

CR No.5472 of 2016 (O&M)

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**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CR No.5472 of 2016 (O&M)

Date of decision:21.05.2018

M/s Nuchem Weir Limited and another ... Petitioners

Vs.

Kamal Bhadana ... Respondent

CR No.6391 of 2016 (O&M)

Kamal Bhadana ... Petitioner

Vs.

M/s Nuchem Weir Limited and another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Adarsh Jain, Advocate
for the petitioner(s) in CR No.5472 of 2016 and
for the respondent(s) in CR No.6391 of 2016.

Mr. Amit Prashar, Advocate
for the respondent(s) in CR No.5472 of 2016 and
for the petitioner(s) in CR No.6391 of 2016.

AMIT RAWAL J.

This order of mine shall dispose of two revision petitions bearing Nos.5472 of 2016 (hereinafter called as “first revision petition) at the instance of petitioner-defendants No.1 and 2 against the impugned order dated 26.05.2016 rendered in civil suit no.94 of 2013 titled as “Kamal Bhadana Vs. M/s Nuchem Weir Limited and another” whereby, an application for amendment of the written statement has been dismissed and 6391 of 2016 (hereinafter called as “second revision petition) at the instance of the respondent-plaintiff against the impugned order dated 10.08.2016

rendered in civil suit no.174 of 2013 titled as “Kamal Bhadana Vs. M/s Nuchem Weir Limited and another”, seeking specific performance of the agreement to sell, whereby, an application under Order 6 Rule 17 of the Code of Civil Procedure (in short “CPC”) for amendment of the written statement, has been allowed.

Occasion for filing of the revision petitions has arisen as both the suits filed by the plaintiff seeking specific performance of the agreement to sell are being tried in different Courts, in other words, one Co-ordinate Civil Judge has allowed the amendment application, whereas, another has dismissed. The facts in brief in both the revision petitions are that respondent-plaintiff instituted the suit seeking specific performance of agreement to sell in question against the petitioner-defendant in first revision petition and respondent-defendant in second revision petition.

During the pendency of the suit, defendants submitted the application for amendment of the written statement seeking leave of the Court for adding preliminary objection no.4, wherein, it was stated that plaintiff was estopped from seeking specific performance because the property in question was mortgaged prior to execution of the agreement to sell in favour of Industrial Financial Corporation of India (IFCI) having paripasu charge. The plaintiff had the knowledge of aforesaid charge but did not disclose the fact to the defendants either in the agreement or orally.

Mr.Adarsh Jain, learned counsel appearing on behalf of the petitioner-defendants in CR No.5472 of 2016 and respondent-defendant in CR No.6391 of 2016 submitted that one Court had allowed the application

for amendment and other Court had dismissed, therefore, as noticed above, two revision petitions. The aforementioned amendment is neither belated nor intentional or willful, for, the factum of mortgage came to the knowledge of the defendants at the later stage. No harm and prejudice would be caused to the plaintiff in case the application for amendment is allowed as the aforementioned piece of objection would be subject matter of the documentary evidence.

On other hand, Mr. Amit Prashar, learned counsel for the respondent in CR No.5472 of 2016 and for the petitioners in CR No.6391 of 2016 submitted that amendment should not have been allowed as it is not in consonance with the amended provisions of Order 6 Rule 17 CPC as no explanation has come forth in not complying with the expression “*despite exercise of due diligence*”. It tantamounts to taking a new stand which is not permissible in law which has seriously prejudiced the right of the plaintiff. Thus, urged this Court for dismissal of the first revision petition and allowing of the second revision petition as the trial Court has committed illegality and perversity in allowing the amendment application.

I have heard the learned counsel for the parties and appraised the paper book. It would be in the fitness of things to extract amendment sought which reads as under:-

“Preliminary Objection No.4*-That the plaintiff is estopped from seeking specific performance of the agreement to sell in question because the property in question is mortgaged much prior to the execution of the above agreement to sell in favour*

of Industrial Financial Corporation of India (IFCI), New Delhi and further Dena Bank, Nehru Ground, NIT Branch, Fardiabad has also paripasu charge on the same as the above financial institutions have advanced loans to the defendants. As the defendants could not pay the loan amount to IFCI under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 it has taken the possession of the property in question and it is under its lock and key. All the above facts are very much in the knowledge of the plaintiff as the defendant disclosed the same before executing the agreement to sell which was pseudo agreement and farce and was never meant to be implemented and materialized. The plaintiff got the agreement to sell made only to secure his amount which was actually loan advance to the defendants. Since the defendants had no choice as they were in dire need of money they had to execute the agreement to sell. But since the property in question is under charge of the above financial institution the plaintiff has no right whatsoever to buy the same by way of said agreement as well as by way of present suit. The plaintiff knew very well that the property in question was under the complete charge and control of the said financial institution, hence, agreement cannot be got specifically performed and at the most a money decree may be passed in case the plaintiff is able to prove that his case. The

suit is thus liable to be dismissed as relief being sought by the plaintiff cannot be granted in view of above factual position.”

From the perusal of the aforementioned amendment sought to be incorporated as preliminary objection no.4, in my view, would not alter the defence or stand taken in the written statement, much less withdrawal of the admission. Technicality should not come in the way of the party to seek amendment as it would help the Court in adjudication of the controversy between the parties to the lis. The amendment sought will always be subject matter of the evidence, for, in the absence of the pleadings the party cannot be permitted to lead evidence. The plaintiff would be at liberty to rebut the aforementioned evidence in case he deems it appropriate but the defendants cannot be prevented for not incorporating the written statement.

Resultantly, the impugned order in first revision petition is hereby set aside and application for amendment of the written statement is allowed. Consequently, the first revision petition is allowed subject to costs of ₹5,000/-.

I do not find any illegality and perversity in the impugned order in second revision petition and the same is hereby upheld. Consequently, the second revision petition is dismissed.

(AMIT RAWAL)
JUDGE

May 21, 2018

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Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No