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

% *Date of decision:* 01.08.2016

+ CM(M) 229/2015 & CM No.4890/2015

ABDUL MUEED & ORS	 Petitioner
Through	Mr.Harish Malhotra, Sr.Adv. with Mr.Simran Mehta and Ms.Swati R.K., Adv.
versus	
HAMMAD AHMED & ORS	 Respondent
Through	Mr.Bobby Lao, Adv. for R-1 & R-2 Mr.Satinder Singh Bawa, Adv. for R- 3 to R-5

AND

+ CM(M) 594/2015 & CM No.11265/2015

ABDUL MAJEED & ORS	 Petitioner
Through	Mr.Harish Malhotra, Sr. Adv. with Mr.Simran Mehta and Ms.Swati R.K., Adv.
versus	
HAMMAD AHMED & ORS	 Respondent
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CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. By the present two petitions, the petitioner seeks to impugn the order dated 26.4.2014. The order had dismissed the two applications filed by the petitioner, namely, one under Order VI Rule 17

CPC for amendment of the plaint and the second under Order VII Rule 14 CPC for placing on record additional documents.

2. The petitioner has filed the present suit seeking the following reliefs:-

“a. DECLARE, Defendants No.1 and 2 have acted in breach of trust and are not competent to continue as Mutawallis of Hamdard (Wakf) Laboratories (Plaintiff No.4) and;

b. Pass a Decree of Permanent Injunction, in favour of the plaintiffs and against defendants No.1 and 2 restraining them permanently from taking any part in the affairs of Hamdard Dawakhana (Wakf) also known as Hamdard (Wakf) Laboratories.

c. Pass a Decree of Mandatory injunction, in favour of the plaintiffs and against the defendants, directing thereby the defendants to render the accounts of the defendant No.5 to the plaintiffs.

d. Pass a Decree of Permanent Injunction, in favour of the plaintiffs and against the defendants, directing thereby the defendants not to indulge in any business, which is competitive in nature with the business of Plaintiff No.4 or is violation and infringement of Trademarks.”

3. The issues were framed on 23rd January, 2009 and the matter was fixed for evidence. The petitioner moved the present two applications on 02.08.2010.

4. I will first deal with the application under Order VI Rule 17 CPC. By the present application the petitioner sought to amend paragraphs 7 to 9 and to add para 17(a) to the plaint. They also sought to delete para 14. A perusal of the amendment sought to be made shows that essentially allegations are being added against defendant No.1/respondent No.1 about

alleged loss having been caused to the plaintiffs by defendant No.1 by his conduct. It has also sought to add the averments that the acts of defendant No.1 caused benefit to the other family members i.e. defendants No.2 to 4. Allegations are also sought to be added that defendants No.1 to 4 have sought to incorporate defendant No.5 for their objects.

5. A perusal of the impugned order shows that the trial Court relied upon the proviso to Order VI Rule 17 to hold that after commencement of trial, the party seeking amendment to the pleadings has to show that an amendment sought could not have been made earlier inspite of due diligence and that the party could not have raised the matter before commencement of trial. The trial court noted that no reasons have been given in the amendment application or plausible explanation given regarding the delay in the proposed amendment and dismissed the application.

6. Learned senior counsel appearing for the petitioner submits that on the date of the impugned order the trial had not yet commenced. Even plaintiffs had not filed their evidence by way of affidavits. He has relied upon a judgment of this Court in ***Raj Rani & Anr. vs. Sumitra Parashar & Anr., 2014 (207) DLT 766*** (by Jayant Nath, J.) and also a judgment of this Court in the case of ***Rajesh Sharma vs, Krishan pal, (2011) 183 DLT 791*** to contend that where even evidence by way of affidavit has not been filed by any of the parties, the trial cannot be said to have commenced and hence the proviso to Order VI Rule 17 is not attracted.

7. Learned counsel appearing for the respondents has strenuously urged that the proposed amendment is mala fide and has been sought belatedly to delay the present proceedings. It is urged that the respondent No.1 is a 70 year old person who is needlessly being harassed by the present Suit, which

is pending since 2006 and has been prolonged for ulterior motives. He submits that the facts which are now sought to be incorporated by way of amendment were within the knowledge of the petitioner prior to filing of the suit and that there is no explanation or plausible reason given as to why, at this belated stage, after framing of issues when the matter has been fixed for recording of evidence the petitioner has chosen to file the present application.

8. Learned senior counsel appearing for the petitioner has refuted the contention of the respondent that the facts which are sought to be brought on record were within the knowledge of the petitioners prior to filing of the suit. Reliance is placed on averments made in the application by the petitioner under Order VII Rule 14 CPC where it has been said that the plaintiffs/petitioner has come to know about the documents only on 20.7.2010 and hence there was no occasion to mention the same in the plaint. The application is supported by an affidavit of the petitioner.

9. Order VI Rule 17 CPC reads as follows:

“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:

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. As far as the proviso to Order VI Rule 17 CPC is concerned, this

Court in ***Raj Rani vs. Sumitra*** (supra) stated in paragraphs 20 and 21 as follows:-

20. In view of the judgment of the Hon'ble Supreme Court in the case of ***Baldev Singh and others versus Manohar Singh and another (supra)***, the phrase completion of trial would have a flexible meaning. It cannot be merely because an Affidavit by way of evidence has been filed and the affidavit has been tendered in evidence and examination-in-chief has been partly recorded on only one date of hearing it would mean that plaintiff has been knocked out from being able to amend his plaint. Such an interpretation of proviso under Order 6 Rule 17 PC would clearly not have been envisaged.

21. Here evidence by way of affidavit having been filed by PW1, the same was tendered as Ex.PW1/A on 2.5.2012. In the short examination-in chief that took place on that date, the said PW1 sought to tender various CS(OS) 2154/2010 documents all of which were objected to by learned counsel for the defendant. Hence, on the request of the plaintiff, further examination-in chief was deferred as the plaintiff sought time to file an application for leave to place the documents on record. In my view, the examination-in chief of PW1 is substantially incomplete. Keeping in view the legal position stated by the Hon'ble Supreme Court in the case of ***Baldev Singh versus Manohar Singh (supra)***, namely, that the proviso to Order 6 Rule 17 CPC must be understood in the limited sense and meaning final hearing of the Suit, examination of witnesses etc., it cannot be held that the evidence in the present case has commenced as envisaged under Order 6 Rule 17 CPC.”

11. Similarly, in ***Rajesh Sharma vs. Krishan Pal (supra)*** this Court noted that affidavit by way of evidence had not been filed by the plaintiff till date. The Court held as follows:-

“13. The learned Counsel for the Defendants states that the trial commenced on 25th February, 2010 when the matter was listed before the Joint Registrar after framing of issues

and the date for recording evidence was fixed by him. I, however, do not find myself in agreement with the learned Counsel for the Defendants. I fail to appreciate when the trial in a suit where the witnesses have to be examined in person instead of filing affidavits by way of their examination-in-chief commences on the appearance of the witness in the Court, for the purpose of giving evidence, how, in a suit where the examination-in-chief is to be recorded on affidavits can it be said to commence when such affidavits being actually filed in the Court. When the Court fixes dates for recording evidence, these are the dates when the trial is scheduled to commence, but, actual commencement of the trial takes place only when either the witness appears in the Court for giving evidence or the affidavits of the witnesses are filed by way of their examination-in-chief. In any case, considering the observations made by Supreme Court in Baldev Singh (supra), where the Court noticing that documentary evidence have not been filed, took the view that the trial had not commenced within the meaning of proviso to Order 6 Rule 17 of Code of Civil Procedure, the view being suggested by the learned Counsel for the Defendants would not be a correct view in law and would, unjustifiably, enlarge the scope of the expression "commencement of trial" to include what actually is a pre-trial stage or a stage preparatory to commencement of trial. Therefore, I am of the view that the trial in a case where evidence is to be recorded on affidavits does not commence before filing of one or more affidavits by way of evidence."

12. In view of the above judgments, it cannot be said that trial had commenced in this case when the application for amendment was filed. Neither the plaintiff had filed their affidavit by way of evidence nor any plaintiff/their witness had been examined. It cannot be said that the trial has commenced merely because the matter was fixed for evidence. Hence, the issue of going into the question of due diligence of the petitioner while

deciding the amendment application would not arise. The impugned order has erroneously gone into the issue of due diligence.

13. Reference maybe had to the judgement of the Supreme Court in the case of *Abdul Rehman and Anr.Vs. Mohd. Ruldu and Ors. 2012 11 SCC 341*. Relevant para read as follows:

“18. We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.”

14. It is an admitted fact that there is no stay in favour of the plaintiff/petitioner. Hence, it cannot be said that the petitioner is getting any real benefit by allegedly delaying the proceedings as alleged by the respondent.

15. In my opinion, the facts which are sought to be brought on record are additional facts which are necessary for complete adjudication of the disputes between the parties. There is no change in the relief sought from the Court. It cannot be said that the nature of suit has been changed. The impugned order has erroneously rejected the application for amendment of the pleadings on the ground that no plausible explanation is given to explain the stated delay in moving the application. The order of the trial court is accordingly quashed and the application for amendment of the plaint is allowed.

16. Now, I will deal with the application filed by the petitioner under Order VII Rule 14 CPC. As noted above, the petitioner has sought to place

on record copies of certain documents stating that he has come to know of the said documents only on 20.7.2010 and was not in a position to mention about the same in the plaint. The impugned order has noted the provision of Order VII Rule 14(3) CPC to hold that the said provision limits the rights of the plaintiff to produce documents which ought to have been produced but are not produced and that it was incumbent upon the plaintiff to state that as to why such documents were not produced earlier. Keeping in view the conclusion of the trial court that no reason has been assigned by the petitioner as to why the documents could not be filed earlier alongwith the plaint, the present application was dismissed.

17. Regarding the legal position for production of documents, reference may be had to the judgment of this court in the case of ***Haldiram (India) Pvt. Ltd. v. Haldiram Bhujawala***, (2009) ILR 5 Delhi 503/ MANU/ DE/ 4994/2009 wherein in para 21 this court held as follows:

“21. In any event, both under the old Order 7 Rule 18 sub-rule (1) and new Order 7 Rule 14 sub-rule (3) CPC a new document can certainly be produced on behalf of plaintiff at the final hearing of suit, but the same has to be done with leave of the Court. It is not that the plaintiff has a legal vested right to file a document at a belated stage i.e. at the final hearing of the suit. The said provision gives a discretionary power to the Court, which needless to say has to be exercised in a reasonable and legal manner. In fact, this power has to be exercised sparingly and for some overpowering reason and not as a matter of routine. If petitioners' interpretation of Sub Rule 3 is accepted, it would make it impossible for the trial court to conclude the hearing of any suit.”

18. Hence, the court has a discretionary power which permits documents to be filed which discretion has to be exercised in reasonable and legal manner.

19. As already noted above, in the application filed under Order VII Rule 14(3) CPC on oath, the petitioner has made averments that the documents sought to be filed came to the knowledge of the petitioner only on 20.7.2010. Needless to add, the respondents have vehemently denied this contention that the petitioners had no knowledge about these documents prior to filing of the suit. None of the parties have been able to show any evidence on this issue. However, a specific averment on oath is made by the petitioner that the plaintiff/petitioner has come to know about these documents only on 20.7.2010. Hence, it would be appropriate to accept the said plea. Further, the respondent has not been able to show any substantial prejudice being caused to it if the documents are permitted to be placed on record. It would be in the interest of justice that these documents are permitted to be taken on record. The impugned order rejecting the application for placing on record additional documents is erroneous.

20. The petition is allowed and the impugned order is quashed. The two applications of the petitioner are allowed.

JAYANT NATH, J

AUGUST 01, 2016/n