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

Decided on: 19th July, 2019

+ **CM(M) 1069/2019**

JAMNA DASS

..... Petitioner

Through: Mr. Praveen Agrawal, Advocate.

versus

AKASH DRALL

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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CM APPL. 31942/2019(*exemption*)

Exemption allowed, subject to all just exceptions.

The application is disposed of.

CM(M) 1069/2019 & CM APPL. 31943/2019

1. The petitioner/defendant is aggrieved by an order dated 12.11.2018 in suit no. CS 17739/2016 by which ADJ-02, (South West), Dwarka Courts, New Delhi has dismissed an application for an amendment of the written statement made under Order VI Rule 17 of the Code of Civil Procedure, 1908 (hereinafter, "the CPC").

2. The suit filed by the respondent/plaintiff was for recovery of the sum of ₹30,00,000/-. In the original written statement filed by the respondent on 04.08.2011, the defendant *inter alia* averred as follows:-

“5-6 That the contents of para No. 5 to 6 of the present suit are wrong and false hence denied. It is further denied that on defendant’s repeated requests and relying upon defendant words regarding defendants undisputed absolute ownership and considering defendant bonafide need to sell the land in question, plaintiff had agreed to purchase the same in a total sale consideration of Rs.90,00,000/- (Rupees Ninety Lacs only) and in this regard the plaintiff and defendant have executed an agreement to sell dated 12-3-2007. The defendant humbly submitted that he never at any point of time execute any agreement with the Plaintiff and the document filed by the Plaintiff as annexure herewith is procured document:

It is wrong and denied that on 12-3-2007, the plaintiff had paid a sum of Rs.30,00,000/- (Rupees Thirty Lakh Only) to defendant as earnest money out of total sale consideration of Rs.90,00,000/- (Rupees Ninety Lakh only). It is denied that the defendant had received the same as Rs.18,00,000/- (Rupees Eighteen Lacs) in cash. The defendant humbly submitted that the document produced by the Plaintiff alongwith the present suit as annexure-c is completely fabricated document.

It is further submitted that the defendant has taken personal loan @ Rs.12,00,000/- (Rupees Twelve Lacks only) from the Plaintiff through two separate cheques of Rs.6,00,000/- (Rupees Six Lack only) each bearing No. 609053 and 502417 dated 12.3.2007.

7. That the contents of Para No. 7 of the present suit under reply are admitted to the extend that the defendant took a personal loan of Rs.12,00,000/- (Rupees Twelve Lacks only) from the Plaintiff rest of the para are wrong hence denied. ”

(Emphasis Supplied)

3. Subsequently, after evidence had commenced before the Trial Court, the petitioner moved an application for amendment of the written statement, seeking to amend the above two paragraphs in the following manner:-

“3. That the following the words may kindly be added at the end of para no. 5-6 of parawise reply;

“that the above mentioned cheques were never encashed and thus no amount stands transferred from the plaintiff to the defendant. The copy of statement of account of the defendant is annexed and marked as annexure ‘A-1’”.

4. That the following the words may kindly be added at the end of para no. 7 of parawise reply;

“that the above mentioned cheques were never encashed and thus no amount stands transferred from the plaintiff to the defendant”.

(Emphasis Supplied)

4. The delay in making this application has been sought to be explained by stating that the fact that the cheques in question were never encashed by the respondent came to the knowledge of the petitioner only when he made an application to his banker seeking statements of his accounts.

5. The application has been dismissed by the Trial Court with following observations:-

“20. The position in law is well settled that the amendment of pleadings particularly, written statement is on a liberal footing than the plaint. But the present application is hit by the proviso of the Order VI Rule 17 CPC. The amendment ought to fail, as the issues were framed on 23.08.2016 and thereafter the trial commenced and the plaintiff (PW3) has been cross-examined by the Ld. counsel for the defendant.

21. The present application shall fail, as the same lacks bona fide. The defendant in paragraph 7 of the application has averred that the very fact of the cheques not being encashed and the money not being transferred came to the knowledge of the defendant very recently when the defendant moved an application with his banker seeking statement of his bank account.

22. Further, the request letter dated 26.04.2018 by the defendant to the concerned bank states that the defendant needs the account statement of year January 2007 to January 2008 for income tax purposes. It is pertinent to mention herein that the cross-examination of the plaintiff (PW3) was concluded on 17.04.2018 and it was subsequent to the conclusion of the cross-examination of the plaintiff (PW3), the defendant filed a request letter dated 26.04.2018 with his banker and the ground cited in the said request letter is that the defendant needs it for income tax purposes. The defendant purports to gain knowledge about the encashment of cheques from the receipt of the bank statement post the request letter dated 26.04.2018 and whereas, the defendant in his written statement filed on 04.08.2011 in paragraph 5-6 and paragraph 7 (Para-wise reply) has admitted receipt of Rs.12,00,000/- (Rupees Twelve lakhs only) as personal loan from the plaintiff.

23. The present application shall also fail, as the defendant by way of the proposed amendment intends to denude the very admission of fact that the defendant had taken a personal loan of Rs.12,00,000/- (Rupees Twelve lakhs only) from the plaintiff.

24. This court also observes that the application moved by the defendant under Order VI Rule 17 CPC is bereft of any plausible explanation about the non-production of the bank statement. In case the facts were in the knowledge of the defendant at the time of filing the written statement, no satisfactory explanation has been forthcoming by the defendant for not introducing those pleadings at the initial stage. Therefore, the amendment sought should fail on this count.

25. This court observes that the captioned suit is over 5(five) year old matter i.e. 8 years before trial court and at the stage of plaintiff's evidence and thus, this court deems it appropriate to dismiss the application moved by the defendant seeking amendment of the written statement under Order VI Rule 17 CPC at the stage of trial with costs of Rs.7,500/- (Rupees Seven thousand and five hundred

*only). The said cost of Rs.7,500/- (Rupees Seven thousand and five hundred only) is to be deposited by the defendant with **Delhi Child Welfare Fund**, A/c No. 30269984245, State Bank of India, I.P. Estate, New Delhi within a period of 15(fifteen) days from today. ”*

6. It is submitted by learned counsel for the petitioner that the amendments sought were merely clarificatory in nature, as the original written statement does not contain any averment regarding the encashment of the cheques. The fact that the cheques were not encashed, having come to the knowledge of the defendant only recently, it is submitted that the Trial Court ought to have permitted the amendment. Learned counsel urged that the denial of the defendant's application has the effect of emphasizing procedural provisions over the substantive justice of the matter.

7. I am not persuaded by the aforesaid submission. The suit is already almost 10 years old. The written statement was filed about 7 years before the application was made for amendment. By this time, the suit had progressed to the stage of petitioner's evidence. The proviso to Order VI Rule 17 of the CPC, inserted by the 2002 amendment, clearly requires the Court to examine whether a proposed amendment, sought after commencement of trial, is belated despite due diligence of the party. Only if the party is able to show that the amendment could not have been sought prior to commencement of trial, despite such diligence, would the amendment be permissible. The Supreme Court in *M. Revanna vs. Anjanamma & Ors.*, (2019) 4 SCC 332 has explained the effect of the proviso to Order VI Rule 17 in the following terms:-

“7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6

Rule 17 CPC virtually prevents an application for amendment of pleadings from being 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 the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money.”

8. In the present case, while the defendant has submitted that he acquired knowledge of the facts sought to be pleaded from his banker only recently, he has not established that such information could not have been acquired earlier. The requirement of the due diligence is not satisfied merely by saying that the information was received late, unless it is shown that timely attempts to acquire the information were either impossible or unsuccessful. In my view, the Trial Court has rightly held that the present application was not justified in terms of the proviso to Order VI Rule 17 of the CPC.

9. There is another good reason for the denial of the application. The original written statement contains clear admissions that the sum of ₹12,00,000/- was “taken” by the defendant from the plaintiff through two cheques as a personal loan. The amendment, inasmuch as the defendant now seeks to plead that these cheques were never encashed, in fact, is

directly contrary to the said admission. When it is pleaded that an amount of money has been “taken” by the defendant by means of cheques, it is implicit that the cheques were encashed. To permit an amendment with the consequences of a party retracting from an admission made in pleadings is not permissible. Reference may be made to *Modi Spinning & Weaving Mills Co. Ltd. vs. Ladha Ram & Co.*, (1976) 4 SCC 320, wherein it was held as follows:-

“10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court.”

The argument of learned counsel, that the amendment is merely clarificatory, therefore, cannot be accepted.

10. The judgments of the Supreme Court, including in *Revajeetu Builders and Developers vs. Narayanaswamy and Sons & Ors.* (2009) 10 SCC 84, clearly lay down the parameters within which amendments can be granted, which are reproduced below:

“63. On critically analysing 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.*

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

In the present case, the withdrawal of the admission made in the Written Statement would certainly cause prejudice to the plaintiff, which cannot be compensated in costs. The nature and character of the defendant's defence would stand fundamentally altered. The present application, therefore, does not satisfy the parameters for grant of leave to amend, and has rightly been rejected by the Trial Court.

11. For the reasons aforesaid, this petition is dismissed. However, it is made clear that the observations contained in this order will not prejudice the parties at the trial of the suit, which will be decided in accordance with law.

PRATEEK JALAN, J.

JULY 19, 2019

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