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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: May 23, 2017

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CM(M) 978/2016

DEEPA JAIN

..... Petitioner

Through: Mr.Ashok Mathur & Ms.Nidhi
Agrawal, Advocates.

versus

KAMLESH JAIN & ORS

..... Respondents

Through: Mr.Kamlesh Jain, R-1 in person

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM No.35752/16 (delay)

1. For the reasons stated in the application delay of 8 days in re-filing the petition is condoned.
2. The application is disposed of.

CM(M) 978/2016

1. The petitioner is feeling aggrieved by the order dated 16th May, 2016 in Civil Suit No.85/2016, whereby his application under Order VI Rule 17 CPC seeking amendment to plaint has been dismissed.
2. Learned counsel for the petitioner has submitted that the amendment sought to be made in the plaint could not have been disallowed by the learned Trial Court for the reasons that necessary averments in respect of the 100 shares now sought to be recovered, have already been made in the plaint. At the time of institution of the suit the petitioner/plaintiff prayed for

a decree of Rs.1,20,000/- along with *pendente lite* interest @ 2% per month as well decree for mandatory injunction. The amount of Rs.1,20,000/- was calculated by computing the cost of 100 shares of Telco having face value of ₹10/- each amounting to ₹43,800 plus cost of 60 bonus shares ₹26,280/-, dividend ₹600/-, stamp charges ₹256/-, penalty ₹200/- and interest ₹48,864/-.

3. As per the petitioner the necessity to amend the plaint has arisen on receiving a communication dated 16th June, 2014 regarding the attempt of the defendant No.1 to get the said shares released. By way of proposed amendment the petitioner/plaintiff wants to substitute paragraphs 12 to 15. The petitioner also proposed to amend the prayer clause thereby claiming the recovery of 100 shares of Telco as per description in the application under Order VI Rule 17 CPC.

4. Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in ***Abdul Rehman And Another vs. Mohd. Ruldu And Others*** (2012) 11 SCC 341 wherein in a suit for permanent injunction, the relief of declaration was allowed to be added observing that the entire factual matrix of relief sought for under the proposed amendment, has already said to be in the amended plaint.

5. Learned counsel for the petitioner has submitted that the proposed amendment is necessary for the purpose of deciding the real controversy between the parties and it will not change the nature of the suit or alter the main cause of action.

6. Learned counsel for the petitioner further submitted that the order impugned whereby the proposed amendment has been disallowed by the learned Trial Court being passed against the principles laid down in the decision ***Abdul Rehman's case*** (*supra*), hence may be set aside.

7. Learned counsel for the petitioner also submits that in the instant case trial has not commenced and no such prejudice would be cause to respondent which cannot be compensated in terms of cost.

8. Perusal of the impugned order records that in the year 1998 the suit was filed for recovery of Rs.1,20,000/- being the cost of 100 shares of Telco along with the arrears of bonus and dividend etc. The case of the petitioner/plaintiff was that the defendant No.1 despite having sold 100 shares of Telco and executing the transfer deed on 16th December, 1994 and realizing the payment from the petitioner/plaintiff, was still trying to obtain the duplicate shares from the defendant No.4.

9. The amendment in the plaint was sought mainly on the ground that only on the strength of letter dated 16th June, 2014 whereby TSR DARASHAW wrote to Ms.Deepa Jian that Mr.Kamllesh Jian and Smt.Sneh Lata Jian has directed them to release the shares and benefits held under the folio which are the subject matter of the captioned suit filed by the petitioner.

10. Learned Trial Court has dismissed the application under Order VI Rule 17 CPC inter alia on the following grounds:

(i) The suit was filed on 18th August, 1998 and at the time of filing suit as well as filing of replication on 4th July, 2011, the plaintiff was having the knowledge that the shares were in the name of defendant No.1.

(ii) The case is at the stage of plaintiff's evidence and examination-in-chief by way of affidavit has been filed on 26th September, 2012 and case is at the stage of plaintiff's evidence since 26th September, 2012.

(iii) There is no new fact which came to the knowledge of the plaintiff after receiving letter dated 16th June, 2014.

(iv) The plaintiff could have claimed recovery of shares at the time of institution of the suit but he preferred to sue only for recovery of the value of the shares and dividends etc.

(v) There is no explanation why the relief of recovery of shares was not claimed at the time of institution of the suit in the year 1998.

(vi) If the plaintiff files a fresh suit for recovery of shares, the same would be time barred.

11. This is a case where the proposed amendment has to be dealt with under Order VI Rule 17 CPC as it stands amended vide Civil Procedure Code (Amendment Act), 2002. The proviso to Order VI Rule 17 CPC (after amendment) reads as under :-

‘Order VI Rule 17.

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

13. The question 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* 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.

*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'.***

14. The contention of the petitioner/plaintiff that the trial has not commenced has to be rejected as examination-in-chief by way of affidavit has been filed before the date of filing the application under Order VI Rule 17 CPC.

15. The application seeking amendment of plaint has been filed in April, 2015. That is almost after 17 years from the institution of the suit.

16. It is not the case of the plaintiff that the relief of claiming the 100 shares was not available to him on the date of institution of the suit. The communication dated 16th June, 2014 cannot be terms as a subsequent event creating a right in the petitioner to seek recovery of 100 shares. If the petitioner had right to claim the value of the shares along with the dividend and interest, at that time he could have sought recovery of shares as well or in the alternative, which was not claimed.

17. The reliance placed by the petitioner on the decision of the Hon'ble Supreme Court reported as ***Abdul Rehman And Another vs. Mohd. Ruldu And Others*** (2012) 11 SCC 341 is of no help to the petitioner for the reason that while filing the suit in the year 1998 factual matrix for claiming recovery of the 100 shares was not laid in the plaint. Rather all the averments made were to claim the value of the shares. After lapse of 17 years the proposed amendment cannot be allowed in view of the proviso to Order VI Rule 17 CPC. It is not the case of the petitioner that in spite of due diligence petitioner/plaintiff could not have raised this claim before the commencement of trial. The trial stands commenced and the matter is very old. It appears that rise in the value of shares is the basis to seek this amendment which is not permissible under the law as it stands amended.

18. In the decision of the Hon'ble Supreme Court reported as ***Abdul Rehman And Another vs. Mohd. Ruldu And Others*** (2012) 11 SCC 341,

relied upon by the learned counsel for the petitioner it was held that if such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

19. In the decision of Hon'ble the Supreme Court in ***Usha Balashaheb Swami and Ors. vs. Kiran Appaso Swami and Ors.*** AIR 2007 SCC 1663, in para 15 it was held as under:

“It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendment to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.”

20. As the proposed amendment in the plaint does not satisfy the twin test laid down under the proviso to Order VI Rule 17 CPC, the learned Trial Court has rightly exercised the discretion by not allowing the amendment.

21. Dismissed.

CM No.35750/2016 (stay)

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 23, 2017

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