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

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Date of Decision: May 24, 2017

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CM(M) 577/2017

AMANPREET SINGH

..... Petitioner

Through: Mr.Sanjay Dewan, Advocate.

versus

KULDEEP SINGH & ANR

..... Respondents

Through: None.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM 19941/17

1. Exemption allowed, subject to all just exceptions.
2. The application is disposed of.

CM(M) 577/2017

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India assailing the order dated 20th April, 2017 whereby the learned Trial Court has allowed the application filed by the petitioner/plaintiff under Order XVI Rule 14 CPC but dismissed the application under Order VI Rule 17 CPC.
2. The grievance of the petitioner against the impugned order is only to the extent that his prayer to amend the plaint has been declined by the learned Trial Court.

3. The application seeking amendment of the plaint has been dismissed by the learned Trial Court for the following reasons:

“In my opinion, plaintiff has taken a completely wrong ground to seek amendment that he had made an inadvertent mistake in referring common passage as parking area. Not only in plaint and the affidavit of plaintiff, in fact almost the entire cross-examination of plaintiff by the defenants’ counsel, was regarding the existence of parking area in the suit property and throughout the plaintiff maintained that parking area existed in the suit property. He also identified the alleged parking area from point A to A1 and point A to C in Site Plan Ex.PW1/D1 as the parking area. He also denied the suggestion given by the counsel for defendants that there was no parking at all constructed/built or otherwise in the suit building.

Moreover, PW-1 is not a layman but a practicing lawyer by his own admission. In my considered opinion if the amendment is allowed it will entirely change the contention of plaintiff which throughout has been that there existed a parking area in the suit property. It appears that plaintiff is seeking to amend the suit since there is no mention of the parking area in the sale deed of plaintiff and only reference is made regarding existence of common passage. Infact a retrial would have to be conducted if plaintiff is permitted to amend the suit at the stage of final arguments and to completely change his contentions from the original suit. Hence prejudice would be caused to the defendant if the amendment is allowed at this late stage especially in view of the fact that plaintiff does not appear to have come with clean hands in seeking the proposed amendment and is intending to fill up lacunae in his case. Application lacks due diligence and is frivolous and hence is dismissed but with cost of ₹3,000/- to be deposited with DLSA.”

4. Learned counsel for the petitioner has submitted that the amendment sought by the petitioner was only to the extent that instead of ‘parking area’

he wanted to substitute it as 'common passage' which does not have the effect of changing the nature of the suit or otherwise causing any prejudice which cannot be compensated in terms of cost.

5. 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.'

6. In order to find out whether the application filed by the petitioner seeking amendment of plaint satisfies the requirement of provision 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.

7. 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'.***

8. It is admitted position that the case was at the stage of final arguments when this application was filed. The entire trial has proceeded on the plea that the relief claimed is in respect of the 'Parking Area'.

9. The amendment sought for by the plaintiff at the fag end of the trial by even changing the nature of the suit property i.e. from 'Parking Area' 'common passage' has rightly been declined by the learned Trial Court.

10. The nature and discretion of the subject matter of the suit as described by the petitioner/plaintiff in the plaint could not have been allowed to assume a different description when the parties have already led their evidence in respect of 'Parking Area' and not as 'common passage'.

11. As it failed to satisfy the twin test laid down under the proviso to Order VI Rule 11 CPC, the learned Trial Court has rightly exercised the discretion by not allowing the amendment.

12. The impugned order to the extent that the application seeking amendment has been dismissed by the learned Trial Court, does not suffer from any error of law.

13. Since no interference is warranted in the exercise of its jurisdiction under Article 227 of the Constitution of India, the petition is dismissed.

CM 19940/17 (Stay)

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 24, 2017

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