Through: Mr.S.K.Bhattacharya & Ms.Seema
Sharma, Advocates

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. Feeling aggrieved by the order dated 20th May, 2015 whereby the prayer of the petitioner to amend the written statement has been declined, the petitioner has invoked the extraordinary jurisdiction vested in this Court under Article 227 of the Constitution of India with a prayer that impugned order may be set aside and the application under Order VI Rule 17 CPC may be allowed.

2. On behalf of the petitioner it has been submitted that the petitioner is owner of the suit property and had been in uninterrupted possession of the same prior to the year 2001 till date. The physical possession of the suit property was never handed over at any point of time to Shri B.D.Arora. The trial in the suit is at the initial stage as the respondent/plaintiff is under cross-examination. When the case was listed for cross-examination of the respondent/plaintiff, with a view to avoid any technical objection during cross-examination, the

amendment application to seek amendment of written statement has been filed on 21st April, 2014.

3. Mr.G.P.Thareja, learned counsel for the petitioner urged that the amendment sought for by the petitioner who is defendant in Civil Suit No. 364/14, does not introduce any new defence and that amendment to the written statement is not on the same footing as amendment to the plaint. Further the proposed amendment was imperative for proper adjudication of the case, bonafide and causing no such prejudice to the opponent which cannot be compensated in terms of cost. The amendment could not have been declined on ground of due diligence and otherwise also 'due diligence' does not apply to the facts sought to be pleaded by way of amendment which are in the nature of clarification to the pleas already taken in the written statement in addition to legal pleas which can be taken even at the stage of appeal. The proposed amendment is necessary for just decision of the case and the impugned order being perverse is liable to be set aside. Learned counsel for the petitioner has contended that dismissal of the amendment application by the learned trial Court placing reliance on Raj Kumar Gurawara (Dead) through LRs Vs. S.K.Sarogi & Company, AIR 2008 SC 2303 was wrong as in that case the application seeking amendment was filed during the course of arguments whereas the petitioner has sought amendment at the stage when PW-1 is still under cross-examination.

4. Learned counsel for the petitioner has placed reliance on two decisions of the Hon'ble Supreme Court in Revajeetu Builders & Developers Vs. Narayanaswamy & Sons & Ors., VII (2009) SLT 537 and Rajesh Kumar

Aggarwal & Ors. Vs. K.K.Modi & Ors., III (2006) SLT 67 in support of his submissions.

5. On behalf of the respondent it has been submitted that the Civil Suit No.364/2014 was filed in May, 2012 praying for decree for possession and damages. Written statement in the said suit was filed on 13th July, 2012. The trial has commenced and the plaintiff has led his evidence by way of affidavit on 25th April, 2013 and partly cross-examined on 21st April, 2014. The application for seeking amendment of the written statement was filed without pleading that the facts now sought to be incorporated in the written statement could not be pleaded earlier despite due diligence. Learned counsel for the respondent has submitted that in view of the proviso to Order VI Rule 17 CPC unless the petitioner is able to satisfy the Court that inspite of due diligence these pleas could not have been taken earlier before commencement of trial, the amendment cannot be allowed. It has been submitted that the present petitioner had also filed a Civil Suit No.407/2011 on 26th December, 2011 against Sh.Bhagwan Dass Arora and the respondent herein praying for permanent injunction, cancellation of documents i.e. agreement to sell, power of attorney. The plaint in Civil Suit No.407/2011 has been rejected under Order VII Rule 11 CPC by learned trial Court on 19th July, 2013 and appeal preferred against the order of the learned trial Court by the present petitioner who was plaintiff in the said suit has also been dismissed. None of the facts now sought to be pleaded is such which could not have been pleaded before commencement of trial, hence amendment to written has rightly been declined by the learned Trial Court.

6. I have considered the rival contentions made on behalf of the parties and carefully gone through the record.
7. Along with this petition, copy of the application seeking amendment to the written statement has been annexed as P-4 wherein in para No.3 of the said application, the petitioner (who is defendant in Civil Suit No.364/14) had referred to Suit No.407/11 instituted by him claiming the relief of permanent injunction, cancellation of document as well declaration that he be declared as sole owner of the suit property.
8. The plaint in Suit No.407/11 stands rejected by learned Senior Civil Judge (East), Karkardooma Courts, Delhi by a reasoned order holding that the suit is hit by Articles 58 and 59 of the Limitation Act. The appeal preferred against the order rejecting the plaint stands dismissed by learned ADJ vide its order dated 4th February, 2014. The order passed by the Appellate Court in RCA No.57/13 has not been challenged by the present petitioner and it has attained finality. Although the contention of the petitioner is that rejection of the plaint does not preclude the petitioner from filing a fresh suit on the same cause of action in view of the provision under Order VII Rule 13 CPC, no fresh suit has been filed till date despite the fact that plaint in Suit No.407/2011 has been rejected on ground of limitation.
9. It is matter of record that after dismissal of the appeal bearing RCA No.57/13 on 4th February, 2014, the application under Order VI Rule 17 CPC has been filed by the present petitioner in Civil Suit No.364/2014 on 21st April, 2014 when it was listed for cross examination of PW-1.

10. After settlement of issues on 3rd December, 2012, the trial has commenced by that date. The plaintiff, PW-1 filed his affidavit on 25th April, 2013 and had already been partly subjected to cross-examination which was continuing on the date when this application for amendment of the written statement was filed i.e. after a period of almost one year from the date when evidence by way of affidavit has been filed.

11. In para 4 of application under Order VI Rule 17 CPC, the purpose of seeking amendment has been mentioned as under:-

“4. That Order VII Rule 13 CPC does not preclude the Applicant from presenting a fresh plaint in respect of the same cause of action. On the same principle the applicant has been advised that the Applicant is not precluded from taking the same plea in defence in this suit.”

12. After detailing the proposed amendments running into about 10 pages, in para 6 of the application necessity to seek amendment has been justified as under:-

“6. That the pleas now sought to be introduced in the written statement:-

(i) Are imperative for proper and effective adjudication of the case.

(ii) The application for amendment is bonafide.

(iii) The amendment will not cause such prejudice to the plaintiff which cannot be compensated in terms of money.

(iv) Refusing amendment could in fact lead to injustice and also lead to multiple litigation.

(v) The amendment sought fundamentally will not change the nature and character of the case, as plea's are already detailed in paragraphs of the written statement and in particular paragraph 4 and 5 of the written statement.

(vi) The amendment sought is not barred by limitation on the date of the application, as limitation prescribed for redemption of the mortgage is thirty years.

7. That the aforesaid pleas are legal in nature. The substance of the aforesaid pleas is already in the written statement in reply to the paragraphs of the plaint on merits. The aforesaid pleas only explain in detail, the pleas already taken.”

13. The question that requires consideration by this Court is whether the proposed amendment by the defendant at the stage of cross examination of PW-1, was necessary for adjudication of the issue in controversy between the parties and it satisfied the test laid down in proviso to Order VI Rule 17 CPC. Before examining the above question, it is necessary to refer to the case law relied upon by the learned counsel for the petitioner and its applicability in the given facts. Placing reliance on the decision in Revajeetu Builders & Developers's case (Supra), learned counsel for the petitioner has referred to para 19 of the report which is extracted hereunder:-

19. The respondents also submitted that the appellant cannot now seek recovery of possession of the property. To grant amendment at this stage would not only have the effect of appellant getting rid of the admissions made in the original plaint but defeating the provisions of Order XII Rule 6 of the CPC by changing the cause of action and entire character of the suit and causing serious prejudice to the respondents. The respondents relied on the decision of this court in Usha Balashaheb Swami & Others v. Kiran Appaso Swami & Others¹ wherein the court has held that by way of amendment, admission made in pleadings and particularly in the plaint cannot be sought to be omitted or got rid of. The Court further observed that a prayer for amendment of the plaint stand on different footing. The relevant observations of the Court are set out as under:

“19. ...a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

14. In para no. 67 of the said report, factors to be taken into consideration while dealing with applications for amendments were summarised 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.

(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.

15. Reliance placed by learned counsel for the petitioner on Revajeetu Builders & Developers Vs. Narayanaswamy & Sons & Ors., VII (2009) SLT 537 and Rajesh Kumar Aggarwal & Ors. Vs. K.K.Modi & Ors., III (2006) SLT 67 is of no assistance to the petitioner for the reason that the amendment application seeking amendment of the written statement after the trial has commenced, was required to be considered by the learned trial Court in the light of proviso to Order VI Rule 17 CPC.

16. On the date the written statement was filed by the petitioner in Suit No.364/14, Civil Suit No.407/11 filed by him was pending and all the necessary pleas had already been taken in the said suit. Thus, on the date of filing of the written statement in Civil Suit No.364/14 filed by the present respondent/plaintiff, all the facts necessary for his defence were well within his knowledge.

17. In a case where the proposed amendment has to be dealt with under Order VI Rule 17 CPC as it stands amended vide Civil Procedure Code (Amendment Act), 2002. The provision to Order VI Rule 17 CPC (after amendment) reads as under:-

‘Order VI Rule 17.

Rule 17. Amendment of Pleadings : *The Court may at any stage of 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 question in controversy between the parties:

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.

18. In order to find out whether the application filed by the petitioner seeking amendment of written statement satisfies the requirement of provision of Order VI Rule 17 CPC, legal position is well settled that the power of the Court to grant amendment is with limitation contained in provision added to Rule 17 of Order VI CPC.

19. In Smt. Kailash Sharma v. Sh. Jagdish Lal Sharma & Others 2010 (10) AD Del. 622, the following view was taken in this regard:-

“9. Before the proviso came to be added to Order VI Rule 17 of CPC, it was not uncommon for the unscrupulous litigants, who, for one reason or the other, were not interest in expeditious disposal of the case, to prolong the trial by seeking unnecessary and sometimes mala fide and frivolous amendments, in order to delay the progress of the trial. This mischief was sought to be remedied by the legislature by putting an embargo on the power of the Court to allow amendments, once the trial has begun. That precisely was the objective behind adding the aforesaid proviso to the statute book. The legislative intent, therefore, needs to be given a meaningful effect and, therefore, unless the amendment sought by a party squarely falls in the four corners of the legal provision, the Courts need to discourage such amendments. The legislative intent cannot be frustrated by the Courts by giving so liberal an interpretation as to allow the amendment even where they find that the amendment now sought by the party could, on exercise of due diligence, have been conveniently sought before the trial began.”

20. The proposed amendment to the written statement which has been declined by the learned trial Court, pertains to facts which predate filing of the written statement in the above suit and pertain to the facts forming basis of claim of the present petitioner as plaintiff in Civil Suit No.407/11. Thus, at the time of filing of the written statement in the year 2012 in this case, all the facts were not only pre-existing but also well within the knowledge of the present petitioner when written statement was filed by him in the year 2012. The amendment cannot be said to be bonafide for the reason that after rejection of plaint in Civil Suit No.407/11 as well dismissal of appeal against the order rejecting the plaint, the petitioner has sought amendment of written statement apparently to include the pleas forming basis of his claim in Suit No.407/2011 and held to be barred by limitation by learned trial Court resulting in rejection of his plaint. The application seeking amendment of the written statement filed at the stage of cross-examination of PW-1 could not have been allowed on the plea that it was necessitated to avoid any technical objection.

21. Even otherwise the application seeking amendment to the written statement has been filed after trial has commenced. It is not the case of the petitioner that facts now sought to be pleaded by way of amendment could not be pleaded before commencement of trial despite due diligence.

22. Whether pleadings can be directed to be amended after the commencement of trial, has been considered by the Supreme Court in the decision reported as Vidyabhai & Ors. vs. Padmalatha & Anr. AIR 2009 SC 1433. In Vidyabhai's case (Supra) the plaintiff had filed a suit on 16.12.2003 for specific performance of an

agreement of sale. Written statement was filed in the said suit on 17.04.2004. When the case was at the stage of cross examination of witnesses, an application under Order 6 Rule 17 CPC seeking amendment of written statement was filed on 08.11.2006. The amendment application was dismissed by the learned Trial Court rejecting the contention that the respondent could not gather the material and information necessary for drafting proper written statement earlier. The order rejecting the amendment was challenged before the High Court of Karnataka. In exercise of writ jurisdiction, the High Court of Karnataka allowed the amendment application observing as under:-

‘.....According to Order 6 Rule 17, an amendment application can be filed at any stage of the proceeding. Filing of affidavit by way of evidence itself is not a good ground to reject the application filed seeking amendment of written statement. It is not out of place to mention that the parties must be allowed to plea. Such a valuable right cannot be curtailed in the absence of good ground.’

Aggrieved by the said order, Civil Appeal No.7251 of 2008 (Arising out of SLP (Civil) No.4740 of 2008) was filed impugning the order of High Court allowing the amendment in the written statement after the trial has commenced. The relevant paras noting the rival contentions and explaining the legal position are as under:

‘5. Mr. S.K. Kulkarni, learned Counsel appearing on behalf of the appellants, would submit that in view of the proviso appended to Order VI Rule 17 of the Code, the High Court committed a serious illegality in passing the impugned judgment.

6. Ms. Kiran Suri, learned Counsel appearing on behalf of the respondents, on the other hand, would contend that the proviso appended to Order VI Rule 17 of the Code is not attracted in the

instant case as by reason of the amendment to the written statement, no new case has been made out. It was submitted that 'leave' to amend the written statement was filed for the purpose of elaborating the defence which had already been taken by the defendants and in that view of the matter, this Court should not exercise its jurisdiction under Article 136 of the Constitution of India particularly when it is well-known that an application for amendment of written statement should be dealt with liberally.

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:

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 the parties could not have raised the matter before the commencement of the trial.

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.'

23. In the instant case, the trial has already commenced. 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 would amount to 'commencement of proceeding'.

24. Legal position is well settled that power under Article 227 of Constitution of India which vests extra ordinary jurisdiction in this Court, needs to be exercised only in a case where the impugned order is suffered from any illegality, irregularity or perversity and if the impugned order is not interfered with, a grave injustice would be caused.

25. In my considered opinion the learned trial Court rightly declined the prayer of the petitioner to amend the written statement as it is not the case of the petitioner that inspite of due diligence such pleas could not have been taken before the commencement of trial. Rather, it is a case where claim of the petitioner in Suit No.407/2011 was held to be barred by limitation and no fresh suit was filed but immediately after dismissal of the appeal, sought incorporation of such pleas by seeking amendment to the written statement.

26. As the impugned order does not warrant any interference by this Court, the present petition is dismissed.

CM No.17040/2015

Dismissed.

**(PRATIBHA RANI)
JUDGE**

OCTOBER 12, 2015

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