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

Reserved on: 25th July, 2019

Pronounced on: 02nd September, 2019

+ **CM(M) 1307/2016**

SURESH JAIN

..... Petitioner

Through: Mr. V.P. Rana & Ms. Pooja
Wason, Advocates alongwith
Petitioner in Person.

versus

MANDEEP SINGH BATRA & ORS

..... Respondents

Through: Mr. S.C. Singhal, Advocate.
Mr. T.S. Nanda, Advocate with
R-2 & 3.
SI Ranbir Singh, PS Nangloi.

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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 has been filed by the plaintiff in Suit No. 68103/2016, challenging the order dated 18.11.2016, passed by the ADJ-07 (West), Tis Hazari Courts, Delhi, by which the plaintiff's application for amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure, 1908 [hereinafter referred to as "the CPC"], was dismissed.

2. The suit in question was filed, originally in this Court, on 11.08.2008 with the following prayers:

“30. Having regard to what has been stated hereinabove, it is therefore prayed that this Hon'ble Court may be pleased to

a) pass a decree of declaration that plaintiff is and continue to be the owner in possession of the suit Property being land admeasuring 1000 Sq. Yds. in Khasra No. 56/3 in Village Mundka, Delhi

b) pass a decree of Declaration that ownership rights claimed by the defendant no. 1 vide Sale Deed dated 26.2.1996 registered as Document no. 3265 do not confer any rights upon him in respect of land in Khasra No. 56/3 in Village Mundka, Delhi;

c) pass a decree of permanent prohibitory injunction thereby restraining defendant 1 to 3 from interfering with the possession of the plaintiff in any manner whatsoever.

d) pass a decree for Rs. 2,00,000/- towards damages/ losses suffered by the plaintiff on account of removal of machinery / raw material from the suit Property illegally and unauthorisedly @ Rs 50,000/- p.m. from April 2008 till July 2008. i.e. till filing of suit.

e) pass such other or further orders as this Hon'ble Court may deem appropriate in the facts and circumstances of the case.”

3. At the first hearing of the suit, while issuing summons, this Court appointed a Local Commissioner at the instance of the plaintiff to find out the present status of the property, the nature of construction existing thereon, and to ascertain who is presently in occupation and use of the same. The relevant extract of the order of this Court dated 13.08.2008 is as follows: -

“During the course of arguments, learned counsel for the plaintiff states that a Local Commissioner may be appointed to find out the present status of the property, the nature of construction existing thereon and, who is presently in occupation and use of the same. Ms. Shalini Kappor, Advocate (Mobile No.9810160155), who is present in the Court, is appointed as the Local Commissioner to visit the property today itself. She shall take photographs and for which she will be entitled to take help of a photographer and submit a report indicating the present status and nature of construction on the property and who is in actual physical possession of the same. Local Commissioner will be paid a sum of Rs.12,000/- plus out of pocket miscellaneous expenses by the plaintiff.

Till the next date of hearing, parties will maintain status quo with regard to possession, nature and status of the property including construction existing thereon.”

4. Pursuant to the said order, the Local Commissioner visited the suit premises on 13.08.2008, and filed a report dated 28.01.2009. As far as the possession of the suit premises is concerned, the Local Commissioner reported as follows:-

“9. The aforesaid three men were joined by two more persons namely, Sh. Gulab Singh and Narender Singh [seen in photograph 6(a)], during the proceedings. These persons informed the undersigned that Sh. Rajesh Saini has been staying in the suit premises since four months; Sh. Lal Singh has been staying since three months; Sh. Narender Singh has been staying since three days and Sh. Gulab Singh has been in the suit property since one month and Sh. Sandeep Prajapati since four months. Sh. Rajesh Saini informed that he was an employee of Sh. Mandeep Singh Batra, who was however, not present at the spot. These men were shown and given a copy of

the order, but they refused to accept the same. Sh. Rajesh Saini immediately started calling up people. These men were explained the directions of the Hon'ble Court and for what purposes, the undersigned was visiting the suit premises.

10. Sh. Surinder Kumar the driver of Santro Car, informed the undersigned that he is an employee of Sh. Suresh Jain and he has been staying in the suit premises, since 4-5 months.

11. S/Sh. Lal Singh and Narender Singh made statements, which were recorded in their own handwritings and form part of the on-the-spot proceedings, which is marked as ANNXURE A. Sh.Lal Singh stated that he had no knowledge about this land. Sh. Narender Singh had stated that he had come only two days prior to the Commission and he had no knowledge about the possession or ownership of either of the parties. Sh. Rajesh Saini refused to make any statement. The other men also refused to make any statement regarding the ownership as they informed that they were not aware as to who is the owner of the suit premises.

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16. From the above, it cannot be concluded with certainty as to who is in possession i.e. whether the Plaintiff or the Defendant and since when.”

5. Evidence in the suit commenced on 27.04.2011, when an affidavit in evidence was tendered by the plaintiff.
6. The injunction application filed by the plaintiff, alongwith certain subsequent applications under Order XXXIX Rule 2A of the CPC were considered by this Court in an order dated 22.07.2013. The Court has specifically recorded the contention of the defendant no.1 that, as on 13.08.2008, it was the defendant no.1 who was in

possession of the suit property. It is in this context that the Court has recorded the following observations: -

“14. The above submissions have been considered. The central issue is as to who was in possession of the suit property on 13th August 2008 when LC visited the suit property pursuant to the orders passed by the Court. The LC’s report states that it could not be concluded with certainty as to who was in possession and since when. At the time of the LC’s visit, the Plaintiff was not present at the suit property. He joined the LC on her way to the site. Although in para 10 of the LC’s report, the driver of the Santro car informed the LC that he was an employee of the Plaintiff and had been staying there for about four to five months, the fact remains that he too reached the suit property only at the time of the LC’s visit. Therefore, there is nothing to clearly indicate that the Plaintiff was in possession on the date of the LC’s visit. What is clear, however, is that the men inside the suit property who were found to be the men of Defendant No. 1 and the LC noticed that they were preventing the Plaintiff from entering the suit property. This is apparent from paras 7 and 8 of the LC’s report. The question is not whether Defendant No. 1 had illegally entered into possession but whether in fact was in possession on that date. It is obvious that the Plaintiff had earlier been in possession of the suit property but was kept out of it and at the time of the LC’s visit it was the men of the Defendant No.1 who were found there. This explains why the locks put on some of the rooms still remained and could be opened only by the Plaintiff whereas he could not open locks of certain other rooms.

15. The present application under Order XXXIX Rule 2-A CPC has been filed by the Plaintiff in February 2011, nearly 2 years after the status quo passed by the Court. If Defendant No. 1’s men were in possession even on 13th August 2008 then it is not surprising that they continued to be in possession when the Plaintiff visited

the suit property thereafter. The status quo order dated 13th August 2008 effectively meant that Defendant No. 1 would not part with possession or induct any third party into the suit property or alienate, transfer it or create any third party rights. None of this is shown to have happened. The mere shifting of certain moveable articles from a portion of the suit property or removal of certain articles cannot be construed as a violation of the said order. In a period of two years there is bound to be some shifting of movable articles within or outside the suit property.

16. For the above reasons, the Court is not satisfied that the status quo order dated 13th August 2008 has been violated by the Defendant No. 1 as has been alleged by the Plaintiff in I.A. No. 4165 of 2011.

17. Counsel for Defendant No. 1 has made a statement that status quo will strictly be maintained in terms of the orders dated 13th August 2008, i.e., the Defendant No. 1 will not part with possession of the suit property, alienate, transfer or create any third party rights in it during the pendency of the suit. The electricity meter now installed in the name of the Defendant No. 1 in the suit premises would not be removed. The said statements are placed on record and Defendant No. 1 is bound by them. As and when the suit is finally decided, an appropriate order in regard to the said electricity meter will be passed.”

7. The plaintiff's appeal against the said order dated 22.07.2013 was dismissed as withdrawn by the Division Bench order of this Court dated 08.08.2014.

8. It is at this stage that the plaintiff filed the application under consideration under Order VI Rule 17 of the CPC seeking an amendment in the prayer clause by addition of an additional relief to the following effect: -

“(cc) as an alternative relief it is most respectfully prayed that in case after trial the Plaintiff is not found in possession of the suit property, a decree of possession in favour of the Plaintiff and against defendants No. 1 to 3 may kindly be passed thereby directing the defendants No. 1 to 3 to handover the peaceful and vacant physical possession of the suit property to the Plaintiff; ”

9. In the application for amendment of plaint, the plaintiff has reiterated the contention in the plaint that he was in possession of the suit premises, which had been forcibly taken over by the defendant no.1. It is his contention that the status of the possession of the suit property, as determined by the order of this Court dated 22.07.2013, was a result of the forcible takeover of possession by the defendant no.1. The following averments in the application under consideration are relevant for this purpose:

“11. That though factually and as per admission of the defnat plaintiff has been in possession, however, after grant of Status-quo plaintiff stopped used of property. On the other hand defendant took advantage of absence of plaintiff and violated order of status-quo by placing certain articles in the suit property which led to the filing of contempt petition by the plaintiff. Contempt petition was dismissed vide order dated 22.07.2013 and after being unsuccessful in the appeal by the Plaintiff against the order dated 22.07.2013, it has become necessary for the Plaintiff to seek the relief of possession also as an alternative relief. It is submitted that the Ld. Judge while deciding contempt proceedings has opined on the basis of repot of Local Commissioner that at-least at the time of visit of L.C., the Plaintiff was out of possession and possession of the defendant may be illegal but the Plaintiff was out of possession on the said date.

12. That the amendment of the plaint seeking addition of alternative prayer for recovery of possession from defendant No.1 has been necessitated due to observation made by ld. Judge in the order dated 22.07.2013.

13. That the Plaintiff bonafidely has averred in the plaint that he was running a factory in a built-up premises and this averment has not been disputed but still the defendant No.1 claimed possession without averring as to how became into physical possession of the suit property.

14. That the relief of possession was not included in the plaint as he was in possession of the suit property and since after removal of machines, raw materials and goods etc. by the police, it was apprehended that physical possession may also be taken over by the defendant No.1 with the help of police, therefore, relief of permanent injunction was also sought. The Ld. Judge while deciding the contempt application vide order dated 22.07.2013 has also categorically held that since three men obstructed the entry of the Plaintiff on the date of visit of Local Commissioner, so on that basis, the Ld. Judge has said that on that day the defendant No.1 was in possession.

15. That the said observation made by the Ld. Judge, though is without any evidence, will certainly come in the way of the Plaintiff during the course of the trial of the suit and at the time of final disposal. In case based on evidence, it is found that Plaintiff was able to prove his possession, but as per observation of the Hon'ble Judge, possession of the defendant on 13.08.2008 can be held and in that eventuality relief of possession cannot be granted to the plaintiff at the final stage in the absence of prayer for possession in the suit. Otherwise also if the defendant No.1 has been able to enter into the suit property being trespasser, he is liable to be evicted on the suit of the Plaintiff.

16. That this relief of possession as an alternative relief could not have been sought and was not sought in the

original suit as for all bonafide reasons, it is the Plaintiff who was in possession. After order dated 22.07.2013 when Ld. Judge held that the defendant No.1 is in possession, the Plaintiff has stopped visiting the suit property and therefore, relief of possession has also become necessary to be sought in the peculiar facts and circumstances of the present suit.”

10. The application was opposed by defendant no. 1, and was dismissed by the impugned order of the Trial Court. The Trial Court held that the plaintiff sought the amendment only in the year 2015, whereas the report of the Local Commissioner was in existence since 2008, and came to the conclusion that the plaintiff had failed to show due diligence as required under the proviso to Order VI Rule 17 of the CPC, in order to amend a pleading after the commencement of trial. The Trial Court has also come to the conclusion that the plaintiff is setting up a new case in the garb of amendment.

11. I have heard Mr. V. P. Rana, learned counsel for the petitioner, and Mr. S. C. Singhal, learned counsel for the respondent no.1 (defendant no. 1 in the suit).

12. Order VI Rule 17 of the CPC provides as follows: -

“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.”

13. The general principles governing the exercise of discretion under Order VI Rule 17 of the CPC are well settled. Upon a consideration of the authorities on the subject, the Supreme Court, in *Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors.* (2009) 10 SCC 84, has formulated the following guidelines in this regard: -

“Factors to be taken into consideration while dealing with applications for amendments

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”

14. The proviso to the rule, inserted by the Code of Civil Procedure (Amendment) Act of 2002, lays down an additional precondition which a party seeking amendment must satisfy, in order for an amendment to be allowed after the commencement of trial; in such a situation, the litigant must satisfy the Court that he could not have sought the amendment despite the exercise of due diligence. The effect of the amendment has been explained by the Supreme Court in *Chander Kanta Bansal vs. Rajinder Singh Anand* (2008) 5 SCC 117, thus: -

“13. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

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15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of “due diligence” the party could not have raised the matter before the commencement of trial depending on

the circumstances, the court is free to order such application.”

Further, the Supreme Court in the recent judgment of *M. Revanna vs. Anjanamma*, (2019) 4 SCC 332, clarified the effect of the amendment to Order VI Rule 17, with regard to exercise of due diligence, as follows: -

“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.”

15. The requirement of due diligence by an applicant, with regard to the proviso to Order VI Rule 17 of the CPC, has been explained by the Supreme Court in paragraph 16 in *Chander Kanta Bansal* (supra), thus: -

“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.”

Further, in the judgment of *J. Samuel & Ors. vs. Gattu Mahesh & Ors.* (2012) 2 SCC 300, the Supreme Court held as follows: -

“19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term “due diligence” is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.”

16. Applying these principles to the facts of the present case, it is clear that the case of the plaintiff in the original plaint is that he was in possession of the suit premises. The Local Commissioner appointed by the Court was unable to come to any conclusion in this regard.

Although the defendant no.1 asserted in the written statement that he remained in possession, and also challenged the maintainability of the suit in the absence of a prayer for possession, the fact of his possession was disputed by the plaintiff. However, during the course of hearing of the applications under Order XXXIX Rules 1 and 2, and Order XXXIX Rule 2A, this Court returned a finding that the defendant no. 1 was in possession. The order of the learned Single Judge dated 22.07.2013 was carried in appeal, which was withdrawn on 08.08.2014. The plaintiff's case, that these proceedings have necessitated an amendment in the plaint, is not unreasonable. The Trial Court has erroneously held that the relevant findings contained in the order dated 22.07.2013 were based upon the report of the Local Commissioner dated 13.08.2008. In fact, the Local Commissioner's report was inconclusive as to possession, as is reflected from paragraph 16 thereof. The order specifically notes as much in paragraph 14 (extracted above), but upon a consideration of the facts reported to the Court, the Court has come to the conclusion that defendant no. 1 was in possession. These observations have been recorded in the context of deciding the plaintiff's application under Order XXXIX Rule 2A, wherein it was alleged that the defendant no.1 had violated the status quo order granted by the Court and entered into possession after 13.08.2008. The plaintiff's failure to move earlier to incorporate this additional prayer does not display any lack of diligence in the circumstances, keeping in mind the tests laid down in *Chander Kanta Bansal* (supra) and *J. Samuel* (supra).

17. Turning to the general principles governing amendment, it is evident that the question of possession is very much at issue between the parties. The incorporation of the prayer to this effect is, therefore, intended to resolve the real controversy between the parties and avoid multiplicity of proceedings. This is the “cardinal test” as laid down by the Supreme Court in *Rajesh Kumar Aggarwal & Ors. vs. K.K. Modi & Ors.*, (2006) 4 SCC 385:-

“17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.”

18. To the extent that the plaintiff now seeks an alternative relief of possession, consequent to the declaration of title sought in the original plaint, the nature of the suit remains unchanged. In the event the Trial Court reaches the conclusion that the plaintiff was in possession of the suit premises, it would consider the plaintiff's entitlement to the relief originally sought of an injunction restraining the defendants from interference therewith. However, if the plaintiff is unable to demonstrate his possession, the alternative relief sought to be incorporated would have to be considered. The plaintiff has specifically stated in the application under consideration that the amendment will not necessitate any further evidence being led on his behalf. Consequently, the defendants will not be put to any prejudice, incapable of monetary compensation, in the event the amendment is permitted.

19. Having reached the aforesaid conclusion, it remains to be considered as to whether the plaintiff ought to be burdened with costs for the amendment sought. In this context, the course of proceedings does demonstrate that the defendant has maintained, from the very inception of the suit, that he was in possession of the suit premises. The grant of an amendment at this stage has already led to, and may necessitate some further delay in the proceedings, even in the absence of any additional evidence being led by the plaintiff. Keeping in mind the observations of the Supreme Court in paragraphs 61 and 62 of *Revajeetu* (supra), regarding the imposition of costs, I am of the view

that the amendment can be permitted, upon payment of costs, assessed at ₹35,000/-, by the plaintiff to defendant no. 1.

20. For the reasons aforesaid, the impugned order of the Trial Court is set aside, and the application of the plaintiff under Order VI Rule 17 of the CPC is allowed, subject to payment of costs of ₹35,000/- by the plaintiff to the defendant no. 1. The parties will appear before the Trial Court on 24.09.2019, when the amended plaint may be filed by the plaintiff, subject to payment of costs as aforesaid. If the defendants desire to file an additional written statement, the Trial Court will grant an opportunity to do so. The evidence will proceed from the stage already recorded, keeping in mind that the plaintiff has expressly stated that no additional evidence will be required on his behalf, as a consequence of the amendment. However, if the Trial Court is satisfied that the amendment necessitates any further opportunity of cross-examination of the plaintiff's witnesses being given to the defendants, it may so order. The defendants will of course be entitled to lead evidence on the basis of the amended pleadings.

21. The petition is allowed in the aforesaid terms.

PRATEEK JALAN, J.

SEPTEMBER 02, 2019/s