

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

**Civil Revision No.7535 of 2017
Date of Decision: 17.09.2018**

**M/s Super Ispat Udyog Partnership Firm and others
.....Petitioners
Vs**

**M/s National Steel and Agro Industries Ltd. and others
.....Respondents**

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Aayush Gupta Advocate
for the petitioners.

Mr. Om Pal Sharma, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioners have assailed the orders dated 12.01.2017 and 03.10.2017 passed by the Civil Judge (Jr. Divn.) Ludhiana vide which application under Order 6 Rule 17 CPC was allowed and the parties to the litigation as well as pleadings in issue were changed and the application under Order 9 Rule 7 CPC was dismissed.

[2]. At the time of issuance of notice of motion on 02.11.2017, following order was passed by this Court:-

“Learned counsel for the petitioners contends that there were two distinct firms. One was partnership concern

and the other was a private limited company. The amendment to introduce cause of action in respect of private limited company to be a partnership firm with defendants No.2 to 4 as partners instead of Directors would be totally time barred as cause of action accrued to the plaintiff in respect of partnership firm in the year 2008. The order dated 03.10.2017 is in continuation of order dated 12.01.2017 vide which amendment was allowed in favour of the plaintiff. After the amendment, original defendants kept on appearing through the advocate in new capacity.

Notice of motion for 02.03.2018.

In the meanwhile, trial Court shall adjourn the proceedings beyond the date fixed by this Court.”

[3]. Brief facts of the case can be noticed for appreciating the controversy.

[4]. There were two firms with distinct entities. One was a partnership firm and other was a private limited company. The plaintiffs/respondents sent a legal notice to the private limited company on 07.02.2011. On the basis of said legal notice, the plaintiffs filed a suit for recovery on 22.06.2011. Para No.3 of the plaint is necessary to be quoted hereinbelow:-

“3. *The defendants company through its Directors approached the plaintiffs and purchased the goods on credit basis from the plaintiffs and has been making the part payment towards the same. The defendants company is also a Private Limited Company and is duly incorporated with the Registrar of Companies, Chandigarh. The E-mail*

copy of the same is attached herewith. The defendants No.2, 3 and 4 are the Directors of the Company and are responsible for the day to day affairs of the company and are liable for the same.”

[5]. Perusal of the aforesaid would show that the plaintiffs sought to recover the amount from the private limited company on the basis of business transactions.

[6]. Defendants/petitioners appeared and filed written statement on 24.08.2015. Para No.5 of the written statement is necessary to be quote hereinbelow:-

“5. *That the suit of the plaintiff is false, frivolous and vexatious and has been filed with a malafide motive to harass the defendants. There have been no dealings between plaintiff No.1 and defendant No.1 since 1.4.2006. No material was supplied by plaintiff No.1 company to defendant No.1 company after 23.11.2005. The last supplies of Colour Coated Sheets were made by the plaintiff No.1 company to defendant No.1 company on 23.11.2005 vide Bill No.421 worth Rs.1,33,322/- and Bill No.420 worth Rs.2541/-. The amounts of these bills were paid by defendant No.1 company vide Cheque No.625749 dated 10.12.2005 for Rs.1,28,322/- drawn on Oriental Bank of Commerce, Miller Ganj, Ludhiana and Rs.5000/- were adjusted against the plaintiff No.1 company on account of the amount of Freight. The balance sum of Rs.2541/- was paid*

on 31.3.2006 in cash as the amount was squared up and the accounts were settled. No supply was made by plaintiff No.1 company to defendant No.1 company after 23.11.2005. No amount is due towards plaintiff No.1.”

[7]. Perusal of the aforesaid para would show that the defendants have denied the case of the plaintiffs being false and frivolous. They have pleaded that there was no dealings between the plaintiff No.1 and defendant No.1 since 01.04.2006. No material was supplied by plaintiff No.1 to defendant No.1/Company after 23.11.2005. The last supply was stated to be made to the Company on 23.11.2005 with the details of bills as shown in the aforesaid reply. In pith and substance the defendants/petitioners have denied the allegations of plaint in the written statement.

[8]. The trial Court framed issues on the basis of pleadings of the parties by referring to the parties as impleaded by the plaintiffs. During course of evidence, the plaintiffs examined two witnesses namely N.K. Tyagi as PW-1 and Abhishek Desai as PW-2. During course of cross-examination of PW-1 N.K. Tyagi, factum of Super Ispat Udyog and Super Ispat Udyog Private Limited was admitted to be two different identities. The relevant cross-examination of the aforesaid witness was to the following effect:-

“It is right that Super Ispat Udyog has its head office at Kanganwal Industries Area-C, Ludhiana, which was incorporated on 04.12.1992, having its ROC at Chandigarh, downloaded copy has been produced which is Ex.PX. It is right that Super Ispat Udyog and Super Ispat Udyog Private Ltd., are different firms. I cannot say that whether in our accounts we have the account of Super Ispat Udyog Private Ltd. or not, the reply of the same can be given by the accountant. This thing is not in my knowledge. The Hon'ble Court has directed us to produce the bill of Super Ispat Udyog Pvt. Ltd. and the said bills could not be produced on record and neither the statement of account has been produced on record. It is right that we could not produce on record the bill and the statement of account in the name of Super Ispat Udyog Pvt. Ltd., which is therein the application dated 10.01.2012.”

[9]. On coming to know the aforesaid lacuna in the pleadings of the plaint based on legal notice and the evidence of the witnesses, an application under Order 6 Rule 17 read with Section 151 CPC was filed by the plaintiffs for amendment of the plaint. Vide the amendment, private limited company was sought to be changed with partnership firm.

[10]. With the change of nomenclature of the parties viz.-a-viz. their respective capacities in the private limited company and in the partnership firm, the application for amendment of the plaint came to be filed on 15.11.2016. The application was opposed by the defendants/petitioners on numerous counts.

[11]. The trial Court accepted the application vide the impugned order dated 12.01.2017 and thereafter proceeded against the partners of the partnership firm on the premise that they were already served in the capacity of Directors of private limited company.

[12]. The application filed by the defendants under Order 9 Rule 7 CPC was dismissed by the trial Court vide the impugned order dated 03.10.2017 on the premise that after the acceptance of prayer for amendment, the presence of the defendants was marked on 21.01.2017, 27.01.2017, 02.02.2017, 15.02.2017, 10.03.2017 and 24.03.2017. On 11.04.2017, the counsel for the defendants pleaded no instructions on behalf of the partnership firm and consequently they were proceeded against *ex parte*.

[13]. I have considered the submissions made by learned counsel for the parties.

[14]. The legality of order dated 03.10.2017 would be totally dependent upon the legality and propriety of order dated 12.01.2017 passed by the trial Court vide which amendment in the plaint was allowed. Vide the proposed amendment, the litigating defendants were changed in the context of their status and being Directors of the private limited company to the partners in the partnership firm. The evidence proposed to be

relied by the plaintiffs was relatable and dealing with the affairs of the partnership firm. PW-1 in his cross-examination has admitted the fact that private limited company and partnership firms are two distinct entities in existence. The replacement of parties made by the application for amendment dated 15.11.2016 would bar the cause of action against the partnership firm as the suit was filed on 22.06.2011. The filing of application on 15.11.2016 in respect of cause of action which was to be espoused by the plaintiffs on 22.06.2011 would be hit by limitation as espousing cause of the plaintiffs viz-a-viz. the partnership firm on 15.11.2016 would be the period of limitation of three years.

[15]. The Court has to justify whether the proposed amendment is *bona fide* or not. All *bona fide* amendments are to be allowed and the Court should satisfy itself whether such an amendment is necessary for determination of the real controversy in issue. The potentiality of prejudice likely to be caused to the either side has also to be appreciated. The principles on which amendment can be allowed are summed up in the following manner:-

- a. Whether the amendment sought to be made is imperative for effective adjudication of the matter?
- b. Whether the amendment is *bona fide* or *mala*

fide?

- c. The amendment should not cause such prejudice to the opposite party which cannot be compensated in terms of adequate cost.
- d. Whether the proposed amendment changes the nature and character of the suit?

[16]. As a Rule the Court should reject such amendments, if fresh suit on intended cause of action is barred by limitation on the date of filing of application of such amendment. The provisions are only illustrative and not exhaustive. It is a very serious judicial exercise and should not be undertaken in a casual manner. The Court should not refuse *bona fide* and legitimate amendment but at the same time *mala fide* and dishonest amendment should be refused. The stage of the litigation is also a relevant factor for considering *bona fide* and *mala fide* character of the amendment. The exercise in terms of Order 6 Rule 17 CPC has to be undertaken with great caution and should be exercised very sparingly. In **Revajeetu Builders and Developers vs. Narayanaswami and sons and others, 2010(1) RCR (Civil) 27**, the Hon'ble Apex Court highlighted the aforesaid principles to be followed meticulously.

[17]. In **Mashyak Grihnirman Sahakari Sanstha Maryadit vs. Usman Habib Dhuka, 2013(2) RCR (Civil) 965**, the Hon'ble Apex Court held that if *prima facie* the statement made in the

application for amendment is proved to be incorrect the amendment should be declined.

[18]. The amendment sought by the plaintiffs should not be based on falsehood. Though the amendment at a belated stage cannot be declined, merely because it is sought at the belated stage, but the prejudice in terms of a legal implication cannot be over looked, if the cause of action as on the date of filing of the application for amendment is time barred, then such amendment should be discouraged.

[19]. On the date of filing of the application i.e. 15.11.2016, the cause of action in respect of filing of suit against the partnership firm appears to be beyond the period of three years i.e. the limitation provided for filing the suit for recovery. The rights and liabilities of the parties crystallizes on the date of filing of the suit. The suit having been filed on 22.06.2011 cannot be termed to be a suit filed against the partnership firm, rather the same was filed against the private limited company after issuance of legal notice to it. In the written statement filed by the defendants specific pleadings were made that the private limited company did not transact business after 23.11.2005 and the last supply was made by plaintiff No.1 to defendant No.1/Company on 23.11.2005. The partnership firm was never in picture at the relevant time. It is only by virtue of the proposed amendment on

15.11.2016, the cause of action viz-a-viz the partnership firm is sought to be raked up, which in my considered opinion cannot be raked up by way of proposed amendment as the cause of action *qua* partnership firm has become time barred. Filing of the application for amendment is beyond the period of limitation of three years.

[20]. In view of aforesaid, the order dated 12.01.2017 and 03.10.2017 passed by the Civil Judge (Jr. Divn.) Ludhiana is not legally sustainable and is hereby set aside. As a consequence of the aforesaid, the order dated 03.10.2017 passed by the Civil Judge (Jr. Divn.) Ludhiana is also not legally sustainable as the same was passed only after acceptance of the prayer for amendment of the plaint. Consequently, the said order is also set aside. This revision petition is allowed.

September 17, 2018

Atik

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No