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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CM(M) 1157/2018 & CAV 882/2018 and CM APPL. 39063/2018

CAPITAL LAND BUILDERS PVT LTD & ORS ..... Petitioners

Through: Mr. Viraj Datar, Mr. Vineet Jhanji and Mr. Imran Moulaey, Advocates.

versus

SHAHEED MEMORIAL SOCIETY & ORS ..... Respondents

Through: Mr. Ashish Mohan with Mr. Mukesh Kumar and Mr. Arjun Chowdhary, Advocates for R-1 to R-6 & R-8.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

<u>O R D E R</u>

% **24.09.2018**

<u>CM APPL. 39064/2018 (exemption)</u>

Exemption allowed subject to all just exceptions.

The application is disposed of.

<u>CAV 882/2018</u>

The learned counsel for the caveator is present.

The caveat is discharged.

<u>CM(M) 1157/2018 & CM APPL. 39063/2018</u>

Vide the present petition, the petitioners assail the impugned order dated 14.09.2018 of the learned Trial Court of the ADJ-03, Patiala House Courts, New Delhi in CS No. 57946/2016 by which an application under Order VI Rule 17 of CPC filed by the plaintiff of the said suit seeking to enhance the valuation of the suit by Rs. 3 crores with seeking liberty to quantify the damages at Rs. 3 crores which were not quantified till the date of filing of the application and were sought to be incorporated in the prayer clause in the suit,- was declined, which application was observed vide the impugned order to be devoid of any merits and it was observed to the effect that the claim sought to be brought now for the quantification was barred by time and that the application had been filed after 11 years seeking to quantify the damages which were not so quantified as contended on behalf of the plaintiff inadvertently by mistake observing to the effect that as the plaint was initially submitted it had been contended through the plaint itself that the damages had not been ascertained as on the date of filing of the suit whereas it was subsequently sought to be submitted that the same was only inadvertent mistake. It was also held vide the impugned order that injustice would also be caused to the defendant if the application was allowed after a lapse of 11 years and that the prayer made by the plaintiff was barred by delay and latches.

The plaint as instituted by the plaintiff i.e. the present petitioner is one for injunction and damages filed in the year 2006 in the suit CS(OS) No.1906/2006 with the prayers to the effect:-

> *In view of the aforesaid it is prayed that this Hon'ble court may be pleased to:*
>
> *(b) Issue a Permanent Injunction restraining the Defendants 1-8, their agents and employees from representing and/or holding themselves out to be shareholders of the Plaintiff Company; and*
>
> *(c) Issue a Permanent Injunction restraining the Defendants 1-8, their agents and employees from representing and/or holding themselves out to be Directors, Agents or Authorized Representatives of the Plaintiff*

Company and restrain the said Defendants from in any manner acting for an on behalf of or in the name of the Plaintiff Company or from using the letterheads of the Plaintiff Company; and

(d) Issue a Mandatory Injunction directing the Defendant No- 1-8 their agents, employees and associates to forthwith handover all letter heads and other documents or instruments, stamps and seals created by them bearing the name of the Plaintiff Company or which may otherwise be in their possession and control and direct the destruction of the same: and

(e) Issue a Mandatory Injunction directing the Defendants No. 9 & 10 to forthwith remove from the records maintained with the said Defendant No 9 in relation to the Plaintiff Company all Forms including Form 32 (Annexure- P17), Form 18 (Annexure- P 18), Form 2 (Annexure-P19) and Form 5 (Annexure –P20) and all such other unauthorized filed; and

(f) Issue a Mandatory Injunction directing the Defendant No. 9 & 10 and their successors in office to immediately institute and initiate appropriate proceedings against the Defendants No. 1-8 and against all those who have filed the unauthorized Form 32 (Annexure –P17) Form 18 (Annexure P-18), Form 2 (Annexure- P19,) and Form 5 (Annexure-P20) and in particular proceedings under the provisions of the Companies Act with respect to the falsification of the Plaintiff companies records with the Defendant No 9 by the filing of the various falsified forms as aforesaid or otherwise; and

(g) Issue a Mandatory injunction directing the Defendants No. 1-8 to disclose (i) all transactions entered into by them in the name of the Plaintiff Company and or on it's behalf,

and (ii) details of all Bank Accounts opened by them in the name of the Company; and

(h) Issue an order of Permanent Prohibitory injunction restraining the Defendants 1-8, their servants, agents or assigns from appropriating and/or using any funds or dealing with any assets of the Company including funds wrongfully obtained by them in the name of the Company; and

(i) Award Damages to the Plaintiff Company against the Defendants No. 1-8 and hold the said Defendants jointly and severally liable to pay the same; and

(j) Award costs to the Suit to the Plaintiffs;

(k) Grant all such other reliefs which the Hon'ble Court deems fit and proper in the facts and circumstances of the case be allowed in favour of the Plaintiffs and against the Defendants.

Prayer clause (i) is the relevant clause qua which the application seeking amendment is indicated to have been filed which has already been adverted hereinabove

Vide the application under Order VI Rule 17 of the CPC dated 20.03.2018, the plaintiff sought to amend the para 14 (c) and 14 (d) of the plaint which earlier read to the effect:-

" c) The Damages in the present suit is not an ascertained amount as on date. The plaintiffs undertake to pay adequate court fees on any ascertained Damages found to be due to them during the course of the proceedings in the present case.

"d). The suit is valued for the purpose of Jurisdiction at Rs. 20,05,000/- on which Court Fees of Rs. 21,980/- has been paid."

and sought the amendment to the effect:

The amended Para 14 (c) shall now read as under:

" c). For the relief of Damages the present suit is valued at Rs. 3 crores on which the requisite Court Frees of Rs. 3,00,000/- is affixed thereon;

The amended Para 14 (d) shall now read as under

"d) The Suit is valued for the purpose of Jurisdiction at Rs. 3,20,05,000 on which Court Fees of Rs. 3,21,980/- has been paid"

Through the application as observed by the learned trial Court, the plaintiff sought to submit that it had inadvertently not quantified the damages sought to be recovered from the defendants as prayed for in the plaint. During the course of submissions that have been made on behalf of the plaintiff, it is however submitted that non-quantification of the damages was on the basis of some ill advise and in view of the verdict of the Division Bench of this Court in ***ZUBAIR UL ABIDIN [DR.] & ORS. Vs. SAMEENA ABIDIN @SAMEENA KHAN*** of 214 (2014) DELHI LAW TIMES 340, and observations therein in virtually similar circumstances where the damages had not been quantified, in view of the observations in para 15 of the said verdict on which reliance is placed on behalf of the respondent as well, where it had been observed to the effect:-

"15. The claim for the damages is not such qua which enquiry is to be held nor are the damages claimed such as to which account are to be taken under the orders of the Court. It is for the respondent/plaintiff to quantify the damages claimed and prove the entitlement thereto. ***It was thus incumbent upon the respondent/plaintiff to quantify the damages/compensation for recovery of which the suit was filed and in the absence thereof, no inquiry into the claim for damages can be***

> ***conducted**. Similarly, if the respondent/plaintiff presses the claim for damages, the respondent/plaintiff is also required to value the same for the purposes of Court fees and jurisdiction and which has also not been done. The Counsel for the respondent/plaintiff does not controvert that ad valorem Court fees is payable on the damages so claimed."*

and with the directions in para 18 of the said verdict, which read to the effect:-

> *"18.We therefore allow the appeal. However, since an opportunity has not been given to the respondent/plaintiff as yet to quantify the damages sought to be recovered and to value the suit properly for the same and to pay appropriate Court fees thereon which is necessarily required to be given, we grant fifteen days time to the respondent/plaintiff to so amend the plaint and to pay appropriate Court fees thereon. Needless to state that if the same is not done, the relief claimed for recovery of damages/compensation and the issue framed thereon shall stand deleted."*

whereby an opportunity had been granted to the plaintiff of that suit to quantify the damages sought to be recovered and to value the suit properly for the same and to pay appropriate Court fees thereon which was necessarily to be given for which time was granted with further observations also in the said verdict to the effect that needless to state that if the same was not done, the relief claimed for recovery of damages/compensation would stand deleted, it is submitted on behalf of the plaintiff that pursuant to the verdict of this court as directed in para 18 of the same, it became incumbent on the plaintiff to seek the amendment that it now seeks in the form of quantification of the damages sought through the original suit.

On behalf of the respondents, it has been submitted that in view of the quantification having not been spelt out, the claim made by the plaintiff in the suit for damages would not have succeeded and virtually a new cause of action is now sought to be inserted which is refuted on behalf of the petitioner. *Inter alia*, reliance is placed on behalf of the petitioner on a catena of verdicts to contend that the aspects as to whether the amendments sought would take the suit out of the jurisdiction of the court where the proceedings are pending, and the contention that the relief for amendment made may be time barred, are aspects that cannot be considered at the stage of consideration of the application for amendment.

Reliance has thus been placed on behalf of the petitioner on the verdict of this Court in ***Dr. D.K. Seth vs*** **Dr. Durga Prasad Ray** ***in C.M. (M) 806/2017*** dated 01.08.2017 with specific reference to Section 40 of Specific Relief Act, 1963 to submit that in terms of Section 40 thereof, and the proviso thereto even in the event of no damages having been claimed, the Court can at any stage of the proceedings allow the plaintiff to amend the plaint on such terms as may be just for including such claims. Observations in para 24 of the said verdict read to the effect:-

> *"24. Thought the senior counsel for the petitioner / defendant has argued that there is no judgment on Section 40 supra but I find this Court, in* ***Jagdish Vs. Har Sarup*** *ILR (1978) II Del 266 to have held that t he proviso to sub Section (2) of Section 40 shows that howsoever belated the request for amendment may be and even if the claim put forward by way of amendment is hopelessly barred by limitation, it is the bounden duty of the Court to allow the amendment. The said view was followed in (i)* ***J.K. Churamani Vs. Escorts Ltd.*** *(1989) 39 DLT 380; (ii)*

> ***Singilidevi Veera Venkata Ananthalakshmi Vs. Bhamidipati Seetharamayya*** *2003 SCC OnLine AP 1001; and, (iii)* ***Sunil Kuthiala Vs. Ajwesh Sood,*** *2006 SCC OnLine HP 60."*

vide which there is a reference made to the verdict of this Court in ***Jagdish vs. Har Sarup*** *ILR (1978) II Del 266* to observe to the effect that the proviso to sub Section (2) of Section 40 shows that howsoever belated the request for amendment may be and even if the claim put forward by way of amendment is hopelessly barred by limitation, it is the bounden duty of the Court to allow the amendment.

Reliance was also placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Court in ***CS Company and Ors. Vs. Kerala State Electricity Board*** (1996) 11 SCC 680 to similar effect to contend that the Court at the time of the consideration of the application seeking an amendment in the prayer seeking quantification of damages cannot enter into the domain of consideration as to whether or not the prayer made would be barred by limitation, it having been observed vide para-3 of the said verdict to the effect that:

> ***"3. It is contended for the petitioner that a suit merely for settlement of accounts and declaration that the respondent is entitled to recover damages from the defendant cannot be converted into a suit for damages in particular after the right of recovery is barred by limitation, i.e., a valuable right had accrued to the petitioners. The High Court, therefore, is not right in granting the amendment . We find no force in the contention. It is seen that what is sought to be amended***

in paragraph 8-A and the suit is to recover the quantified amount as damages based upon the original cause of action, namely, the contract referred to hereinbefore. It is seen that the original suit was for settlement of accounts and fastening a liability jointly and severally against all the defendants and the assets and estates. The relief originally sought for also was to declare the liability of the damages to be ascertained and recoverable from them. Thus, it could be seen that as per the original cause of action, the relief now sought for was available in the suit itself. Instead of settlement of account, the respondent is now seeking for damages against the defendant and the damages instead of being ascertained were quantified in paragraph 8-A of the plaint. The amendment does not constitute addition of any new cause of action. The respondent is not introducing any new cause of action nor would it change the cause of action as originally pleaded. Thus, there is neither change of cause of action nor introduction of any new cause of action after the bar of limitation. The High Court was, therefore, right in allowing the petition for amendment of the plaint."

Reliance was also placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Courtin ***Lakha Ram Vs. Balar Marketing Pvt. Ltd.*** (2008) 17 SCC 671 qua the aspect when considering the amendment whether it is to be granted or not, the Court does not go into the merits of the matter and decide whether or not the claim made therein was *bona fide* or not and whether it was for the purpose of taking the matter out of the jurisdiction of the Trial Court where the matter was pending. Reliance is also placed on behalf of the petitioner on the verdict of this Court in ***Arjun Chowdhry Vs. Capital Land Builders & Ors***. in CRP 141/2018 dated 17.07.2018 to the similar effect.

On behalf of the respondent, it has been contended by the learned counsel for the respondent while placing on the reliance on the verdict of the Hon'ble Supreme Court in ***South Konkan Distilleries and Anr. Vs. Prabhakar Gajanan Naik and Ors.*** AIR 2009 SC 1177 to reiterate the contention that the claim made vide the petition now seeking the quantification of the damages would be time barred and thus the prayer made by the petitioner cannot be granted. Reliance has also been placed on behalf of the respondent on the verdict of the Hon'ble Supreme Court in ***Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Ors.*** 2009 (77) ALR 654 with specific reference to observe para 67 of the said verdict which reads to the effect:-

> *"67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.*
> *(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?*
> *(2) Whether the application for amendment is bona fide or mala fide?*
> *(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
> *(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;*
> *(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and*
> *(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."*

It is submitted on behalf of the respondent that it has been categorically laid down that as a general rule, the Court would decline the amendment of if a fresh suit on the amendment claim would be bound by limitation on the date of application and that the aspect of consideration of the application for amendment being bona fide or mala fide is also an essential part of ascertaining the prayer made seeking an amendment.

Undoubtedly, the principles of law as sought to be contended on behalf of the respondent and as laid down by the Hon'ble Supreme Court cannot be refuted.

It is essential to observe however that the plaintiff undoubtedly through the suit filed by the plaintiff as filed initially itself had sought injunction and damages. Setting up of the claim of quantification thus of the damages is apparently essential as laid down by the hon'ble Division Bench of the Court in ***ZUBAIR UL ABIDIN [DR.] & ORS. Vs. SAMEENA ABIDIN @SAMEENA KHAN*** of 214 (2014) DELHI LAW TIMES 340. The aspect of the merits or demerits of the amendment cannot be gone into at this stage. In view of the verdict of the Hon'ble Supreme Court in Lakha Ram *supra*, taking into account that the prayer had also been made seeking damages with a submission further to the effect that the quantum of damages would be ascertained, the submission made now seeking quantification of the damages in terms of the verdict of the Hon'ble Division Bench of this Court cannot be termed to be lacking of *bona fides*.

In the circumstances though undoubtedly there is an undue delay in seeking the prayer made by the petitioner, as apparent from the record, in view of the proceedings dated 08.08.2018 between the same parties in ***CM (M) No. 822/2018***, the plaint instituted on 04.10.2006 has not yet reached the stage of completion of pleadings as on the date 08.08.2018 and has still not reached the same apparently, and thus the amendment to the proviso to Order VI Rule 17 of CPC in view of the factum that issues have not yet been framed would not come into play.

In the circumstances despite the contentions on behalf of the respondent that it would not be open for this Court to consider the correctness or otherwise of the discretion exercised by the learned trial Court with the rejection of the prayer made by the petitioner seeking the amendment to the quantification of the damages, taking into account the verdict of the Division Bench of this Court in ***ZUBAIR UL ABIDIN [DR.] & ORS. (SUPRA)*** and the verdicts relied upon on behalf of the petitioner, it is considered essential and appropriate to set aside the order of the learned Trial Court which had not permitted the amendment prayed for.

However taking into account the delay and laches in the case on behalf of the petitioner seeking to quantify the damages, the amendment sought by the plaintiffs i.e. the petitioners is allowed subject to payment of cost of Rs. 80,000 to be paid to the respondent before the learned Trial Court.

The petition is disposed of accordingly.

ANU MALHOTRA, J

SEPTEMBER 24, 2018

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