

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

1. Civil Revision No. 6578 of 2014 (O&M)

DATE OF DECISION : November 27, 2019

Balbir Singh and others

..... PETITIONER(S)

VERSUS

Harmanjeet Singh and another

.... RESPONDENT(S)

2. Civil Revision No. 614 of 2015 (O&M)

Balbir Singh and others

..... PETITIONER(S)

VERSUS

Rajinder Singh and another

.... RESPONDENT(S)

CORAM : HON'BLE MR. JUSTICE SANJAY KUMAR

Present: Mr. H.S. Bedi, Advocate, for the petitioners.
Ms. Rakhi Sharma, Advocate, for respondent No.1 (in both petitions).
Mr. Karanveer Singh, Advocate, for
Mr. J.S. Toor, Advocate, for respondent No.2 (in CR-6578-2014).
Mr. Manveer Singh, Advocate, for
Mr. Sanjeev Soni, Advocate, for respondent No.2 (in CR-614-2015).

Sanjay Kumar, J.

Arising out of interlocutory orders passed in the same suit, these two revisions are amenable to disposal by way of this common order.

The petitioners in these cases are the same. They are the defendants in the Civil Suit bearing old Case No. CS/2506951/2009, which is presently on the file of the learned Civil Judge (Junior Division), Amritsar (hereinafter, 'the trial Court'). The said suit was originally filed by late Rajinder Singh and after his death, Harmanjeet Singh, his son, was brought on record as his legal representative.

This suit was filed for a mandatory injunction directing the defendants to remove the machinery and the furnace/Bhathi, which was installed by them in the basement of the residential house bearing No.5124-25, situated at Gali No.2, Habibpura, Sultanwind Road, Amritsar. A permanent injunction was also sought restraining the defendants from doing any kind of commercial work/business in the said basement through use of the machinery and the furnace/Bhathi. A consequential mandatory injunction was also sought directing the defendants to fill in/demolish the unauthorized basement constructed by them.

An interlocutory application was filed in the suit by the original plaintiff under Order 39 Rules 1 and 2 CPC seeking a temporary injunction restraining the defendants from doing any kind of commercial work/business in the basement through use of machinery and the furnace/Bhathi till the disposal of the suit. By order dated 26.04.2014, the trial Court granted an interim injunction as prayed for. Aggrieved thereby, the defendants preferred an appeal under Order 43 Rule 1 CPC in CM No.182 of 24.05.2014 before the learned Additional District Judge, Amritsar. By order dated 02.12.2014,

the appellate Court confirmed the injunction granted by the trial Court and dismissed the appeal. Aggrieved thereby, the defendants filed CR-614-2015 before this Court under Article 227 of the Constitution.

The defendants filed an application in the suit under Order 6 Rule 17 CPC seeking to amend their written statement. Thereby, they wanted to add additional lines in para-6 of their original written statement. The additional lines read as under :-

'As already stated above, the area where the property of the plaintiff and the replying defendants is located is a semi-residential and semi-commercial i.e. mixed area and the people living in the locality are carrying defendants since long ago So far as, the commercial activity being credit out by the replying defendant is concerned, the competent authority has already issued certificate under the relevant provisions of the law that the said small business activity does not cause any pollution of any kind, whatsoever, neither coal nor any other fuel is burnt for carrying on the small business activity by the replying defendants. Only an electric even is used to heat the metal straps to soften their hardness for the purpose of easy rolling in the rolling machine. Neither there is any kind of noise nor any kind of emissions of gases in the said process. Further, on account of rising of the height of the road with the passing of number of years, the original floor level of the house of the defendant no.1 and his wife Smt. Surinder Kaur bearing no.5124/39 (New No.10040/XVI-39), and 5125/39 had become lower than the present level of the road by more than 2 ft. and as the rainy water used to frequently enter the ground floor of the said house, the defendant no.1 and his wife namely Smt. Surinder Kaur had to affect repair and renovation of the said house. In that repair and renovation, the ground level of the area covered under porch and shop, has been raised by 1 ft. and 6 inches that the present level of the road, while the remaining area of the road on the rear of the porch and the shop has been allowed to

remain of the same original level. After the completion of the repair and renovation of the said house, the competent authority of Municipal Corporation, Amritsar has issued the No objection Certificate in respect of the building bearing H. No.5124/39 (New No.10040/XVI-39) and 5125/39, located in street No.3, Habib Pura, Sultanwind Road, Amritsar. A correct layout cum building plan of the property has been separately filed in this Hon'ble Court.'

By order dated 13.08.2014, the trial Court dismissed their application. Aggrieved thereby, they filed CR-6578-2014 before this Court under Article 227 of the Constitution.

By order dated 25.09.2014 passed in CR-6578-2014, this Court directed the trial Court not to pass the final judgment in the suit.

The zimni orders filed by the defendants, vide CM-2177/CII-2016, demonstrate that the issues in the suit were framed by the trial Court on 26.04.2014 while the amendment application under Order 6 Rule 17 CPC seems to have been filed by them in July, 2014. The zimni order dated 17.07.2014 refers to the fact that the application under Order 6 Rule 17 CPC was already filed by the defendants and records that the matter was adjourned to 23.07.2014 for filing of a reply thereto. It is well settled that framing of issues marks the commencement of the trial [see **Kailash V/s Nanhku (2005) 4 SCC 480** and **Ajendraprasadji N. Pande and another V/s Swami Keshavprakeshdasji N. and others 2007 AIR (SC) 806 : 2006 (12) SCC 1**]. That being so, the *proviso* to Order 6 Rule 17 CPC would come into play and the defendants necessarily had to demonstrate that despite due diligence on their part, they could not have raised the pleas which were subject matter of the amendment application before commencement of the trial. This *proviso* was added in the statute book w.e.f. 01.07.2002, vide Act

No.22 of 2002, and the defendants *per se* had to comply with this requirement. The defendants cannot claim ignorance of the requirement of this *proviso*, but the application filed by them demonstrates that not even a reference was made to any circumstance which prevented them from seeking amendment of their written statement prior to commencement of the trial. It may be noted that the averments in the additional lines now sought to be introduced refer to certain existing factual aspects, which would have been within the knowledge of the defendants even at the time of the filing of the written statement and they necessarily had to explain as to why they did not seek amendment of their original written statement before commencement of the trial, in terms of the legal position obtaining after 2002.

In **Revajeet Builders and Developers V/s Narayanaswamy and Sons [2009(4) SCC (Civil) 37 : 2009(Supp) AIR (SC) 2897]**, the Supreme Court observed that the decision on an application made under Order 6 Rule 17 CPC is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. The principles which ought to be taken into consideration while allowing or rejecting an application for amendment were set out as under:-

- '(1) Whether the amendment sought is imperative for proper and effective adjudication of the case ?
- (2) Whether the application for amendment is *bonafide* or *malafide*?
- (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.'

Earlier, in **Baldev Singh V/s Manohar Singh [2006 AIR (SC) 2832 : 2006(6) SCC 498]**, the Supreme Court observed that the Court should be liberal in allowing amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. However, this case pertained to a situation prior to amendment of Order 6 Rule 17 CPC and therefore the *proviso* thereto, which was introduced in the year 2002, did not fall for consideration.

In **Sushil Kumar Jain V/s Manoj Kumar [2009 AIR (SC) 2544 : 2009 (14) SCC 38]**, the Supreme Court observed that amendment of a plaint and amendment of a written statement would not be governed by the same principles as adding a new ground of defence or substituting or altering a defence would not raise the same problem as adding, altering or substituting a new cause of action. Reference was made to the earlier judgment in **Baldev Singh (supra)** and **Usha Balasaheb Swami V/s Kiran Appaso Swami [2007(2) RCR (Civil) 830]**. The Supreme Court noted that it is equally well settled that in the case of amendment of a written statement, the Court would be more liberal in allowing it than amendment of a plaint, as the possibility of prejudice would be far lesser. As regards the *proviso* to Order 6 Rule 17 CPC, the Court held that the *proviso* would not have any application as the issues had not been framed, documents had not been filed and evidence had not been adduced.

In **Rajkumar Gurawara (Dead) Thr. L.Rs. V/s M/s. S.K. Sarwagi and Co. Pvt. Ltd. and another [2008 AIR (SC) 2303]**, the Supreme Court observed that Order 6 Rule 17 CPC confers jurisdiction on

the Court to allow either party to alter or amend his pleadings but pre-trial amendments are to be allowed more liberally than those which are sought after commencement of the trial. The question of prejudice to the opposite party may arise and in such event, it would be incumbent on the part of the Court to satisfy itself that the conditions prescribed in the *proviso* to Order 6 Rule 17 CPC are established.

In **Vidyabai V/s Padmalatha [2009 (2) SCC 409 : 2009 AIR (SC) 1433]**, the Supreme Court observed that the *proviso* to Order 6 Rule 17 CPC is couched in a mandatory form and the Court's jurisdiction to allow an amendment application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to the conclusion that in spite of due diligence the party could not have raised the matter before commencement of the trial. This principle was reiterated thereafter in **Salem Advocate Bar Association V/s Union of India [(2005) 6 SCC 344]** wherein the validity of the *proviso* to Order 6 Rule 17 CPC was upheld.

In **J. Samuel and others V/s Gattu Mahesh and others [2012 (2) SCC 300 : 2012 AIR SC (Civil) 811]**, the Supreme Court observed that due diligence in the context of the *proviso* to Order 6 Rule 17 CPC is the idea that duly diligent efforts are a requirement for a party seeking to use an adjudicatory mechanism to obtain an anticipated relief. The term 'due diligence' was stated to determine the scope of a party's constructive knowledge and claim and is very critical to the outcome of the suit. Earlier, in **Chander Kanta Bansal V/s Rajinder Singh Anand [(2008) 5 Supreme Court Cases 117]**, the Supreme Court opined that 'due diligence' means diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. Noting that

the words 'due diligence' were not defined in the Code of Civil Procedure, 1908, the Supreme Court observed that 'due diligence', in law, means doing everything reasonable but not everything possible as it would mean reasonable diligence – meaning to say, such diligence as a prudent man would exercise in the conduct of his own affairs.

Significantly, in **Amar Ujala Publications V/s Rajiv Prashar [2010(4) PLR 472]**, a learned Judge of this Court observed that for the purpose of determining the real question between the parties, an amendment can be allowed in the pleadings prior to commencement of the trial but if a party seeks amendment after commencement of the trial, it has to prove that in spite of due diligence, the matter sought to be incorporated in the pleadings could not be raised earlier. The learned Judge further observed that it would not suffice for a party to seek amendment by just mentioning in the application that in spite of due diligence the matter could not be raised before commencement of the trial and some causes and reasons have to be given.

Though Shri H.S. Bedi, learned counsel, would point out that the additional lines now sought to be added in para-6 of the written statement also advert to a 'No Objection Certificate' which was issued by the municipal authorities after the filing of the original written statement, he does not deny the fact that no separate application was filed by the defendants under Order 8 Rule 1-A(3) CPC to receive the said certificate as an additional document. It appears that a set of 26 documents was straightway filed by the defendants along with their application under Order 6 Rule 17 CPC. Some of these documents date back to prior to the original written statement, which was filed on 26.04.2013, while others are of later origin. In any event, without a proper application being filed under Order 8 Rule 1-A(3) CPC, none of these

documents could be taken on file by the trial Court. Without the documents actually being placed before the trial Court by way of a proper application, mere reference to the Certificate dated 20.05.2014 issued by the municipal authorities is of no legal consequence. So is the case with the consent letter dated 30.10.2013 issued by the Environmental Engineer, Regional Office, Punjab Pollution Control Board, Amritsar.

Thus, on grounds more than one, the amendment application filed by the defendants warranted dismissal. The order passed by the trial Court holding to this effect was therefore fully justified and does not brook any interference in revision. Hence, CR-6578-2014 is devoid of merit.

Insofar as CR-614-2015 is concerned, the trial Court recorded cogent reasons for granting interim relief by way of a temporary injunction pending disposal of the suit. Irrespective of whether the activity by the defendants was being carried out in the basement or otherwise, the fact remains that they were actually indulging in commercial activity. The report of the local commission appointed by the trial Court *prima facie* showed that there was unauthorized construction by the defendants and they were carrying on commercial activity by installing machines. The trial Court therefore held that the balance of convenience tilted in favour of the plaintiff and that permitting the defendants to carry on such commercial activity/business through use of machines and a furnace/Bhathi would cause irreparable loss to the plaintiff, which could not be compensated in terms of money. This was the basis on which the trial Court granted a temporary injunction.

In appeal, the learned Additional District Judge, Amritsar, affirmed the factual findings recorded by the trial Court. The appellate Court

noted that at the stage of granting relief under Order 39 Rules 1 and 2 CPC, the Court only had to examine the *prima facie* case and not resolve the merits thereof. The appellate Court further noticed that the defendants were blowing hot and cold in relation to the date of construction and the plaintiff had *prima facie* established that the area in question was a residential one. The appellate Court accordingly found no illegality or infirmity in the order of the trial Court granting temporary relief and dismissed the appeal.

Shri H.S. Bedi, learned counsel, would contend that when the main relief sought in the suit was a mandatory injunction for removal of the machinery/business by the defendants, the trial Court ought not to have granted the main relief by way of an interim order. This Court is not persuaded to agree. Reference in this regard may be made to the recent judgment of the Supreme Court in **Dr. Syed Afzal (Dead) through LRs and others V/s Rubina Syed Faizuddin and others [Civil Appeal No.8447-49 of 2019 dated 04.11.2019]**, wherein the Supreme Court affirmed the settled legal position that the civil Court is not powerless and can grant an interim mandatory injunction also. Reference in this regard was made to the earlier judgment in **Dorab Cowasji Warden V/s Coomi Sorab Warden and others (1990) 2 SCC 117]**. Therefore, the trial Court was justified in and fully empowered to grant what was in the nature of an interim injunction, which partook the nature of the main relief sought in the suit. When the plaintiff *prima facie* established that the defendants had resorted to unauthorized construction and the use of a furnace/Bhathi for commercial purposes, that too without requisite permission, sufficient grounds were made out for grant of interim relief. The discretion exercised by both the Courts below in this regard does not warrant interference in revision as the

defendants are not in a position to point out any jurisdictional error or factual irregularity in the grant of the temporary injunction. CR-614-2015 is therefore found to be equally without merit.

On the above analysis, this Court finds no grounds to interfere in either of these cases. The orders under revision are accordingly confirmed and both the civil revisions are dismissed.

There shall be no order as to costs.

November 27, 2019
Kang

(Sanjay Kumar)
Judge

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No