

\$~40

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

%

Date of Decision: May 1, 2017

+

CM(M) No.476/2017

RAJ KUMARI & ANR

..... Petitioner

Through: Mr.Anuj Kumar Garg, Advocate.

versus

PARPATI DEVI (SINCE DECEASED

THR HER LRS) & ORS

..... Respondent

Through: Ms.Shobhana Takiar, Advocate for
R-3/DDA.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM No.16346/2017 & CM No.16347/2017

1. Exemption allowed, subject to all just exceptions.
2. The applications are disposed of.

CM(M) 476/2017

1. Feeling aggrieved by the order dated 21st January, 2017 passed in Suit No.535420/2016 whereby the prayer of the petitioner/plaintiff to amend the plaint has been declined by learned Trial Court, petitioner has invoked the extra-ordinary jurisdiction vested in this Court under Article 227 of the Constitution of India with the prayer that the impugned order may be set aside and petitioner may be allowed to amend the plaint.

2. Vide the impugned order learned Trial Court had dismissed the application under Order VI Rule 17 CPC observing that the proposed amendment in the plaint is not necessary for determining the real question in controversy between the parties. The application has been dismissed with cost of ₹5,000/- payable to the learned counsel for the defendants.

3. The application under Section 151 CPC for issuing directions to the SHO, P.S. Ashok Vihar for compliance of the order dated 2nd April, 2009 has also been dismissed with the cost of ₹2,000/- to be paid to the learned counsel for the defendants observing that in case of non-compliance the plaintiff may seek resort to provisions of Order XXXIX Rule 2A CPC.

4. Learned counsel for the petitioner has submitted that the proposed amendment is necessary for adjudication of the real controversy between the parties and the proposed amendment neither changes the nature of the suit, nor the cause of action or have the effect of withdrawal of the facts stated earlier. The proposed amendment is only for the explanation of the facts earlier pleaded, hence, learned Trial Court should have allowed the amendment.

5. The Civil Suit No.298/2011 (New No.535420/2016) was filed by the petitioner on 2nd March, 2009. The issues in the case have already been settled. The case was at the stage of plaintiff's evidence when the application under Order VI Rule 17 CPC has been filed on 7th February, 2016 i.e. after a period of almost seven years.

6. In order to find out whether the application filed by the petitioner seeking amendment of plaint satisfies the requirement of proviso to Order VI Rule 17 CPC, legal position is well settled that the power of the Court to grant amendment is with limitation contained in provision added to Rule 17 of Order VI CPC.

7. In *Smt. Kailash Sharma v. Sh. Jagdish Lal Sharma & Others* 2010

(10) AD Del. 622, the following view was taken in this regard:-

“9. Before the proviso came to be added to Order VI Rule 17 of CPC, it was not uncommon for the unscrupulous litigants, who, for one reason or the other, were not interest in expeditious disposal of the case, to prolong the trial by seeking unnecessary and sometimes mala fide and frivolous amendments, in order to delay the progress of the trial. This mischief was sought to be remedied by the legislature by putting an embargo on the power of the Court to allow amendments, once the trial has begun. That precisely was the objective behind adding the aforesaid proviso to the statute book. The legislative intent, therefore, needs to be given a meaningful effect and, therefore, unless the amendment sought by a party squarely falls in the four corners of the legal provision, the Courts need to discourage such amendments. The legislative intent cannot be frustrated by the Courts by giving so liberal an interpretation as to allow the amendment even where they find that the amendment now sought by the party could, on exercise of due diligence, have been conveniently sought before the trial began.”

8. The proposed amendment to the plaint which has been declined by the learned trial Court, pertains to facts which predate filing of the plaint in the above suit and pertain to the facts forming basis of claim of the present petitioner as plaintiff in Civil Suit No.298/2011. Thus, at the time of filing of the plaint in the year 2009 in this case, all the facts were not only pre-existing but also well within the knowledge of the present petitioner when plaint was filed by him in the year 2009.

9. Even otherwise the application seeking amendment to the plaint has been filed after trial has commenced. It is not the case of the petitioner that facts now sought to be pleaded by way of amendment could not be pleaded before commencement of trial despite due diligence.

10. Whether pleadings can be directed to be amended after the commencement of trial, has been considered by the Supreme Court in the decision reported as *Vidyabhai & Ors. vs. Padmalatha & Anr.* AIR 2009 SC 1433. In *Vidyabhai's case* (Supra) the plaintiff had filed a suit on 16.12.2003 for specific performance of an agreement of sale. Written statement was filed in the said suit on 17.04.2004. When the case was at the stage of cross examination of witnesses, an application under Order 6 Rule 17 CPC seeking amendment of written statement was filed on 08.11.2006. The amendment application was dismissed by the learned Trial Court rejecting the contention that the respondent could not gather the material and information necessary for drafting proper written statement earlier. The order rejecting the amendment was challenged before the High Court of Karnataka. In exercise of writ jurisdiction, the High Court of Karnataka allowed the amendment application observing as under:-

'.....According to Order 6 Rule 17, an amendment application can be filed at any stage of the proceeding. Filing of affidavit by way of evidence itself is not a good ground to reject the application filed seeking amendment of written statement. It is not out of place to mention that the parties must be allowed to plea. Such a valuable right cannot be curtailed in the absence of good ground.'

Aggrieved by the said order, Civil Appeal No.7251 of 2008 (Arising out of SLP (Civil) No.4740 of 2008) was filed impugning the order of High Court allowing the amendment in the written statement after the trial has commenced. The relevant paras noting the rival contentions and explaining the legal position are as under:

'5. Mr. S.K. Kulkarni, learned Counsel appearing on behalf of the appellants, would submit that in view of the proviso appended to Order VI Rule 17 of the Code, the High Court

committed a serious illegality in passing the impugned judgment.

6. Ms. Kiran Suri, learned Counsel appearing on behalf of the respondents, on the other hand, would contend that the proviso appended to Order VI Rule 17 of the Code is not attracted in the instant case as by reason of the amendment to the written statement, no new case has been made out. It was submitted that 'leave' to amend the written statement was filed for the purpose of elaborating the defence which had already been taken by the defendants and in that view of the matter, this Court should not exercise its jurisdiction under Article 136 of the Constitution of India particularly when it is well-known that an application for amendment of written statement should be dealt with liberally.

7. By reason of the civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

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.

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore are satisfied, viz., it 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.

8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition.'

11. In the instant case, the issues have already been settled and the case was at the stage of plaintiff's evidence when the application under Order VI Rule 17 CPC have been filed on 7th February, 2016 i.e. after a period of almost seven years.

12. Legal position is well settled that power under Article 227 of Constitution of India which vests extra ordinary jurisdiction in this Court, needs to be exercised only in a case where the impugned order suffers from any illegality, irregularity or perversity and if the impugned order is not interfered with, a grave injustice would be caused.

13. In my considered opinion the learned trial Court rightly declined the prayer of the petitioner to amend the plaint as it is not the case of the petitioner that inspite of due diligence such pleas could not have been taken before the commencement of trial.

14. As the impugned order does not warrant any interference by this Court, the present petition is dismissed.

CM No.16345/2017 (stay)

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 01, 2017
'hkaur'