

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Civil Revision no.4211 of 2018

Date of decision : 31.07.2018

Parvinder Singh @ Pinda and others

... Petitioners

Versus

Didar Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Surjit Singh Salar, Advocate,
for the petitioner.

AMOL RATTAN SINGH, J.

By this petition, the petitioners challenge the order dated 22.05.2018 (copy Annexure P-6) passed by the learned Civil Judge (Senior Division), Nabha, allowing the application moved under Order 6 Rule 17 CPC by the respondent-plaintiff, seeking amendment of his suit. In the application, it was alleged that a counsel had been engaged by the plaintiff to file a suit seeking specific performance of an agreement dated 25.02.2011, but instead of doing that the Advocate “inadvertently filed a suit seeking permanent injunction against the petitioners-defendants” and the plaintiff not being conversant with either English or 'legal language', signed the plaint and power of attorney in favour of the said counsel (Smt. Anjana Guliany, Advocate), in good faith.

Subsequently, another counsel (Shri Arun Chopra) is stated to have appeared in the suit filed on behalf of the plaintiff on 30.03.2016 (the civil suit having been instituted on 24.11.2015) and upon examining the case file, he informed the plaintiff that the suit was not one seeking specific

performance of the agreement and consequently, as per the plaintiff, it had become necessary to amend the plaint by “including the relief for specific performance of the agreement dated 25.02.2011 extended on 25.10.2011 to 31.12.2014, with the mutation (*sic* mutual) consent at (*sic* of) the party”.

On that very day, the defendants had also filed an application under Order 7 Rule 11 CPC seeking rejection of the plaint.

It was further contended by the applicant-plaintiff (present respondent) that the suit being at its initial stage, no prejudice would be caused to the defendant if the proposed amendment was allowed.

2. Upon notice of the application for amendment, the petitioners-defendants appeared before the learned Civil Judge and filed a written reply to the effect that a “false suit” had been got filed through the previous Advocate, seeking permanent injunction, and with the plaintiff having sworn an affidavit in which he admitted the contents of the plaint to be correct, duly read over and explained to him in Punjabi, it was actually not the fault of the previous counsel, as she had filed the suit as per the instructions of the plaintiff.

Consequently, dismissal of the application (under Order 6 Rule 17 CPC) was sought by the present petitioners-defendants.

3. Upon hearing the parties, the learned Civil Judge held that the amendment of pleadings can be allowed at any stage of the proceedings, in terms of Order 6 Rule 17, if the amendment was found to be necessary for the purpose of determining the real question involved in the dispute between the parties, even though the proviso to the said rule stipulated that no such amendment would be allowed after the trial had commenced, unless the Court came to a conclusion that in spite of due diligence, the party

(seeking the amendment) could not have raised the matter before the commencement of the trial.

Holding that the proviso under Order 6 Rule 17 did not apply to the present case as the trial had not commenced, with even the defendants not having filed their written statement, it therefore being at the initial stage; and further rejecting the contention that the application was not maintainable because the plaintiff swore an affidavit admitting the contents of the plaint to be correct, duly explained to him in Punjabi, that Court went on to hold that a party to a *lis* cannot be made to suffer on account of the mistake of his counsel and that the amendment “appears to be essential”.

Consequently, the application of the respondent herein, seeking amendment of his plaint, was allowed vide the impugned order, leading to the filing of the present revision petition.

4. Before this Court, Mr. Salar, learned counsel appearing for the petitioners, submitted that no amendment can be made in a civil suit changing the nature of the suit, as such amendment would be barred in terms of Order 2 Rule 2 CPC.

He further submitted that in the application filed by the present petitioners under Order 7 Rule 11 CPC, it was contended therein that the suit was barred as it did not seek specific performance of the agreement relied upon by the plaintiff and that even a reply to the said application had been filed by the plaintiff, prior to the application for amendment of the suit having been filed, with even that reply stating that the suit was maintainable in its original form, i.e. as a suit seeking permanent injunction restraining the petitioners-defendants from transferring the suit land to anyone else except the plaintiff.

5. In support of his arguments, learned counsel relied upon judgments of the Supreme Court in Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit v. Ramesh Chander and others (Civil Appeal No. 8982 of 2010) and Virgo Industries (Eng.) Private Limited v. Venturetech Solutations Private Limited (2013) 1 SCC 625.

6. Having considered the aforesaid arguments, it is first to be seen that as per the copy of the plaint, which is annexed as Annexure P1 with the petition, undoubtedly of course, the relief originally sought by the respondent-plaintiff was one of permanent injunction, restraining the defendants from “alienating, transferring, mortgaging or selling” the suit land.

However, the opening paragraph of the plaint was to the effect that on 25.02.2011, Kirpal Singh, (father of the present petitioners-defendants no.1 to 3 & 5 and husband of petitioner no.4), had agreed to sell the suit land for a sum of Rs.3,42,000/- per bigha, vide an agreement of sale executed by him in the presence of marginal witnesses, after receiving a sum of Rs.10,00,000/- from the plaintiff as earnest money. The said agreement is also stated to have been duly attested by the Notary Public, Nabha, on 25.02.2011 itself, with an entry to that effect entered in the register of the Notary (as contended by the plaintiff), with even the presence of the 5th petitioner-defendant, i.e. Jasbir Kaur, having been duly marked by the Notary.

7. It was further stated in the plaint that Kirpal Singh had agreed to get the registration of the sale deed done on or before 01.11.2011. However, on 25.10.2011 Kirpal Singh extended the date of execution and registration of the sale deed due to the fact that the suit land had been

attached in favour of one Parveen Rani and consequently, the new date fixed was 31.12.2014, with a writing to that effect made behind the agreement of sale, again in the presence of marginal witnesses.

On 31.12.2014, the plaintiff is stated to have marked his presence before the Notary Public, Nabha and executed an affidavit to that effect, again stated to have been attested by the Notary.

8. Still further, it was contended in the suit of the respondent-plaintiff that Kirpal Singh thereafter died, with the defendants (petitioners herein) being his only first class legal heirs, bound to execute the said sale deed in favour of the plaintiff, whereas they were actually threatening to alienate the suit land to unknown persons.

Yet further, it was contended that the cause of action to file the suit arose in favour of the plaintiff on the date of execution of the agreement, i.e. 25.02.2011, with Kirpal Singh having received the aforementioned earnest money of Rs.10,00,000/- and with the date for execution and registration of the sale deed extended till 31.12.2014, on which date Kirpal Singh however did not come present to do so.

9. Hence, eventually, a prayer for permanent injunction, restraining the defendants from alienating the suit land in any manner was made, with Court fee also affixed in respect of such a suit only.

10. A perusal of the present case file also shows that indeed the respondent-plaintiff had replied to the application filed under Order 7 Rule 11 CPC by the present petitioners-defendants, stating in the reply that it was correct that a suit for permanent injunction had been filed, further stating that limitation for filing a suit for specific performance would expire

only on 31.12.2017, and further stating as follows:-

“It was not obligatory for the plaintiff to file suit for specific performance prior to 31.12.2017. It is wrong that suit for permanent injunction only is not maintainable. Since the defendants wanted to alienate the suit property to somebody else, so suit for permanent injunction has been filed. The plaintiff reserves his right to file suit for specific performance prior to 31.12.2017.”

The said reply is seen to be dated 09.05.2016, with the application under Order 7 Rule 11 being dated 30.03.2016.

The application by the respondent-plaintiff, under Order 6 Rule 17, is also stated to have been filed on 30.03.2016 itself, with a reply thereto also filed by the petitioners on 03.05.2017, eventually leading to the passing of the impugned order on 22.05.2018.

11. Before considering the arguments of learned counsel for the petitioners, it is necessary to reproduce Order 6 rule 17 of the CPC, 1908, as also Order 2 Rule 2 thereof, with learned counsel having contended that the amendment would be barred under the latter provision also.

“17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleading 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.”

Order 2 Rule 2 CPC reads as follows:-

“2. Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

The question therefore is as to whether the respondent-plaintiff was within his right to amend the suit thereby changing its nature to one seeking specific performance of an agreement, instead of only seeking permanent injunction restraining the present petitioners from alienating the suit land in any manner.

12. In my opinion, nothing in Order 2 Rule 2 CPC bars the amendment of the plaint, or even changing the nature thereof, provided the amendment would not otherwise be barred for any reason, including the fact that the relief sought by the amendment, would fall beyond the period of limitation. No doubt, sub rules (2) and (3) of Rule 2 stipulate that a relief either omitted to be claimed when a suit is filed, or relinquished, shall not be permitted to be claimed subsequently, however, there is nothing even the said sub-rules that prevents amendment of the pleadings in terms of Order 6 Rule 17 and therefore, in the opinion of this Court, any such omission made at the time of filing the original plaint, can still be included by way of an

amendment, but only with the leave of the Court. Of course, as already observed earlier, the relief so claimed should be one which is not otherwise barred for any reason (other than the fact that it was omitted to be included earlier).

If that were so, it would, to a very large extent, render the provisions of Order 6 Rule 17 CPC almost otiose. Naturally, even in terms of that provision, the amendment can be permitted only if it is considered essential by the Court, in order to determine the real questions in controversy between the parties; and as per the proviso to Rule 17 of Order 6, such an amendment would not be permitted after the trial has commenced, unless the Court comes to a conclusion that what is sought to be included by way of amendment, was something which could not have been raised by the party concerned before commencement of the trial, despite due diligence.

In the present case, as regards applicability of the proviso, that would be dealt with further ahead in this judgment; but as regards the relief sought being necessary, I have no doubt that the entire case of the plaintiff being based on the agreement between him and the late father of the defendants (husband of defendant no. 4), the relief of specific performance was very much a relief to be included, and even though it could have been included at the time when the suit was filed, the plaintiff would not be barred from seeking an amendment to include such relief in his plaint at the stage that he did move the application under Order 6 Rule 17. Further reasons for this conclusion reached, by this Court, are as would be seen hereinafter.

13. In the judgment first relied upon by Mr. Salar, in *Van Vibhag Karamcharis'* case (supra), the issue was more or less the same, i.e. the plaintiff therein had filed an application under Order 6 Rule 17 CPC for amendment of the plaint by including therein the relief of specific performance of a contract. That amendment having been allowed by the trial Court, eventually the matter came before the Madhya Pradesh High Court by way of a writ petition which was treated as an appeal which was dismissed, the matter therefore coming to the Supreme Court.

It was held by the Apex Court as follows:-

“Apart from that, in the notice dated 3.2.1991, the first respondent clearly stated that the agreement of sale between him and the appellant stood cancelled and the first respondent asserted his title over the plot of land in question.

23. Under the aforesaid circumstances, the crucial question is whether the appellant has a cause of action to file a suit for specific performance. In our judgment, the refusal by the first respondent to acknowledge the right of the appellant over the land in its public notice dated 3.2.1991 definitely furnishes the appellant with a cause of action to file a suit for Specific Performance.

24. If the appellant had filed such a suit, it could in the said suit, have questioned the action of the first respondent as blowing hot and cold. But it has not filed such a suit within the period of limitation prescribed for filing such a suit.”

(Emphasis applied by this Court).

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“33. This Court is, therefore, of the opinion that the appellant had the cause of action to sue for Specific Performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. This Court may consider its

omission to include the relief of Specific Performance in the suit which it filed when it had cause of action to sue for Specific Performance as relinquishment of that part of its claim. The suit filed by appellant, therefore, is hit by the provisions of Order 2 rule 2 of the Civil Procedure Code.”

14. Undoubtedly, in paragraph 33 reproduced hereinabove, it was held by their Lordships that the second relief of specific performance, as was sought to be included in the suit by way of an amendment thereof, could not having been included in the original suit and the plaintiff would be deemed to have relinquished that part of the claim and therefore the bar contained in under Order 2 Rule 2 would apply to the facts of the case.

However, before that, in paragraphs 22 to 24, (and thereafter in paragraphs 35 to 38), what has been stressed upon by the Supreme Court is that the relief subsequently sought, was after a long period of time (in that case after 11 years) and in the meanwhile, limitation to file a suit seeking specific performance of the contract had already expired.

Hence, in such a situation, naturally, an amendment could not be allowed to be made in the plaint, thereby altering the nature of the suit, by including a relief which if it had been sought on the date that the amendment was applied for, would be non-maintainable on the ground of limitation alone.

15. In the present case, even on specific query to learned counsel for the petitioners, he has very fairly not denied that the amendment sought in the plaint, i.e. the relief of specific performance of an agreement, was not barred by limitation, the eventual date fixed for execution of the sale deed being 31.12.2014, with the suit having been filed on 24.11.2015, and the amendment having been sought by the respondent-plaintiff on 30.03.2016.

Yet, Mr. Salar contended that even if a suit for specific performance of the agreement would not have been barred on the ground of limitation, the relief claimed being wholly different to the relief claimed in the original suit, the plaintiff would be deemed to have relinquished his right to the relief subsequently sought, he not having included it at the time when the suit was filed; and therefore the principle contained in Order 2 Rule 2, (as per learned counsel), very much applicable to the present case.

16. He also referred to paragraphs 9 and 17 of the judgment of the Supreme Court in *Virgo Industries (Eng.) Private Limiteds'* case (supra), which reads as follows:-

“9. Order 2 Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not, afterwards, sue for the part of portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the court is contemplated by Order 2 Rule 2 (3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order 2 Rule 2(2) and (3) CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different

situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit.”

(Emphasis applied by this Court)

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“17. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in *R. Vimalchand v. Ramaligam* holding that the provisions of Order 2 Rule 2 CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order 2 Rule 2 (3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order 2 Rule 2 CPC as already discussed by us, namely, that Order 2 Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order 2 Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order 2 Rule 2 CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in *Murti v. Bhola Ram* and by the Bombay High Court in *Krishnaji Ramchandra v.*

Raghunath Shankar.”

17. Thus, in *Virgo Industries'* (supra) also, Order 2 Rule 2 was held to apply only when a second suit was filed during the pendency of the first suit and not in a situation where an amendment was sought in the existing suit itself, that too when the relief claimed in the amendment was not hit by limitation.

Hence, both the judgments cited by learned counsel are not applicable at all to the case in hand.

18. Coming to the issue of whether the nature of the suit can be changed *per se*, by way of an amendment, even in terms of Order 6 Rule 17 CPC and the proviso thereto.

As already observed hereinafore, no such bar exists to seek such an amendment, if it goes to the root of the dispute between the parties, provided such amendment is sought within the period of limitation and the Court is of the opinion that it would be necessary to fully adjudicate upon the dispute between the parties.

Mr. Salar had stressed on the fact that once the suit had been instituted, then the proviso to Rule 17 would apply, inasmuch as, the nature of the suit could not be changed by way of an amendment after the trial commenced, unless the Court was satisfied that such amendment was sought because the relief sought by the amendment, could not have been included in the suit originally, despite due diligence by the plaintiff.

19. Having considered the aforesaid argument also, I cannot agree with learned counsel, in view of the fact that in the suit out of which the present petition arises, the trial cannot be stated to have commenced, (as is stipulated in the proviso), with even the written statement to the plaint not

having been filed by the petitioners-defendants.

No doubt, they filed an application under Order 7 Rule 11 CPC to which the respondent-plaintiff had filed a reply, stating therein that the suit seeking permanent injunction was maintainable, also further stating that the limitation to file a suit seeking specific performance of the agreement had still not expired, (which as already noticed, learned counsel for the petitioner also very fairly does not deny).

Thus, the amendment having been sought at such a stage, with the trial still to actually commence only upon issues being settled, I see no error in the exercise of jurisdiction by the learned trial Court, in allowing the application for amendment.

20. As to when a trial is deemed to commence in a civil suit, a judgment of the Supreme Court in **Ajendra Prasadji N. Pandey v. Swami Keshav Prakeshdasji N. (2006) 12 SCC 1** can be cited, wherein it was observed as follows:-

“60. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in spite of due diligence. As held by this Court in *Kailash v. Nanhku* the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.”

21. As regards allowing amendments in pleadings to avoid multiplicity litigation and so as to ensure that justice is done, the following paragraph from the judgment of the Apex Court in **State of M.P. v. Union of India (2011) 12 SCC 26** can be referred to:-

“8. The purpose and object of Order 6 Rule 17 of the Code is

to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule, particularly in case where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.”

Hence, in the present case, the plaintiffs' contention being that he was already in possession of the suit property and therefore, initially he had filed a suit seeking permanent injunction, even though it may be doubtful that he had initially intended to file a suit for specific performance, in my opinion, even such doubt does not take away his right to seek an amendment by including thereafter a relief seeking specific performance of an agreement contended to have been entered into between the parties, such amendment not being otherwise barred by limitation.

22. Consequently, in view of the aforesaid discussion, I find no ground to entertain this revision petition, which is therefore dismissed in *limine*.

No order as to costs.

(AMOL RATTAN SINGH)
JUDGE

July 31, 2018.
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Whether speaking / reasoned	Yes
Whether reportable	Yes