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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 19th November, 2015

CM(M) 1113/2015

RAKESH SACHDEVA

..... Petitioner

Through: Mr.Ashish Upadhyay, Advocate

versus

NARESH SACHDEVA

..... Respondent

Through: None

PRATIBHA RANI, J. (Oral)

CM(M) 1113/2015

1. The petitioner has impugned the order dated 29.06.2014 whereby the application filed by the respondent seeking amendment to the plaint had been allowed subject to cost of ₹5,000/-. After about seventeen months of passing of impugned order and accepting the cost of ₹5,000/- subject to which the application under Order VI Rule 17 CPC was allowed, this petition has been filed in November, 2015.

2. On behalf of the petitioner Sh. Ashish Upadhyay, Advocate has submitted that irrespective of the fact that whether cost has been accepted or not, the petitioner has a right to impugn the order allowing the amendment as the cost was not conditional but awarded by Ld. Trial Court in its discretion. Learned Counsel for petitioner has placed reliance on Bijender Nath Srivastava vs. Mayank Srivastava, AIR 1994 Supreme Court 2562, Radha Govind (Dead) through LRs. and others vs. Patel Bidi Company and

others, 2008 (72) ALR 219 (Allahabad High Court and Shamsher Singh and others vs. Joginder Singh and Anr. in RA-CR No.162-CII of 2011 decided on 17th July 2012 (Punjab & Haryana High Court) in support of his contentions.

3. In the case reported as Bijender Nath Srivastava's case (Supra) in paras no.19-21 of the report, the Hon'ble Supreme Court has dealt with the principle of estoppel precluding a party from challenging the order allowing a petition subject to cost which has been accepted by other party and held as under:-

“19. Another reason given by the High Court for holding that the order dated May 8, 1976 allowing the amendment could not be assailed was that the said order was subject to payment of costs and since cost has already been accepted by the appellants they are estopped from challenging the amendment. As indicated earlier there were two orders whereby amendments are allowed. One was order dated October 9, 1969 whereby the amendments sought by respondent Nos. 2 and 3 in the objection petition filed by them were allowed and the other was order dated May 8, 1976 whereby the amendments in objection petition filed by respondent No. 14 were allowed. The contention based on estoppel arising from acceptance of costs awarded under the order allowing the amendment was raised by Shri Dhasmana, the learned Counsel for Bhuvaneshwar Nath, respondent No. 3, with regard to order dated October 9, 1969. No such contention was urged by the learned Counsel for respondents Nos. 1 and 14 herein as regards order dated May 8, 1976. The acceptance of the contention urged by Shri Dhasmana, on behalf of respondent No. 2, by the High Court can only mean that the order dated October 9, 1969 has been upheld on that basis. Since no such contention was advanced by the learned Counsel for respondents Nos. 1 and 14 in support of the order dated May 8, 1976 the said order cannot be said to have been upheld on that basis.

20. That apart the principle of estoppel which precludes a party from assailing an order allowing a petition subject to payment

of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award costs because in such a case the party who has been awarded costs had no opportunity to waive his right to question the validity or correctness of the order. The decision of the Andhra Pradesh High Court in The Metal Press Works Ltd., Calcutta v. G.M. Cotton Press Co. MANU/AP/0139/1976 : AIR1976AP205 , on which reliance has been placed by the High Court, proceeds on the basis that awarding of costs was, in fact and substance, a part of the entire order allowing amendment in written statement and the said order was a conditional one. The decision of the Madras High Court in Prayag Dossjee v. Venkat Perumal MANU/TN/0291/1932 : AIR1933Mad410 , and the decisions of the Patna High Court in Ramcharan v. Custodian of Evacuee Property MANU/BH/0076/1964 : AIR1964Pat275 , and M. Kapur Kumar v. Narain Singh MANU/BH/0184/1948 : AIR1949Pat491 , on which reliance has been placed in the said judgment of the Andhra Pradesh High Court also emphasise that the orders under Challenge were conditional orders and payment of costs was a condition precedent allowing the petition. In Deviah v. Nagappa AIR (1965) Mys 102 the order allowing amendment of the election petition contained a direction regarding payment of costs. It was held that the application was allowed without any condition and that the order was not conditional order and principle of estoppel was held inapplicable.

21. A perusal of order dated May 8, 1976 shows that the said order is not a conditional order. The civil Judge, after considering the merits has allowed the proposed amendments. The costs were awarded not as a condition precedent to allowing the amendment but by way of exercise of the

discretionary power of the court to award costs to the opposite party. It may also be mentioned that the appellants did not accept the said order dated May 8, 1976. They assailed the validity of the same at the stage of final hearing before the trial court but the said contention was rejected by the Additional District & Session Judge on the view that the said order had become final as regards the proceedings before him and the same could not be recalled or reviewed. Thereafter, the appellants assailed the correctness of the order dated May 8, 1976 in the appeal filed by respondent Nos. 1 & 3 in the High Court. The principle of estoppel arising from acceptance of costs so to preclude the appellants from challenging the validity of the order dated May 8, 1976 cannot, therefore, be invoked in the facts and circumstances of the present case. Since the grounds given by the High Court for upholding the order dated May 5, 1976 cannot be affirmed the amendments allowed by the said order in so far as they relate to insertion of paragraphs 52 and 53 in the objection petition filed by respondent No. 14 are set aside”.

4. The other two cases reported as Radha Govind (Dead) through LRs. and others vs. Patel Bidi Company and others, (Supra) and Shamsher Singh and others vs. Joginder Singh and Anr. (Supra) relied upon by the learned counsel for the petitioner have also been decided following the decision passed in Bijender Nath Srivastava's case (Supra).

5. With a view to appreciate the contentions raised on behalf of the petitioner and in the light of legal position in Bijender Nath Srivastava's case (Supra), it is necessary to refer to the ordersheet by the learned Trial Courts as well as the operative part of the impugned order, which are extracted as under:-

“Suit No.99/14

29.06.2014

Present : None for the plaintiff.
Defendant in person.
Put up for orders at 04:00 PM.

-SD-
Civil Judge-10 (Central)/ THC
Delhi/29.06.2015

At: 04:00 p.m.

Present : None.

Vide separate order of even date, the application of the plaintiff U/o VI R 17 CPC is allowed subject to cost of Rs.5,000/- (Rupees Five Thousand Only) to be paid to the defendant with the rider that the amended relief shall be deemed to have been claimed only on the date of moving the application and the same is without prejudice to the defendant's right to raise the appropriate pleas including the plea of the bar of limitation. Further since the plaintiff has incorporated the relief of cancellation of documents vide the amendment application therefore he is directed to make good the deficiency in the Court fees qua the newly added relief as per law.

Put up for further proceedings on 01.08.2015."

Operative part of the impugned orders reads as under:-

".....However, a perusal of the averments, in the present application and those of the plaint shows that the plaintiff is not seeking to change the basic nature of the suit through these amendments nor are any admissions being sought to be withdrawn and the averments do appear to be necessary for the purpose of deciding the real question in controversy between the parties and also to prevent the multiplicity of litigation. Ofcourse, if defendant is able to show that the reliefs sought on the date of making the application were barred by limitation his vested rights cannot be defeated and in view of the above discussion, the amendments sought are allowed with the rider that the amended relief shall be deemed to have been claimed only on the date of moving the application and the amendments permitted shall be without prejudice to the defendant's right to raise the appropriate pleas including the plea of bar of limitation. Also, the plaintiff should have been more diligent while filling the plaint and should have incorporated all the averments relevant to the dispute in the first instance itself and his contention that after filing of the written statement he was

able to recoup the incidents does not show much diligence on his part therefore for the prejudice if any caused to the defendant and the delay in the proceedings caused by the lack of diligence on the part of the plaintiff the present amendment application is allowed only subject to cost of Rs.5,000/- (Rupees Five Thousand Only) to be paid to the defendant. In addition, since the plaintiff has sought the relief of cancellation of the documents therefore he is directed to make good the deficiency in the Court fees qua the said relief as per law in view of the ratio of the judgment of Hon'ble Supreme Court in Suhrid Singh (Supra)."

6. Thus, the limited question arising before this Court is whether the cost awarded by the learned Trial Court while allowing the application Under Order VI Rule 17 CPC is a condition for allowing the amendment application or the costs have been awarded independently in exercise of the discretionary power of the Court.

7. A bare reading of the impugned order operative, part of which has been extracted above, shows that the cost awarded by learned Trial Court while allowing application Under Order VI Rule 17 CPC was conditional and not independently awarded in exercise of the discretion vested in the Court. Thus, the petitioner is stopped from impugning the order dated 29.06.2014 after the cost has been accepted by him, subject to which the prayer for amendment has been allowed.

8. The petition is dismissed.

9. No costs.

CM APPL.No.26558/2015

Dismissed as infructuous.

PRATIBHA RANI, J.

NOVEMBER 19, 2015/‘aky’