

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 309 of 2015****Order Reserved on : 03.11.2016****Order passed on : 08.11.2016**

Smriti Grih Nirmana Sahakari Sanstha Maryadit, Through – Rajiv Choubey, President Registration No. D.R./D.R.G./68 Dated 11.11.1988 Smriti Nagar, Police Station – Supela, Tehsil & District – Durg (Chhattisgarh)

---- Petitioner**Versus**

1. Smt. Balvinder Kour Dhillon, wife of Shri Trilok Singh Dhillon, Aged about 47 years, R/o 7-A/1, Nehru Nagar East Police Station-Supela, Tehsil & District- Durg (C.G.)
2. State of Chhattisgarh, Through Collector – Durg
3. Recovery Officer Shri T.R. Sahu, Sahkari Samitiyan, Durg, Tehsil & District – Durg
4. Sales Officer, Shri R.N. Singh Branch Manager, Bhilai Nagarik Sahkari Bank Maryadit, Sector-6 Bhilai, P.S. Kotwali-Bhilai, Tehsil & District- Durg
5. Bhilai Nagrik Sahkari Bank Maryadit, Through – Chief Manager, Secot-6 Bhilai, P.S. Kotwali Bhilai, Tehsil & District Durg (C.G.)

---- Respondents

 For Petitioner : Mr. P.K. Shrivastava, Advocate.
 For Respondent No.1 : Mr. Raghvendra Pradhan, Advocate.
 For Respondent No. 2/State : Mr. Avinash Singh, Panel Lawyer
 For Respondent No. 3 : Mr. Parag Kotecha, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order [C.A.V.]**

(1) The petitioner herein is the plaintiff before the trial Court. He filed a suit for injunction before the trial Court on 27.04.2010, in which defendant No.1 has filed his written statement on 10.8.2010. Thereafter, the trial Court has framed issues on the basis of pleadings

of the parties on 14.02.2002. Thereafter, the plaintiff filed his affidavit under Order 18 Rule 4 of the CPC on 09.7.2014 and thereafter application for amendment under Order 6 Rule 17 of the CPC was filed on 13.01.2015 running into 15 pages seeking leave to insert 24 paragraphs in the plaint stating *inter alia* that the plaintiff has lost possession of the suit land, during pendency of the suit, therefore proposed amendments are necessary and the amendments proposed are only to elaborate the pleadings already made.

(2) Defendant No.1 has filed his reply and opposed the said prayer stating *inter alia* that by the proposed amendment nature of suit will be changed i.e from suit of injunction to suit of possession. It has further been held that the plaintiff has stated before the Joint Registrar, Co-operative Societies, Chhatisgarh that peaceful possession of the suit land was handed over to defendant No.1 on 09.05.2007 by him and, therefore, such amendments are not necessary and the same was filed only to delay the proceedings, that too, after commencement of trial and, as such, the application for amendment be rejected .

(3) The trial Court, by its impugned order, rejected the application for amendment finding no merit in the same.

(4) Feeling aggrieved against the order rejecting application for amendment, this writ petition has been filed.

(5) Mr. P.K. Shrivastava, learned counsel appearing for the petitioner would submit that the relief of possession is necessary in the suit as the petitioner/plaintiff has lost his possession during pendency of the suit. He further submits that the proposed amendment was filed only to elaborate the pleadings already made and the trial Court has

committed illegality in rejecting the application for amendment and, therefore, the application for amendment may be allowed by setting aside the order impugned. He placed reliance upon the judgment of the Supreme Court in the matter of ***Rajesh Kumar Aggarwal Vs. K.K. Modi¹, Suhrid Singh @ Sardool Singh Vs. Randhir Singh², Sampath Kumar Vs. Ayyakannu³ & Prembakshi Vs. Dharam Dev⁴*** in support of his submissions.

(6) Per contra, Shri Raghvendra Pradhan, learned counsel appearing for respondent No.1/defendant would submit that by the proposed amendment nature of suit will be changed and the plaintiff has already handed over the peaceful possession of the suit land to defendant No.1 on 09.05.2007 and, as such, the amendments proposed are not necessary and the trial has already commenced and there is no reason assigned in the application that as to why such amendments could not be filed at the earlier point of time and, therefore, the writ petition deserves to be dismissed.

(7) Shri Parag Kotecha, learned counsel for respondent No. 3 would submit that defendant No. 3 is not proper or necessary party in this case.

(8) I have heard learned counsel appearing for the parties and perused the order impugned.

(9) In order to decide the plea raised at the Bar, it would be appropriate to notice Order 6 Rule 17 of the CPC which reads as under:-

“17. Amendment of pleadings.- The Court may at

1 2006 (4) SCC 385

2 2010 Legal search (SC) 246

3 2002 SCC (7) 559

4 (2002) 2 SCC 2

any stage of the proceedings allow either party to alter or amend his pleading 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:

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.”

(10) A careful reading of proviso to Order 6 Rule 17 of the CPC, which was brought into statute book on 1.7.2002 reveals that application for amendment cannot be entertained after the trial has commenced, unless the party making amendment has established that in spite of due diligence the party could not have raised the matter before the commencement of trial.

(11) The aforesaid proviso came into consideration before the Supreme Court in **Vidyabai and others vs. Padmalatha and another**⁵ and it has been held that 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 and the trial Court 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. In **Vidyabai** case (supra), it has also been considered that filing of an affidavit in lieu of examination-in-chief of the witness would amount to commencement of proceeding and held as under:-

“11. From the order passed by the learned Trial

5 (2009) 2 SCC 409

Judge, it is evident that the respondents had not been able to fulfill the said precondition. 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'.

Their Lordships further considered the meaning of the terms of "trial" and "commence" and observed as under:-

"19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

(12) Thus, proviso to Order 6 Rule 17 of the CPC is mandatory in nature. Keeping in view the proviso to Order 6 Rule 17 CPC and the judgment rendered by the Supreme Court in the matter of Vidya Devi (Supra), if the facts of present case are examined, it is quite vivid that an affidavit under Order 18 Rule 4 of the CPC was filed on 9.7.2014 and thereby the trial has already commenced. The writ petitioner/plaintiff did not aver in his application for amendment that in spite of due diligence he could not have raised the matter before the commencement of trial as the application for amendment filed by the

petitioner is blissfully silent. Apart from this, the plaintiff has stated before the Joint Registrar, Co-operative Societies that plaintiff has already handed over the peaceful possession of the suit land to defendant No.1 on 09.05.2007 and bare suit for injunction was filed on 27.04.2010 without claiming the relief of possession and the application for amendment was filed on 13.01.2015 running into 15 pages of 24 paragraphs and there is no explanation for inordinate delay of five years in filing the amendment application, therefore, the plaintiff has miserably failed to establish the fact that in spite of due diligence he could not have moved the application for amendment before the commencement of trial. Concludingly, this Court has left with no other option except to affirm the order of the trial Court dismissing the application for amendment as the application for amendment filed after commencement of trial has failed to establish that despite due diligence the plaintiff could not move amendment before the Court.

(13) Resultantly, the writ petition is liable to be and is hereby dismissed subject to payment of cost of Rs.5,000/- payable to defendant No. 2 within a period of 30 days from today. Since the suit was filed on 27.04.2010 and there is no substantial progress in the trial, the trial Court is directed to conclude the trial within a period of four months from the date of receipt of a certified copy of this order.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

