

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

Civil Revision No.8609 of 2017.
Decided on:-February 15, 2018.

Pravin Kumar Budhia.

.....Petitioner.

Versus

Amrit Kumar Budhia (since deceased) through his LRs and others

.....Respondents.

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA.

Present:- Mr. Avnish Mittal, Advocate
for the petitioner.

Mr. H.K. Aurora, Advocate
for respondents No.1(e), 2, 3, 6 and 9(a).

HARI PAL VERMA, J.

The petitioner has filed the present civil revision under Article 227 of the Constitution of India impugning the order dated 09.10.2017 (Annexure P-6) passed by learned Civil Judge (Junior Division), Jalandhar, whereby an application under Order VI Rule 17 read with Section 151 CPC for amendment of plaint filed by the respondent-plaintiffs during pendency of the suit, was allowed.

Briefly stated, the respondent-plaintiffs had filed a suit for declaration to the effect that the parties in the suit are owners in possession of their partitioned share as reflected in the site plans attached with the plaint. An oral family partition was effected between the parties and was acted upon accordingly in the year 1971. Thereafter, the memorandum of partition dated 30.11.1998 of the properties situated at Atma Niwas, Seth Hukam Chand

Colony, G.T. Road, Jalandhar, double storey shop No.859, Bazar Nauhrian-B-III/610/1 situated at Bazar Nauhiran, Jalandhar and three storey house No.NK-202, situated at Malkan Chowk, Charanjit Pura, Jalandhar, were partitioned.

The petitioner-defendant No.1 filed his written statement, wherein it has been admitted that the plaintiffs and defendants are co-owners and are in joint possession of the suit properties, but the site plan so attached with the plaint was denied being incorrect. It has been pleaded that the properties are still joint and no partition by metes and bounds has taken place between the parties. As such, there is joint ownership and possession between the parties to the suit properties. With regard to the execution of the memorandum of partition, it was denied that the suit property was orally partitioned in the year 1971. Regarding execution of memorandum of partition dated 30.11.1998, it was stated that the document is an agreement of partition and the parties mentioned therein have agreed to hold their ancestral properties separately. The terms as agreed in the said agreement have not been acted upon in a legal manner. In fact, there is no partition and division of specific shares between the parties except, the holding of separate properties jointly. The memorandum of alleged partition dated 30.11.1998 has not been lawfully implemented.

The rejoinder to the written statement was filed by the respondent-plaintiffs, wherein the averments made in the written statement were denied. It has been submitted that the petitioner-defendant No.1 is trying

to wriggle out of the memorandum of partition and is also trying to misinterpret it.

After submission of the written statement and the rejoinder thereof, the respondent-plaintiffs had filed an application under Order VI Rule 17 read with Section 151 CPC seeking amendment of the plaint on the ground that so far as defendants No.2 to 4 are concerned, they have agreed to such adjustment, but the petitioner-defendant No.1 is not agreeing to any such adjustment and has specifically claimed the joint status of the properties and has also indicated that without partition by metes and bounds, he does not agree to such adjustment. Therefore, in order to get the dispute settled between the parties for once and all, it has become necessary to seek additional relief of partition by metes and bounds of the properties in question. The act and conduct of defendant No.1, as reflected in his written statement, shows that it is not possible for the plaintiffs and defendants to live together without getting partition of their respective shares, as the petitioner-defendant No.1 is not under control or in agreement with other defendants. Even his own mother, sister and heirs of his brother are not in agreement with him. The petitioner-defendant No.1 is interfering in peaceful possession of the property. Therefore, the only way to settle this entire matter is by way of partitioning the properties by metes and bounds. Thus, the respondent-plaintiffs have sought amendment of plaint after the relief of declaration to the following effect:

“(a) Suit for partition of the properties between the plaintiff and defendants by metes and bounds, partitioning their share as per their lineage and share.

(b) *The suit for permanent injunction restraining the defendant no.1 from interfering into the possession of the plaintiffs over the property in question and in the use of amenities of the plaintiffs in the amenities used by them in the property situate at Atma Niwas, Seth Hukam Chand Colony, GT Road, Jalandhar.*

(c) *In para no.4 of the plaint, the following be added in the end:-*

‘the defendant no.1 has started creating problems for the plaintiff and even other defendants in use and occupation of the property in question and has obstructed its enjoyment. He is not agreeing to the oral family partition and has acted in such a manner that relief of injunction and partition have been necessitated. His threats of not allowing the plaintiffs and defendants to enjoy the property are real and he has already created problem with electric connections and payment of bills with respect to the same. It is not possible to have any jointness with him and plaintiffs thus have decided to partition the property by metes and bound.’

(d) *In para No.7 of the plaint after the word ‘records’ and before the word ‘and’ in the fourth line, the following be added:*

‘And defendant no.1 creating problems for use and occupation of the properties and his denial of oral adjustment and his half hearted admission to the acting upon of the earlier oral partition between heirs of Hukam Chand and further his wrongful obstruction of enjoyment of plaintiffs in the property at Atma Niwas, G.T Road, Jalandhar has given further causes of action.’

- (e) *In para No.8, the following be added after the word 'paid' in the third line and before the word 'which':-*

'and for the relief of partition and injunction at this stage is fixed at Rs.50/- each thus a total court fee of Rs.150/- is liable to be affixed.'

- (e) *In the prayer clause of the plaint, the following be added in the end after the words 'interest of justice', and before the word 'and':-*

'And the relief of partition of the properties between the plaintiff and defendants by metes and bounds , partitioning their share as per their lineage and share be also granted and further the relief of permanent injunction restraining the defendant no.1 from interfering into the possession of the plaintiffs over the property in question and use of amenities of the plaintiffs in the amenities used by them in the property situated at Atma Niwas, Seth Hukam Chand Colony, G.T. Road, Jalandhar be also granted in favour of the plaintiffs and against the defendant No.1.'

The petitioner-defendant No.1 has filed reply to the application filed under Order VI Rule 17 read with Section 151 CPC taking the plea that in case the proposed amendment is allowed, it will lead to setting up of a new case which is altogether different from the pleadings and the relief sought in the previously filed plaint. The proposed amendment will change the nature of the suit. The amendment would change the cause of action, nature of suit, relief and shall be presenting a new case.

Vide impugned order dated 09.10.2017, learned trial Court has observed that the suit was filed for declaration to the effect that the plaintiffs

be declared as owners in possession of their partitioned share and this fact has been admitted by respondent-defendants No.2, 3 and 4 in their written statement, but the petitioner-defendant No.1 has denied the said partition, as submitted in the pre-amended plaint. The civil Court has allowed the application while considering the pleadings and relief as it would avoid multiplicity of litigation between the parties. It was recorded that it will not change the nature of the suit.

Aggrieved against the aforesaid order dated 09.10.2017 passed by learned trial Court, whereby the application under Order VI Rule 17 read with Section 151 CPC filed by the respondent-plaintiffs was allowed, the petitioner-defendant No.1 has filed the present civil revision petition.

Learned counsel for the petitioner-defendant No.1 has argued that the impugned order dated 09.10.2017 passed by the trial Court, whereby the application for amendment of plaint has been allowed, is not legally sustainable as while passing the same, the trial Court has not appreciated the fact that the entire case of the respondent-plaintiffs was that there was a family partition between the parties in the year 1971 and it is on this basis, the suit for declaration was filed so that the same can be incorporated in the record. But by way of present amendment application, the respondent-plaintiffs have claimed partition of the suit properties making out altogether a different case which is beyond the scope of Order VI Rule 17 CPC. Where the amendment changes the basic structure of the suit, such amendment cannot be allowed.

He has further argued that even otherwise, the impugned order is not sustainable for the reason that it is after framing of the issues, the amendment has been allowed by the trial Court. It is a settled principle of law that once the trial has begun, the amendment cannot be allowed. In support of his contention, he has relied upon **2007(1) RCR(Civil) 481** titled as ***Ajendraprasadji N. Pande and another Versus Swami Keshavprakeshdasji N. and others*** to contend that amendment in the pleadings cannot be allowed when the trial has commenced. The trial is deemed to have commenced, when the issues are settled and the case is set down for recording of evidence. Thus after framing of the issues, amendment in plaint is legally not permissible.

He has further argued that the issues in the case were framed on 20.04.2015, whereas the application seeking amendment of the plaint was filed on 15.11.2016. Even affirmative evidence by way of examination-in-chief of the witnesses produced by the respondent-plaintiff has started. So once the case is fixed at evidence stage, whereby examination-in-chief of the plaintiff has already been concluded, the same would result in *de novo* trial and would be an abuse of the process of law. He has also relied upon **2013(2) RCR(Civil) 957** titled as ***S. Malla Reddy Versus M/s Future Builders Cooperative Housing Society and others***; **2012(34) RCR(Civil) 833** titled as ***Sunil and others Versus Jai Prakash and another***; **2014(30) RCR(Civil) 113** titled as ***Ajmer Singh Versus Girdhala and others***; ***Mukesh Kumar Versus Sushil Mittal and others*** **2012(13) RCR(Civil) 110**; **2013(26) RCR(Civil) 934** titled as ***Balvir Singh Versus Jaspal Singh and another*** and **2014(78)**

RCR(Civil) 17 titled as ***Amardeep Singh and another Versus Harbhajan Singh and another.***

On the other hand, learned counsel for the respondents has argued that necessity for filing the application seeking amendment of the plaint has arisen for the reason that in the written statement filed by the petitioner-defendant No.1, he has shown his unwillingness to admit any such site plan showing adjustment and has rather claimed joint ownership and possession between five parties mentioned in the agreement regarding the property. The act and conduct of petitioner-defendant No.1, as reflected in the written statement is as such that it is not possible for the respondent-plaintiffs and the other defendants to live together without having partition of their respective shares. The petitioner-defendant No.1 is creating problems and interfering in the peaceful possession of the suit property. Therefore, it has become necessary for the plaintiffs to seek necessary amendment in the plaint as it would avoid multiplicity of litigation more particularly when the property is joint. As the petitioner-defendant No.1 is not agreeing to the partition, relief of partition of the property between the plaintiffs and defendants by metes and bounds, partitioning their share as per their lineage and share be also granted.

The power of attorney filed on behalf of respondents No.1(e), 2, 3, 6 and 9(a) in the Court today, is taken on record.

I have heard learned counsel for the parties.

There is no dispute that the plaintiffs and defendants are the co-owners and are in joint possession of the suit property, as described in the

plaint and shown in the site plan attached with the plaint. The parties are *inter se* in close relationship. The suit was filed for declaration to the effect that the parties are owners in possession of their partitioned share as per oral family partition effected and acted upon the year 1971. On the basis of this oral partition, memorandum of partition dated 30.11.1998 was affirmed between the parties. It is for the reason that the petitioner-defendant No.1 has disputed the alleged partition, the respondent-plaintiffs have filed the application for amendment of the plaint.

Though learned counsel for the petitioner has referred to ***Ajendraprasadji N. Pande and another's case (supra)*** and has drawn attention of this Court towards para Nos.52, 53, 54 and 57 of the judgment, which are reproduced as under:

“52. We have carefully perused the pleadings and grounds which are raised in the amendment application preferred by the appellants at Ex. 95. No facts are pleaded nor any grounds are raised in the amendment application to even remotely contend that despite exercise of due diligence these matters could not be raised by the appellants. Under these circumstances, the case is covered by proviso to Rule 17 of Order 6 and, therefore, the relief deserves to be denied. The grant of amendment at this belated stage when deposition and evidence of three witnesses is already over as well as the documentary evidence is already tendered, coupled with the fact that the appellants' application at Exh. 64 praying for recasting of the issues having been denied and the said order never having been challenged by the appellants, the grant of the present amendment as sought for at this stage of the proceedings would cause serious prejudice to the contesting respondents τ original

plaintiffs and hence it is in the interest of justice that the amendment sought for be denied and the petition be dismissed.

53. *An argument was advanced by Mr. Parasaran that affidavit filed under Order 18 Rule 4 constitutes Examination-in-Chief. The marginal note of order 18 rule 4 reads recording of evidence. The submission is that after the amendments made in 1999 and 2002 filing of an affidavit which is treated as examination in chief falls within the amendment of phrase recording of evidence.*

54. *It is submitted that the date of settlement of issues is the date of commencement of trial. [Kailash vs. Nankhu & Ors. (supra)] Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination in chief as date of commencement of trial, the matter will fall under proviso to order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter affidavit which proves lack of due diligence on the part of the defendant Nos. 1 and 2 (appellants).*

57. *The above averment, in our opinion, does not satisfy the requirement of Order VI 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 respect of due diligence. As held by this Court in Kailash vs. Nankhu & Ors. (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.”*

But the facts in the case in hand are altogether different. In the cited case, the amendment was sought at a belated stage when deposition of three witnesses was already over and documentary evidence was already tendered. In that case, even recasting of issues was denied and the order, whereby recasting of issues was denied was never challenged by the appellants. But in the case in hand, the amendment sought by the respondent-plaintiffs is not at a belated stage. It is only after framing of issues, the amendment has been sought. Even otherwise, no witness on behalf of the plaintiff has been examined. Though one PW, namely, Pritam Chand was examined as one of the witnesses, but he could not be cross-examined for the reason that he has died. Therefore, this Court finds that the facts stated in ***Ajendraprasadji N. Pande and another's case (supra)*** are altogether different.

Similarly, another judgment cited by learned counsel for the petitioner-defendant No.1 i.e. ***S. Malla Reddy's case (supra)*** has also no applicability in the facts and circumstances of the case. In the cited case, it was held by the Apex Court that the defendants cannot be allowed to resile from the admission made in the written statement by taking recourse to Order VIII Rule 9 or Order VI Rule 16 CPC by seeking to file a fresh written statement. However, in the case in hand, the respondent-plaintiffs have not resiled from the admission made in the plaint. Moreover, except the petitioner-defendant No.1, all other defendants have admitted the factum of partition between the parties. Thus, except the petitioner-defendant No.1, remaining defendants are inclined to honour the earlier partition.

Further, in *Sunil and others' case (supra)* relied upon by learned counsel for the petitioner-defendant No.1, the proposed amendment was sought long after commencement of the trial, but in the case in hand, the proposed amendment has not been sought long after commencement of the trial, rather is sought at an initial stage, when plaintiffs' evidence has virtually not started.

In fact, the very language of Order VI rule 17 CPC shows that in order to determine the real question in controversy between the parties, the amendment of pleadings should generally be allowed. The real controversy between the parties is regarding the respective share, may it be by way of declaration or by way of a partition suit. The amendment allowed is not going to cause any prejudice to the interest of petitioner-defendant No.1. The power to allow amendment in a suit has been considered by the Apex Court in *B.K.N. Pillai Versus P. Pillai 2000(1) RCR(Civil) 511*, wherein it has been held that no doubt the amendment cannot be claimed as a matter of right, but at the same time, the Court should, however, not adopt a hyper-technical approach which dealing with the prayer for amendment. The amendments are allowed in pleadings to avoid uncalled for multiplicity of litigation. The relevant paragraph Nos.2 and 3 of the cited judgment are reproduced as under:

“2. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that

the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt hyper-technical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.

3. This Court in *A.K. Gupta & Sons v. Damodar Valley Corporation*, [1966] 1 SCR 796 held:

‘The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit or new case or cause of action is barred: Weldon v. Neale (1887) 19 QBD 394. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: See Charan Das v. Amir Khan, AIR (1921) PC 50 and L.J. Leach and Company Limited and another v. Jardine Skinner and Company, [1957] SCR 438.

The principal reasons that have led to the rule last mentioned are, first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (Cropper v. Smith, (1884) 26 Ch.D. 700) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in

substance to be already in the pleading sought to be amended in Kishandas Rupchand v. Rachappa Vithoba, (1909) ILR 33 Bom. 644 approved in Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil, [1957] SCR 595.

The expression 'cause of action' in the present context does not mean every fact which it is material to be proved to entitle the plaintiff to succeed as was said in Cooke v. Gill, (1873) 8 CP 107, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corporation Limited, (1962) 2 All ER 24, and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas': Doman v. J.W. Ellis and Company Limited, (1962) 1 All ER 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time.'

Again in Smt. Ganga Bai v. Vijay Kumar & Ors., [1974] 2 SCC 393 this Court held:

'The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court.'

In M/s. Ganesh Trading Company v. Moji Ram, [1978] 2 SCC 91 it was held:

‘It is clear from the foregoing summary of the main rules of pleadings and provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its Counsel is inefficient in setting out its case initially the short coming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.’

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original is was raised or defence taken, Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of

amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.”

Similarly, in ***Rajesh Kumar Aggarwal and others Versus K.K. Modi and others 2006(2) RCR(Civil) 577***, the Apex Court has held that it is mandatory on the Court to allow all amendments which are necessary for the purpose of determining the real questions in controversy between the parties and the Court should not get into the correctness or falsity of the case in the amendment.

Order VI Rule 17 CPC declares that 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 it may be just, and all such amendments should be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Though the proviso does provide that no application for amendment should 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 VI Rule 17 CPC consists of two parts, whereas the first part is discretionary (may) and leaves it to the Court to order amendment of

pleading, the second part is imperative (shall) and enjoins the Court to allow all amendments, which are otherwise necessary for the purpose of determining the real question in controversy between the parties.

Interpreting the scope of amendment of pleadings, the Apex Court in ***Mahila Ramkali Devi and others Versus Nandram (D) through legal heirs and others 2015(5) RCR(Civil) 562*** has held that the Court always gives relief to amend the pleadings of the party, unless it is satisfied that the party seeking amendment was acting with malafide intent or that by his blunder he had caused injury to his opponent, which cannot be compensated for by an order of cost for the reason that the rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. However, the power to grant amendment to pleadings is intended to serve the needs of justice and is not governed by any such narrow or technical limitations.

In the case in hand, since the cause of action has arisen during pendency of the suit i.e. after filing of the written statement, the amendment so granted has not changed the basic structure of the suit as it is merely supplementing the nature of relief claimed. The trial Court in its wisdom has found that the amendment sought for is necessary to decide the real dispute between the parties and the amendment so allowed is not going to cause any prejudice to the petitioner-defendant No.1.

Thus, in view of the discussion made hereinabove and in the light of law laid down by the Apex Court in ***B.K.N. Pillai's case (supra)***;

Rajesh Kumar Aggarwal and others' case (supra) and ***Mahila Ramkali Devi and others' case (supra)*** and also having regard to the fact that the amendment sought by the respondent-plaintiffs is not going to change the nature of relief, and the same was not sought at a much belated stage, rather immediately after framing of issues and before plaintiff's evidence could start effectively, this Court finds that there is no illegality in the impugned order dated 09.10.2017 passed by learned trial Court.

Accordingly, the impugned order dated 09.10.2017 (Annexure P-6) passed by learned Civil Judge (Junior Division), Jalandhar is affirmed and the instant civil revision, being devoid of any merit, is dismissed.

February 15, 2018
Yag Dutt

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned: Yes

Whether Reportable: No