220

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No.5263 of 2016
Date of Decision: 01.04.2019

Bharat Bhushan ......Petitioner

Vs

Jatinder Kaur and another ....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Sunil Chadha, Sr. Advocate with
Mr. Chetan Bansal, Advocate
for the petitioner.

Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Vaibhav Sehgal, Advocate
for respondent No.1.

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RAJ MOHAN SINGH, J.

[1]. Petitioner/plaintiff No.1 has preferred this revision petition against the order dated 12.07.2016 passed by the Civil Judge (Jr. Divn.) Ludhiana vide which the application filed by the plaintiffs for amendment of the plaint was dismissed

[2]. Brief facts are that the plaintiffs filed a suit for possession by way of specific performance of agreement to sell dated 06.04.2005 in respect of the suit land. The suit was decreed by the trial Court vide judgment and decree dated 16.05.2013 against which an appeal was preferred before the

lower Appellate Court. The lower Appellate Court vide judgment and decree dated 20.01.2016 accepted the appeal, thereby setting aside the judgment and decree dated 16.05.2013 passed by the trial Court and remanded the case back to the trial Court with a direction to provide an effective opportunity to the parties to lead evidence on the additional issue to be framed by the trial Court and thereafter reappraise the evidence and decide the suit afresh within a period of six months from the date fixed before the trial Court i.e. 15.02.2016. While deciding the appeal, the lower Appellate Court recorded the following observations in para No.18, 21 and 22 of its judgment:-

> *"18. He further contended that under these circumstances, the point of non-maintainability of the suit has not to be considered by the Ld. Lower Court and the questions needs consideration as it goes to the root of the case and in case, the plaintiffs have not sought the relief for declaration regarding the termination of the agreement by the defendants and forfeiture of the earnest money, then the suit becomes non-maintainable and has to be dismissed. An issue can be framed even at this in view of Order 41 Rule 25 CPC, where it is laid down as follows:-*
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> *"Where the court from whose decree the appeal is preferred has omitted to frame or try and issued or to determine any question of fact which appears to the appellant Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required." He further contended that the following issues should be framed "Whether the suit of the*

plaintiffs is maintainable for specific performance of the agreement to sell dated 06.04.2005 in view of the termination of the agreement by the defendants vide notice dated 17.01.2006 without seeking declaration to challenge the said termination of the agreement and forfeiture of the earnest money."

21. The contentions of the two sides are that the pleadings are the very foundations of the case of a party and it is the pleadings from which the Courts are supposed to frame the issues between the parties and the Order 14 Rule 01 of the CPC lays down that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other and further holds out that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue and Order 14 Rule 01 (4) categorizes broadly issues to be of fact and of law and Order 14 Rule 03 of the CPC clarifies the material from which issues may be framed and in this case two material contentions and issues have arisen in the written statement of the defendants, whereby they have set up a plea that plaintiffs breached the terms and conditions of the agreement to sell dated 06.04.2005 and the earnest money paid by them stands forfeited, it was the bounded duty of the learned Trial Court as has been argued by the two sides to have frame the issues over the question of the termination of agreement dated 06.04.2005 has been framed and the factum of the legality of the Judgement and Decree has been left out and as such, the material issues pertaining to the agreement dated 06.04.2005 alleged to have been executed by the defendants and, thus, reflects that there has been non framing of essential issues, which could comprehensively determine the rights of the parties to this lis having regard to the fact that these are material points which needs to be freshly adjudicated and would have its bearing on the outcome of other issues as well and it is not by mere framing of issues by this Court in terms of Order 41 Rule 25 of the CPC additional evidence could be adduced on these issues and rather it is a situation where a comprehensive *determination of the issues necessitating recording of fresh evidence is essential and a retrial is very much necessary and, therefore, having taken into consideration immense prejudice that has been caused to the parties in this suit. As such, the matter has not been finally and effectively adjudicated, between the parties, due to omission of framing of proper issues. Therefore it is held that the lower court has not framed the proper issues in the present suit which has occasioned a serious miscarriage of justice.*

22. In the light of framing of the additional issue, which has been omitted, at the earlier stage, it is appropriate to give an opportunity, to the parties concerned to lead evidence, upon the same and the matter be re-adjudicated, in the light of the evidence, so coming forth. As such, the appeal is hereby accepted and the impugned judgment and decree dated 16.05.2013 is set aside and the suit is remanded back to the learned Lower Court with the direction to provide an effective opportunity to the parties concerned to lead evidence on the additional issue, to be framed by the trial Court and thereupon, re-appraise the evidence and decide the suit afresh within a period of six months, from the date fixed before the trial Court i.e. 15.02.2016. The parties are directed to make appearance, before the learned Lower Court on 15.02.2016. Lower Court record be returned well before the date fixed along with copy of this judgment. File be consigned to the record room."

[3]. After decision of the lower Appellate Court on 20.01.2016, the plaintiffs immediately filed an application under Order 6 Rule 17 read with Section 151 CPC for amendment of the plaint on 25.02.2016. The said application was contested by the respondents on the premise that on the date of filing of the application, the cause of action viz.-a-viz. the proposed amendment seeking to incorporate challenge to the factum of

cancelling the agreement to sell by notice dated 17.01.2006 was barred by limitation.

[4]. Learned Senior counsel for the petitioner submitted that the case titled '***I.S. Sikandar by LRs vs. K. Subramani and others, 2014(1) R.C.R. (Civil) 236*** was decided by the Hon'ble Apex Court in the year 2013. The factum of cancellation of agreement to sell by way of notice dated 17.01.2006 in the pleadings was sought to be incorporated and precisely for the aforesaid reasons, the lower Appellate Court in para No.18 of its judgment observed that an additional issue can be framed and in para No.21 of its judgment, the lower Appellate Court has observed that it was the duty of the trial Court to have framed the necessary issues over the question of termination of agreement to sell dated 06.04.2005. The material issues in respect of cancellation of agreement to sell was required to be framed. The case was remanded to the trial Court for framing the necessary issues and then to decide the controversy afresh. In view of findings recorded by the lower Appellate Court in para Nos.21 and 22, the additional issues are to be framed by the trial Court. It is a settled principle of law that for leading evidence there has to be a foundation in terms of pleadings. Therefore, for leading evidence on the issues to be framed in the context of cancellation of agreement to sell by means of

notice dated 17.01.2006, necessary pleadings are required to be incorporated.

[5]. Learned Senior counsel by relying upon decision dated dated 28.07.2006 passed in ***CR No.2933 of 2015*** titled '***Arun Kumar and another vs. Ishro Devi and others***' further submitted that the implication of the ratio as rendered by the Hon'ble Apex Court in ***I.S. Sikandar by LRs'*** case (supra) has to be pleaded in terms of pleadings. The amendment has been declined primarily on the ground of limitation. In the instant case, the lower Appellate Court has remanded the case to the trial Court for framing additional issues and thereafter the evidence has to be led by the parties. For leading evidence, foundation in terms of pleadings is required to be made.

[6]. On the other hand, learned Senior counsel for the respondent No.1 sought to argue the case on the strength of ***K. Raheja Constructions Ltd. vs. Alliance Ministries & Ors., 1995(3) RRR 425***, ***Voltas Limited vs. Rolta India Limited, 2014(3) R.C.R. (Civil) 378***, ***Revajeetu Builders & Developers vs. Narayanswamy & Sons, 2010(1) R.C.R. (Civil) 27***, ***Amrit Lal Vij vs. Jalandhar Improvement Trust, Jalandhar and others, 2008(3) R.C.R. (Civil) 164***, ***Ajendraprasadji N. Pande & Anr. vs. Swami Keshavprakeshdasji N. & Ors. 2007(1)***

R.C.R. (Civil) 481 and ***Khushi Ram vs. Murli Manohar Thatheran Panchayati Mandir and Dharamshala Society, 2010(1) R.C.R. (Civil) 967*** and submitted that the amendment should not be allowed after commencement of the trial and the proposed amendment is barred by law. A valuable right accrued in favour of the defendants would be defeated in case of acceptance of application for amendment of the plaint.

[7]. Learned Senior counsel further submitted that the cause of action in respect of challenge to the notice has become time barred as on the date of filing of the application, the cause of action accrued to the plaintiffs on the date of issuance of notice dated 17.01.2006. The filing of application at this belated stage would amount to defeat the accrued right in favour of the defendants.

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

[9]. Perusal of the record would show that the suit filed by the plaintiffs was decreed by the trial Court. It was only in the appeal filed by defendant No.2, the same was allowed and the case was remanded back to the trial Court with a direction to frame necessary issues on the strength of ratio of ***I.S. Sikandar by LRs*** case (supra). The lower Appellate Court for the first time

thought it necessary to direct the trial Court to frame necessary issues in the context of challenge to the notice dated 17.01.2006. Since the issues are to be framed by the trial Court on the basis of remand order, therefore, for framing of issues both the parties would lead evidence. For leading evidence, the foundation in terms of pleadings is necessary. The cause of action accrued in favour of the plaintiffs cannot be defeated as there was no such precedent earlier to passing of '***I.S. Sikandar by LRs*** case (supra). Cause of action for amendment in question accrued in favour of the plaintiffs only after the decision in the aforecited case.

[10]. It is a settled principle of law that all *bona fide* amendments are to be allowed. An amendment in the pleadings is to be liberally construed so as to consider real controversy between the parties and to give the verdict more satisfactorily. The proviso to the Rule to some extent curtails absolute discretion of the Court to allow amendment at any stage, however knowledge and diligence are the considerations on which bona fides of the party has to be tested in order to prevent frivolous applications for amendment. The object of the Rule is that the Court must try the merit of the case and allow all amendments which may be necessary for determination of real controversy between the parties. In this regard reference can be made to ***Ramchandra Sakharam Mahajan vs. Damodar Trimbak***

Tanksale (Dead) and ors. (2007) 6 SCC 737 **and** ***Rajesh Kumar Aggarwal Vs. K.K. Modi, AIR 2006 SC 1647*****.**

[11]. Order 6 Rule 17 CPC is in two parts. First part is discretionary and leaves it to the Court to order amendment in the pleadings. Second part is imperative and enjoins the Court to allow all amendments which are necessary for determining real issue between the parties. The first condition for the amendment is that it should not be unjust and result in prejudice against the opposite party and could not be compensated in terms of cost or would deprive the opposite party for a valuable right which has accrued to him with the passage of time. The second condition is that the amendment should be perceived by the court to be necessary for just decision of the case. All amendments are to be allowed which satisfy the aforesaid two conditions. Amendment can be refused, if such a prayer is barred by time or where the opposite party would suffer irreparable loss which could not be compensated in terms of cost(s). The Court can allow the amendment at any stage of proceedings for the purposes of determining real issues between the parties. The whole object of the provision is to avoid multiplicity of litigation, however no such amendment should be allowed which may result in material prejudice to the opposite party and is not capable of being compensated in terms of cost(s).

[12]. In ***Abdul Rehman and another vs. Mohd. Ruldu and others, 2012(4) RCR (Civil) 481***, the Hon'ble Apex Court has held

that the power to allow amendment is wide enough to be exercised at any stage of the proceedings in the interest of justice. The basic purpose of allowing the amendment is to minimise the litigation. However, the relief which has become time barred cannot be inserted by way of amendment. The power of amendment should be exercised in the larger interest for doing full and complete justice to the parties and it should be allowed, if the same subserves the cause of justice and avoids further litigation. The original provision was deleted by the Amendment Act 46 of 1999, however it was again restored by the Amendment Act 22 of 2002, wherein a proviso was added to prevent application for amendment after the trial has commenced, unless the Court is satisfied that inspite of due diligence, the parties could not have raised the matter before the commencement of trial. The proviso to some extent curtails absolute discretion of the Court to allow the amendment at any stage. If the application is filed after commencement of the trial, it has to be shown that inspite of due diligence, it could not have been filed earlier. The object of the Rule is that the Court should try the merits of the case for determining the real issue between the parties, provided it does not cause prejudice to the opposite party. The power to allow the amendment is wide and can be exercised at any stage of litigation. The principles were reiterated by the Hon'ble Apex Court in ***J. Samuel and others vs. Gattu Mahesh and others, 2012(1) RCR (Civil) 903***.

[13]. However, it is equally important to see that the amendment can be allowed before the commencement of trial and not after that in routine manner. It is the primary duty of the Court to decide as to whether the amendment sought after commencement of the trial goes to the roots of the case or the same is malafide. The proviso inserted by way of amendment has to be meticulously followed and the Court should allow the amendment before the commencement of the trial. The proviso of Order 6 Rule 17 CPC has been couched in a mandatory overtone. In ***Vidyabhai and others vs. Padmalatha and another, 2009(1) RCR (Civil) 763*****,** the Hon'ble Apex Court while relying upon ***Baldev Singh vs. Manohar Singh, 2006(3) RCR (Civil) 844*****,** ***Kailash vs. Nanhku and ors., (2005) 4 SCC 480*****,** and ***Rajesh Kumar Aggarwal's*** case (supra) has reiterated the aforesaid facts. However, the jurisdiction of the Court to allow amendment has to be based on the condition precedent that it must come to the conclusion that in spite of due diligence, the parties could not have raised the matter before commencement of the trial.In a way conditional reservoir exists in the form of due diligence, if the party is sufficiently prevented from raising the matter before commencement of the trial. The restriction provided by the proviso is an embargo on the exercise of jurisdiction by the Court. Thus, unjust jurisdictional fact, as envisaged therein is found to be existing, the Court will have no jurisdiction to allow amendment in the plaint.

[14]. The amendment cannot be declined solely on the

ground of its being delayed. In ***Salem Advocate Bar Association vs. Union of India, 2005(3) RCR (Civil) 530*** and ***Surinder Kumar vs. Makhan Singh, 2010(1) Apex Court Journal 78*** has held that the discretion under Order 6 Rule 17 CPC is an unfettered discretion conferred upon the Courts to allow amendment in the pleadings on such terms and conditions as it appears to the Court to be just and proper. The delay in making the application for amendment cannot be a ground to refuse the same. The Court must do full and complete justice between the parties subject to payment of adequate cost(s) to the party opposite, if no prejudice beyond repair is caused to the opposite party. The Hon'ble

Apex Court held in the aforesaid manner while relying upon ***B.K.N. Pillay vs. P. Pillay, (2013) CCC 165, Supreme Court.***

[15]. Since the application under Order 6 Rule 17 CPC was filed primarily on the ground of challenge to the notice dated 17.01.2006 for cancellation of agreement to sell, therefore, an exception can be made in the instant case to bring the same out of the purview of the precedents as cited by learned Senior counsel for respondent No.1.

[16]. For the reasons recorded hereinabove, I deem it appropriate to accept this revision petition, thereby allowing the plaintiffs to amend the plaint for incorporating the challenge to the notice of termination of agreement to sell and forfeiture of

the earnest money. Consequently, the impugned order dated 12.07.2016 passed by the Civil Judge (Jr. Divn.) Ludhiana is set aside. Normal consequences to follow.

April 01, 2019 **(RAJ MOHAN SINGH)**
Atik **JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No