

\$~

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

% ***Date of decision:* 31.08.2016**

+ **CM(M) 854/2016 & CM Nos.31789-90/2016**

PRATAP SINGH AND ANR.Petitioners.

Through: **Mr.Manu Nayar, Mr.Chetanya &
Ms.Nisha Rawat, Advocates.**

Versus

MAHAVIR SINGH AND ANR.Respondents

Through: **Mr.Fanish K.Jain, Advocate**

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

CM No. 31790/2016 (*exemption*)

Allowed subject to all just exception.

CM(M) 854/2016 & CM No.31789/2016(*stay*)

1. The present petition is filed under Article 227 of the Constitution of India seeking to impugn the order dated 12.07.2016 by which an application filed by the petitioners under Order 6 Rule 17 CPC was dismissed.

2. The petitioners have filed a suit for declaration, permanent and mandatory injunction. It is stated that the petitioners are the absolute owners of land situated in Village Khanjhawla, Delhi- 110081. The respondents approached the petitioners for purchasing of the land and the parties entered into an Agreement to Sell on 20.11.2006 for 1000 sq.yds. The agreed consideration was Rs.50,00,000.00. The respondents are said to have not paid any amount. Thereafter, it is alleged that taking advantage of innocence/lack of education of the petitioners, a sale deed was got executed on 02.02.2007 without paying the agreed consideration of Rs.50,00,000.00.

Hence, the relief was sought to declare the alleged sale deed dated 02.02.2007 as *ab-initio* void and that the same is against the law and without consideration and also a decree of permanent injunction restraining the defendants /respondents to use the documents for creating any third party interest and not to disturb the physical and peaceful possession of the plaintiffs/petitioners.

3. The petitioners have now in 2015 moved the present application under Order 6 Rule 17 CPC where a large number of facts/changes are sought to be introduced. The petitioners also seek to add and amend the prayer clause seeking a decree of declaration for declaring the alleged sale deed dated 02.02.2007 as *ab-initio* void and the same is against the law and without consideration and for cancellation of the same. The decree of possession is also sought to be passed in favour of the petitioners. Future mesne profits was also sought from the date of filing of the plaint till recovery of the possession.

4. The trial court by the impugned order noted that the petitioners were fully aware about the facts and persons whose name is now sought to be introduced and they are not new developments. Under the garb of the present application, the petitioners want to substantially change the nature of the case as earlier in the plaint, he prayed for declaration, permanent and mandatory injunction and now by way of the present application, the petitioners are seeking relief of possession and mesne profits. The application was dismissed.

5. I have heard the learned counsel for the parties.

6. The learned counsel appearing for the petitioners have stressed that no prejudice is caused to the respondents if the present amendment is allowed. He relies upon the judgment of the Supreme Court in the case of

Rajesh Kumar Aggarwal & Ors. v. K.K.Modi & Ors., 2006 (3) SC 1647

where the Supreme Court held that the court should give leave to amend the pleadings of a party unless it is satisfied that the party is acting malafide. Further, the court also held that the amendment to pleading should be liberally allowed.

7. Reliance is also placed on the judgment of the Supreme Court in ***Baldev Singh & Ors. v. Manohar Singh & Anr., (2006) 6 SCC 498***, where the Supreme Court held that the commencement of trial as used in proviso to Order 6 Rule 17 CPC must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.

8. The learned counsel for the respondents has submitted that the petitioners did not seek cancellation of the documents of the sale deed executed in favour of the respondents. By the present amendment, the relief of cancellation is sought which is barred under Article 59 of the Limitation Act as the sale deed is of 02.02.2007. Further, it is stated that there is complete lack of due diligence on the part of the petitioners as in the year 2007 the petitioners had knowledge about the fact that the respondents are in possession of the suit property. It was stated so in the written statement filed by the respondents. Now in the year 2015 the petitioners have moved the present application seeking relief of possession.

9. A perusal of the original plaint filed by the petitioners shows that it is a simple plaint running into 12 paras. The basic facts stated therein are that the parties entered into an agreement to sell regarding the suit property. The agreed sale consideration was Rs. 50 lacs. In para 3 (i) it is stated that Rs.5 lacs has been received as an advance. In para 6 it is stated that the respondents have taken undue advantage of the innocence and lack of

education of the petitioners and got the sale deed registered on 02.02.2007 in their name without paying the agreed consideration of Rs.50 lacs. Hence, the suit is filed seeking a decree of declaration declaring the alleged sale deed dated 02.2.2007 as void-ab-initio. A decree of permanent injunction is also sought to restrain the respondents from using the documents to create any third party interest and not to disturb the physical and peaceful possession of the petitioners. Mandatory injunction is also sought against the respondents to deliver the documents.

10. The suit was filed in 2007. PW evidence has already been concluded. At this stage, the petitioners have now filed the application which broadly seeks to add the following:-

- (i) Clarify that pursuant to the agreement to sell Rs.10 lacs have been received on 20.11.2006 and 25.12.2006.
- (ii) That the petitioners never gave possession to the respondents but the respondents on the basis of sham and fabricated documents have claimed possession and have now after filing of the suit put a boundary wall around the land in dispute. Hence, the petitioners now seek the relief of possession and mesne profits also.
- (iii) Additional relief is sought seeking cancellation of the sale deed dated 02.02.2007. This is in addition to the relief already sought that the same be declared as null and void, unenforceable under law and without consideration having been obtained by fraud.
- (iv) Substantial additional facts are sought to be incorporated in paras 7a to 7z giving detailed description as to how the petitioners were allegedly defrauded and made to sign the sale deed dated 02.02.2007.

11. Order 6 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.”

12. It is obvious that the petitioners have jumbled up various aspects including adding the relief of possession, of cancellation of the sale deed, correction to the effect that the sum of Rs.10 lacs was received pursuant to the agreement to sell and a detailed narration of events and facts which led to execution of the sale deed none of which is stated in the earlier plaint.

13. I would deal with different contentions sought to be introduced by amendment.

14. As far as the relief of possession is concerned, in my opinion, as per the application it is stated that at the time of filing of the plaint, the petitioners were in possession of the property. It is stated that after filing of the suit, the respondents have erected a wall around the land and are claiming possession of the same. It is a subsequent event which as per the petitioner has arisen after filing of the plaint and the petitioners can add these facts/reliefs. In case they succeed in showing that the sale deed executed in favour of the respondents is fraudulently executed, as an inevitable conclusion, they would be entitled to the relief of possession of the property. Hence, the relief has been correctly sought.

15. As far as the relief of cancellation of the documents is concerned, the

basic objection of the learned counsel for the petitioners was that the said relief is barred by law of limitation. He has argued that the sale deed of 02.02.2007 now in 2015 is sought to be declared as cancelled at this belated stage and hence, the same is barred by the law of limitation.

16. The Supreme Court in the case of ***Pankaja & Anr. v. Yellappa & Anr., 2004(6) SCC 415***, held that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. There is discretion in such cases and it depends upon facts and circumstances of the case. The Supreme Court held as follows:

“14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends upon the factual background of that case.”

Hence, even if the relief is time barred as is sought to be claimed, the amendment can be allowed.

17. I note that in the original plaint the petitioners have sought the relief of declaration that the sale deed dated 02.02.2007 is void-ab-initio and the same is against law and without consideration. Now, the additional relief of cancellation of the Deed is sought. The Supreme Court in the case of ***Suhrid Singh @ Sardool Singh vs. Randhir Singh & Ors., (2010) 12 SCC 112*** explained the difference between the relief of cancellation of a sale deed and

declaring that the same as void. Relevant portion of the judgment reads as follows:-

“7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act.”

18. Keeping in view of the above difference between the two transactions, in my opinion, the petitioners had already sought the relief of a declaration that the Deed is void. In that background, the factual foundation of the relief of cancellation had already been stated in the original plaint. I am inclined to allow the addition of the relief of cancellation of the Deed inasmuch as the effect would only be that the petitioners have to pay additional court fees on the said amount.

19. Regarding the other aspect, namely, the clarification which is sought to be added about the receipt of Rs.10 lacs from the agreed sale price, essentially it is mere a clarifactory point which in my opinion causes no prejudice to the respondents and is necessary for the purpose of complete adjudication of the dispute between the parties.

20. The last set of amendment which is sought pertains to a detailed narration of facts as to how the sale deed was allegedly executed. This is culled out in paras 7a to 7 w. In my opinion, this detailed narration of facts which is mostly reproduction of the evidence which the petitioners would perhaps have led cannot be allowed at this late and belated stage. These are facts which cannot be permitted to be raised belatedly and after the evidence has already commenced in view of the proviso to Order 6 Rule 17 CPC. The petitioners would have been aware of these facts which are now sought to be introduced.

21. The Supreme court in the case of *Ganesh Trading Co. vs. Moji Ram*, (1978) 2 SCC 91 held that if a party is in-efficient in setting out its case initially, the shortcomings can certainly be removed. However, substituting virtually a new plaint is something which would normally not be permitted. Relevant portion of the judgment reads as follows:

“4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being

rectified so long as remedial steps do not unjustifiably injure rights accrued.

5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation; to be put on every defective state of pleadings. Defective pleadings are generally curable, if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.”

22. Accordingly, I allow the application to the extent that it seeks to amend paras 2, 4, 5 & 6 of the plaint. I also allow the application to the extent that it seeks to insert para 7x, 7y, 7z, 10, 12 and the relief clause as prayed. Rest of the portion cannot be allowed as the evidence has already

started and these are facts which were known to the petitioners at the time of the filing of the suit. They cannot be in terms of the proviso to Order 6 Rule 17 CPC permitted to be brought on record. Further allowing such a relief, would tantamount to substituting a new plaint for the old plaint.

23. The amendment application is allowed to the above extent.
24. With the above observations, the petition stands disposed of.
25. All pending applications also stand disposed of.

JAYANT NATH, J.

AUGUST 31, 2016/v/rb
signed on 2.1.2017