

C.R. No. 3901 of 2012

(1)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.R. No. 3901 of 2012

DATE OF DECISION: 7.3.2017

Gurdev Singh

.....Petitioner

Versus

Tarsem Singh

.....Respondent

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Sarju Puri, Advocate
for the appellant.

Mr. Vijay Lath, Advocate
for the respondent.

DAYA CHAUDHARY, J.

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside impugned order dated 11.5.2012 (Annexure P-10) passed by Additional Civil Judge (Senior Division), SBS Nagar, whereby, application of the respondent-plaintiff under Order 6 Rule 17 CPC for amendment of the plaint has been allowed.

Briefly, the facts of the case as made out in the present petition, are that respondent-plaintiff filed a suit for permanent injunction restraining the petitioner-defendant from encroaching upon the Rasta bearing Khewat No. 311, Khatauni No. 546, Khasra No. 4416/1974 (0-18) situated in the area of village Chakdana, Tehsil and District Nawanshahar. Said suit was contested by the petitioner-defendant and written statement was filed. During pendency of the aforesaid suit, respondent-plaintiff filed another suit for mandatory injunction to direct the petitioner-defendant to remove his

structure and possession from the encroached property of the respondent-plaintiff as mentioned in fard jamabandi for the year 2000-2001, Khewat No. 67, Khatauni No. 92, Khasra No. 4412 (7-1). Thereafter on 22.12.2016, the earlier suit No. 634 of 2004 was withdrawn by the respondent-plaintiff. The petitioner-defendant filed reply to the subsequent suit. During pendency of the second suit, respondent-plaintiff filed an application under Order 23 Rule 1 CPC for withdrawal of the suit with liberty to file afresh on the same cause of action. Thereafter, on 25.9.2009 the application under Order 23 Rule 1 CPC was withdrawn by the respondent-plaintiff on the ground that he did not want to pursue his application and another application under Order 6 Rule 17 CPC was moved for amendment of the plaint seeking to incorporate the relief of possession in the suit. Reply to the application was filed but the same was allowed vide order dated 11.5.2012, which is subject matter of challenge in the present revision petition.

Learned counsel for the petitioner contends that while allowing the application of the respondent-plaintiff, the trial Court has not taken into consideration that the previous suit of the plaintiff, which was also based on the same cause of action qua the same suit property has already been dismissed as withdrawn on 22.12.2006. Subsequently the present suit was filed during the pendency of the earlier suit on the same cause of action, whereas, the subsequent suit was not maintainable. Learned counsel further contends that the trial Court has wrongly allowed the application of the respondent-plaintiff for amendment of the plaint, which is misuse of process of law. Learned counsel also submits that the trial Court has also not taken into consideration that the application of the respondent-plaintiff under

Order 23 Rule 1 CPC for permission to withdraw the present suit with liberty to file afresh on the same cause of action was also withdrawn by the plaintiff on 25.9.2009. It is also the argument of learned counsel for the petitioner that the respondent-plaintiff has failed to conclude his evidence despite availing numerous opportunities after framing of issue on 8.3.2007 and the application for amendment of the suit was decided after a period of two years of filing the same. At the end, learned counsel for the petitioner submits that the purpose of filing the application for amendment of plaint was to delay the proceedings and great prejudice is going to be caused to him in case the impugned order is not set aside.

Learned counsel for the respondent submits that evidence of the parties is yet to commence. The respondent-plaintiff had claimed the relief of possession by way of amendment, which was necessary for just decision of the case and no prejudice would be caused to the other party as the amendment was allowed subject to costs of ₹1,000/-. Learned counsel has also relied upon the judgments of Hon'ble the Apex Court in the cases of **Abdul Rehman and another Vs. Mohd. Ruldu and others** 2012 (4) RCR (Civil) 481, **Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others** AIR 2006 Supreme Court 1647, of this Court in **Jai Bhagwan Vs. Sumer Chand** 1989 PLJ 171, of Allahabad High Court in **Ganpat Singh Vs. Sher Bahadur Singh and others** 1978 AIR (Allahabad) 66 and of Patna High Court in **Krishnadeo Pathak and others Vs. Hemlata Choudhar** AIR 2007 Patna 54, in support of his contentions.

Heard the arguments advanced by learned counsel for the parties and have also gone through the impugned order and other documents available on the file.

Facts relating to filing of two civil suits and withdrawal of earlier suit as well as application under Order 23 Rule 1 CPC are not disputed. The application for amendment of the plaint under Order 6 Rule 17 CPC was moved subsequently after withdrawal of the earlier suit as well as application under Order 23 Rule 1 CPC. It is also not disputed that both the suits were filed on the same cause of action and subsequently the earlier suit was dismissed as withdrawn, whereas, no liberty was sought therein. Nothing has been mentioned as to how the second suit was maintainable and no argument has been raised in this regard. The application filed under Order 23 Rule 1 CPC for permission to withdraw the suit with liberty to file afresh on the same cause of action was also withdrawn. The issues were framed on 8.3.2007 but the witnesses who have filed their affidavits in evidence failed to get their cross-examination conducted and the application for amendment of the plaint was decided after two years of its filing. Nothing was mentioned in the application as to how the amendment was necessary for deciding the real controversy between the parties. Although the Courts are liberal in allowing the application for amendment of the plaint but the same should not be with mala fide intention and to cause any prejudice to other party.

In the present case, no reason has been mentioned for amendment of the plaint and no finding whatsoever has been recorded while allowing the application. Moreover, the respondent-plaintiff filed suit in the year 2006 and after framing of issues on 8.3.2007, no evidence was adduced in spite of availing more than ten opportunities. Till the filing of the application, only the affidavits of one or two witnesses by way of examination-in-chief were furnished and they were not examined. When

respondent-plaintiff was not able to explain as to how two suits were maintainable, a new tactic was adopted by moving an application under Order 6 Rule 17 CPC for amendment of his plaint, which was allowed by the trial Court. Undisputedly, as per provisions of Order 6 Rule 17 CPC, the amendment of the pleadings can be allowed at any stage but it is to be seen as to how the amendment is necessary for determining the real controversy between the parties. It can be allowed only in case it does not change the basic structure of the suit. It is not disputed that two suits were filed on the same cause of action and the initial suit was withdrawn, however, no liberty was sought at the time of withdrawal of the earlier suit. The application moved under Order 23 Rule 1 CPC for withdrawal of the suit with liberty to file fresh suit on the same cause of action was also withdrawn by respondent-plaintiff on the statement that he did not want to pursue the application at that stage as the case was fixed for plaintiff's evidence. Vide order dated 21.1.2010 last opportunity was granted to the plaintiff for adducing entire evidence. Thereafter, the present application under Order 6 Rule 17 CPC was moved for amendment of the plaint. It appears that the plaintiff had adopted a clever tactic for amendment of the plaint just to incorporate the relief of possession in the suit. While allowing of the application by the trial Court, it has not been considered as to how the second suit was maintainable. A specific objection was raised before the trial Court by the petitioner-defendant in reply to the application for amendment. Nowhere, it has been mentioned in the order as to how the amendment was necessary for just decision of the controversy. Even it has not been mentioned that the petitioner has encroached upon the land of the plaintiff during pendency of the suit. Not only the nature of suit has been

changed but a great prejudice has also been caused to the petitioner-defendant.

Order VI Rule 17 of the Code enables the parties to make amendment of the plaint which reads as under;

“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 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.”

In **Rajkumar Gurawara (Dead) Through L.Rs vs. S.K. Sarwagi & Company Private Limited & Anr.** (2008) 14 SCC 364, Hon'ble the Apex Court has considered the scope of amendment of pleadings before or after the commencement of the trial. In paragraph 18, it has been held as under:-

“.....It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation.....”

In **North Eastern Railway Administration, Gorakhpur v.**

Bhagwan Das (Dead) By LRs. (2008) 8 SCC 511, Hon'ble the Apex Court has held as under:

“16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. Postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Ors.* which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.”

Similarly, Hon'ble the Apex Court in the case of **Revajeetu Builders & Developers Vs. Narayanaswamy and sons and others** 2010 (1) RCR (Civil) 27 has considered the scope of amendment of pleadings in para No. 63 by concluding as follows:-

“Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing 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. These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

In view of facts and law position as explained above, there is force in the argument raised by learned counsel for the petitioner. Accordingly, the present petition is allowed and impugned order dated 11.5.2012 (Annexure P-10) is set aside.

7.3.2017
pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes