THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO

CIVIL REVISION PETITION NO.4942 OF 2018

O R D E R
(*Per Hon'ble Sri Justice Sanjay Kumar*)

The plaintiff in C.O.S.No.170 of 2017 on the file of the learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, filed I.A.No.355 of 2018 therein under Order 6 Rule 17 CPC seeking to amend the plaint. By order dated 27.07.2018, the Commercial Court dismissed the I.A. Aggrieved thereby, the plaintiff is before this Court by way of this revision filed under Article 227 of the Constitution.

Heard Sri P.Kamalakar, learned counsel for the petitioner-plaintiff, and the learned Government Pleader for Arbitration, State of Telangana, for the respondents-defendants.

C.O.S.No.170 of 2017 was filed for various reliefs, including payment of a sum of Rs.31,77,24,458/- towards settlement of the petitioner-plaintiff's claims in respect of L.S.Agreement No.79 SE/2008-09 dated 02.02.2009, in terms of the details set out in para XXIV of the plaint, along with interest thereon at 12% per annum. Para XXIV detailed various claims, one of which was Claim No.5 for Rs.45,62,845/- towards reimbursement of commission paid by the petitioner-plaintiff to the banks for furnishing bank guarantees. While so, the petitioner-plaintiff filed the subject I.A. stating that the figure of Rs.45,62,845/- in Claim No.5 in para XXIV had to be substituted with Rs.93,44,539/-. Reference was made to the three bank guarantees furnished by the petitioner-plaintiff and details of the total commission paid for each of them were set out in a tabular form, aggregating to Rs.93,44,539.60 ps. Be it noted that in relation to bank guarantee Nos.04/2008 and 01/2009, the claim for commission was calculated up to 01.08.2018 and in so far as bank guarantee No.07/2009 was concerned, the commission payable was reckoned up to 09.09.2018.

In the affidavit filed in support of the subject I.A., the petitioner-plaintiff stated that the amount in Claim No.5 relating to commission paid for furnishing bank guarantees was calculated only till the date of filing of the suit, viz., 08.08.2012, but the bank guarantees were extended thereafter from time to time and therefore, the commission paid later also had to be included in the suit claim, by permitting amendment of the plaint.

The Commercial Court however observed that the petitioner-plaintiff ought to have claimed commission paid for furnishing bank guarantees from the date of filing of the suit till cancellation/honouring of the said bank guarantees but it chose to seek amendment of the suit prayer in this regard only for a period of six months and that, in all probability, it would have to again seek further amendment. The Commercial Court opined that the amendment sought in the present form, being a piecemeal one, was not permissible under Order 2 Rule 2 CPC, as the petitioner had not reserved any rights while filing the suit that he would claim future commission on the bank guarantees from the date of the suit. The Commercial Court therefore concluded that the amendment petition was barred by Order 2 Rule 2 CPC and dismissed the I.A.

Sri P.Kamalakar, learned counsel, would contend that the Commercial Court erred in extending the provisions of Order 2 Rule 2 CPC to an amendment petition filed in a pending suit. He would rely upon the observations made by a learned Judge of this Court in B.V.NARASIMHA RAJU V/s. K.LAKSHMIPATHI DIXITULU[1], wherein the learned Judge observed as under:

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[1] 1977 ALT 68 (Notes of Recent Cases)

'It is now well-settled that a plaintiff is not permitted to sue in a subsequent suit in respect of the portion which he omitted to use in the first suit and this legal position is quite clear from the expression "he shall not afterwards sue in respect of the portion so omitted or relinquished" employed in Rule 2 of Order 2, C. P. C. But if the portion is included by way of amendment of the very same plaint before the suit is disposed of, does this bar apply? By bringing in the amendment as to the inclusion of claim omitted earlier in a pending suit, the plaintiff cannot be said to have sued afterwards in respect of the portion so omitted. This is based on the principle that if no decree is based in respect of a portion of the claim, made in the suit, a second suit in respect of the remaining portion which was omitted earlier is not barred. It follows that where a suit brought in respect of only a portion of cause of action has not been heard and decided, the court should allow the plaint in the suit to be amended by adding the omitted portion of the claim.'

He would also point out that in SAJJAN KUMAR V/s. RAM KISHAN[2], the Supreme Court permitted amendment of the plaint though it was not sought at an early stage of the suit and though the error on the part of the plaintiff was pointed out by the defendant in the written statement itself, as the said amendment was necessary to bring to the fore the real question in controversy between the parties and refusal to permit such amendment would create needless complications at the stage of execution in the event of the plaintiff succeeding in the suit.

Per contra, the learned Government Pleader would place reliance on VAN VIBHAG KARAMCHARI GRIHA NIRMAN SAHKARI SANSTHA MARYADIT (REGISTERED) V/s. RAMESH CHANDER[3], wherein the Supreme Court was dealing with amendment of the plaint in a pending civil suit whereby the relief of specific performance of contract was sought to be included. The same was allowed by the trial Court by order dated

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[2] (2005) 13 SCC 89
[3] (2010) 14 SCC 596

10.03.2003. The Supreme Court found that the plaintiff in the suit had notice by 03.02.1991 that the first defendant had made its intention clear about refusing performance of the agreement and the cancellation thereof. Though the plaintiff chose to file a suit on 11.02.1991, it did not include a prayer for specific performance. In these circumstances, the Supreme Court opined that when the plaintiff had a cause of action to sue for specific performance in 1991 but omitted to do so, it could not be allowed to sue on that cause of action, which was omitted to be included when the suit was filed, and the Court may consider such omission to include the relief of specific performance in the suit, though the cause of action to do so had already arisen, as relinquishment of that part of the claim. The Supreme Court accordingly opined that the suit was hit by the provisions of Order 2 Rule 2 CPC. The Supreme Court observed that though the plaintiff had not filed a second suit so as to bring the case squarely within the bar of Order 2 Rule 2 CPC, the broad principles thereof, which were based on public policy, would be attracted on facts.

In VIRGO INDUSTRIES (ENG.) P. LTD. V/s. VENTURETECH SOLUTIONS P. LTD.[4], the Supreme Court observed that Order 2 Rule 2 CPC would apply even to a situation where the first suit has not been disposed of but a second suit was filed during the pendency thereof. By the same analogy, Order 2 Rule 2 CPC would also be applicable even to a subsequent amendment of the plaint in the first suit in relation to a claim which ought to have been included in the plaint originally but was left out.

In ANKAM GOVINDAMMA V/s. SYED SHAFEEULLAH[5], a learned Judge of this Court observed that after the amendment of Order 6 Rule 17 CPC in the year 2002, a party seeking amendment after commencement of

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4 (2013) 1 SCC 625
5 2018 (4) ALT 421

trial should convince the Court that in spite of due diligence it could not have raised the matter before such commencement. The learned Judge observed that in his considered opinion, the yardstick for considering the amendment petition filed after commencement of trial was not only whether a separate suit on the same facts and for the same relief would be time barred but also whether the party could show plausible cause that in spite of due diligence, it could not raise the matter before commencement of the trial.

In the case on hand, it is not in dispute that the Commercial Court has already framed the issues for trial. It is the settled legal position that the trial is deemed to have commenced upon framing of the issues by the trial Court (See VIDYABAI V/s. PADMALATHA[6]). Despite the same, no mention was made in the affidavit filed in support of the subject I.A. as to why the petitioner-plaintiff did not take steps before framing of the issues.

Further, as rightly pointed out by the Commercial Court, the petitioner-plaintiff sought an amendment in relation to Claim No.5 only up to August/September, 2018. Invariably, the petitioner-plaintiff would again have to seek further amendment hereafter, in relation to the commission paid by it after August/September, 2018, for furnishing of bank guarantees. These piecemeal amendments of the pleadings requiring additional further steps to be taken at each such stage would hamper the suit proceedings and would be wholly subversive of the judicial process.

This being the factual situation and as the Supreme Court, in RAMESH CHANDER[3], validated the application of the broad principles underlying Order 2 Rule 2 CPC even to an amendment petition, basing it on public policy, this Court finds no merit in the argument of Sri P.Kamalakar, learned counsel, that the Commercial Court erred in applying Order 2 Rule 2

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[6] AIR 2009 SC 1433

CPC to the subject amendment petition. The observations of the Supreme Court in RAMESH CHANDER[3] would override the contrary observations of the learned Judge of this Court in B.V.NARASIMHA RAJU[1].

On the above analysis and viewed from any angle, the civil revision petition is devoid of merit and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

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SANJAY KUMAR, J

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M.GANGA RAO, J

20th DECEMBER, 2018
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