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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 5th July, 2019

Pronounced on: 6th August, 2019

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CM(M) 335/2018 & CM APPL. 11256/2018

PRADEEP BHARDWAJ

..... Petitioner

Through: Mr. Mukul Gupta, Senior Advocate
with Mr. Udayan Srivastava, Advocate.

versus

INDIAN BANK & ORS

..... Respondents

Through: Mr. Manish Sharma, Advocate for R-
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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. This petition under Article 227 of the Constitution of India is directed against an order dated 13.02.2018, passed by the Additional District Judge, Central-04, Tis Hazari Courts, Delhi in Suit No.9737/2016 by which the application of the petitioner/defendant No.3 under Order VI Rule 17 of the Code of Civil Procedure, 1908 ["CPC"] for amendment of the written statement was dismissed.

Facts

2. The suit was filed on 25.11.1991 [originally in this Court] for recovery of the loan amount of ₹7,80,000/- (approximately). The

written statement was filed on 17.05.1995 and issues framed by an order dated 11.03.1996. The plaintiff's evidence was thereafter recorded and concluded on 11.07.2003. The suit was thereafter transferred to the Trial Court, after which the evidence of some of the defendants has also been recorded.

3. It is at this stage, on 01.08.2017, that defendant No.3 made the application under consideration for amendment of the written statement. The contention of defendant No.3 in the application was that the proposed amendments were required in order to give details of the securities which have been placed by the defendant No.3 with the plaintiff-bank in relation to the loan in question. The application was opposed by the plaintiff *inter alia* on the ground of delay.

4. By the impugned order, the Trial Court has rejected the application for the following reasons:

“The issue raised by the defendant against the plaintiff is that the documents were signed on blank paper. No issue was framed that whether the plaintiff bank need to adjust such and such amount from the security lying with the plaintiff bank. However the plaintiff bank has raised the issue of entitlement of principal amount in the suit. The plaintiff bank has mentioned about the life insurance policies, Demand promissory note and securities in the plaint itself filed on 14.11.1991, therefore, the opportunity was available with the defend to plead the facts as he seeks to file in the present application. Defendant no. 3 has failed to show how he failed to plead the said facts earlier. Though, it is the duty of the plaintiff to bring the entire record of the security taken by it on the alleged loan. In the present matter the defendant is not making fresh claim and seeking adjustment of security available with the defendant for satisfaction of

claim of the plaintiff. However the defendant no. 3 could have made the said claim earlier and had opportunity to cross-examine the witnesses of the plaintiff on the above aspect. At this belated stage, it is held that the present application is not maintainable when the matter is at the stage of the DE only for more than seven years. The trial cannot be left at the hands of the parties on their chance filing more so in view of the fact that Hon'ble High Court has given specific direction on the administrative side for disposal of 10 years old cases in early matter. Hence, the present application of the defendant no. 3 stands dismissed. The defendant still has opportunity to bring evidence in defence as per his pleadings. Last opportunity is given to the defendant to bring the entire DE on 24.03.2018 failing which the opportunity to lead the DE stand closed."

Submissions

5. In support of the petition, Mr. Mukul Gupta, learned Senior Advocate argued that the amendment of the written statement was intended only to clarify the nature of the securities which were available with the plaintiff and in fact ought to have been disclosed in the plaint itself. Mr. Gupta submitted that the amendment was required to ensure complete adjudication of the controversy between the parties. He relied upon the judgment of this Court in *Shilwanti Kewal Ramani vs. Balram Saini* (CM(M) Nos. 1932-33/2005, decided on 10.08.2007) to submit that an amendment which does not cause injustice or prejudice to the other side ought to be readily allowed.

6. Mr. Manish Sharma, learned counsel for the respondent supported the judgment of the Trial Court principally on the ground of delay. Following the amendment of Order VI Rule 17 of the CPC in

the year 2002, Mr.Sharma submitted that an amendment of pleadings after the commencement of the trial can be permitted only if the Court is satisfied that the party seeking the amendment was unable to make the application prior to commencement of the trial despite due diligence. Mr.Sharma relied upon the judgments of the Supreme Court in *Revajeetu Builders and Developers vs. Narayanaswamy and Sons & Ors.* (2009) 10 SCC 84 and *Vidyabai & Ors. vs. Padmalatha & Ors.* (2009) 2 SCC 409 in support of his submission. He also cited judgments of this Court in *Sonia Mehra vs. Manisha Rawat* 2015 (152) DRJ 396 & *Subhash Chand Sethi vs. J.K. Jain* 224 (2015) DLT 33.

Analysis

7. Having heard learned counsel for the parties, I am of the view that the belated amendment sought by the defendant No.3 has rightly been disallowed by the Trial Court. The provision of Order VI Rule 17 of the CPC as amended is set out below:

“17. Amendment of Pleadings.- *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 may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

Provided that no application for amendment shall 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.”

8. It is clear from the proviso that the requirement of due diligence applies whenever a party seeks to amend its pleadings after the commencement of the trial. The general principles governing amendment come into play only if the party is able to cross this threshold requirement.

9. As held by the Supreme Court *inter alia* in *Mohinder Kumar Mehra vs. Roop Rani Mehra & Ors.* (2018) 2 SCC 132, the proviso reflects the legislative intention towards avoiding unnecessary delay in disposal of suits by reason of belated applications for amendment of pleadings. The importance of proviso to Order VI Rule 17 of the CPC has also been stressed in the judgments of this Court in *Sonia Mehra* (supra) and *Subhash Chand Sethi* (supra) relied upon by the respondent. The Supreme Court's judgment in *Vidyabai* (supra) characterizes the requirement of the proviso as a jurisdictional condition. The observation of the Court in paragraph 10 of the judgment is as follows:

“10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:

“Provided that no application for amendment shall 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.”

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence

the parties could not have raised the matter before the commencement of the trial.”

10. The requirement of “due diligence” has been explained in *Chander Kanta Bansal vs. Rajinder Singh Anand* (2008) 5 SCC 117.

The relevant paragraph is as follows:-

“16. The words “due diligence” have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word “diligence” means careful and persistent application or effort. “Diligent” means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), “diligence” means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. “Due diligence” means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) “due diligence”, in law, means doing everything reasonable, not everything possible. “Due diligence” means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.”

11. In the present case, the application under consideration was filed by the defendant No.3, twenty six years after the suit was filed, twenty two years after the written statement and more than twenty years after issues were framed. The application, insofar as it relates to delay, contains the following averments:

“2. That the Defendant no. 3 had placed on record its written statement jointly with the other defendants, however the applicant after having engaged the new counsel, has come across various facts and circumstances

which were inadvertently not within the understanding/knowledge of the defendant, but are important to adjudicate the real questions in controversy between the parties.

3. That the applicant has been diligently pursuing the present matter, despite the other defendants being ex-parte, and has been in constant touch with his lawyers. However, due to some inadvertent error and in spite of due diligence of the defendant No. 3, the same could not be pleaded before. The facts as are being sought to be pleaded by way of the present amendment are necessary for deciding the real dispute between the parties.

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5. That the amendments as mentioned herein above are necessary for the adjudication of the real questions/controversy between the parties and the same couldn't be pleaded earlier by the defendant despite due diligence on his part."

12. The aforesaid averments are wholly inadequate to support a plead of due diligence of the nature required. The transaction between the parties was a business transaction and it is expected that parties would have exercised due care at the time of filing their pleadings. To assert more than two decades later that a new counsel has been engaged or that the application is necessitated by inadvertence and lack of understanding or knowledge on the part of the defendant is simply not enough. The application fails to demonstrate any exercise of diligence on the part of defendant No.3. In the written submissions filed before this Court, the petitioner [defendant No.3] has further stated that it was only after the son of the defendant No.3 himself became a lawyer and started handling the matter did the aforesaid

circumstances come to light. Unfortunately, the fortuitous circumstance that the suit has remained pending for this length of time and the son of the petitioner has since been enrolled as an advocate also cannot serve to carve out an exception to the general rigour of the proviso to Order VI Rule 17 of the CPC.

13. The judgment of this Court in *Shilwanti Kewal Ramani* (supra) relied upon by Mr. Gupta is of little assistance as it does not turn on the question of a belated application, to which the proviso to Order VI Rule 17 of the CPC applies. The application of the defendant No.3 in the present case has been rejected not on a consideration of the generally liberal approach to an amendment but on the question of delay itself. The proviso to Order VI Rule 17 of the CPC does not appear to have been an issue in the said judgment, wherein it has been held that mere delay cannot be a ground for refusing a prayer for amendment. However, even in such a situation, the Court held that pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof.

14. The judgment of the Supreme Court in *Usha Balashaheb Swami & Ors. vs. Kiran Appaso Swami & Ors.* [2007] 5 SCC 602 relied upon in the written submissions filed by the petitioner is also inapplicable as the Court has expressly noticed [in paragraph 17 of the judgment] that the proviso to Order VI Rule 17 of the CPC was not applicable in that case as the trial had not commenced. Similarly, in *Andhra Bank vs. ABN AMRO Bank N.V. and Others* (2007) 6 SCC 167, also cited in the written submissions, the Supreme Court has not

adverted to the proviso to Order VI Rule 17 of the CPC. The facts narrated in the said judgment do not indicate that trial had commenced in the suit in that case. The observations of the Supreme Court that delay alone cannot defeat an amendment application are therefore not applicable to the present case.

15. The facts of the present case, and the abovementioned grounds relied upon in the application under consideration, do not satisfy the test of due diligence under the proviso to Order VI Rule 17 of the CPC.

Conclusion

16. In the aforesaid facts and circumstances, the petitioner has failed to make out any ground for interference with the impugned order under Article 227 of the Constitution of India. The petition is dismissed, along with the pending application.

AUGUST 06, 2019
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PRATEEK JALAN, J.