

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

CR No.4779/2017(O&M)

Date of decision: November 24 ,2022.

Om Parkash Sharma

.....**Petitioner**

Vs.

Ved Parkash Sharma and others

.....**Respondents**

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr.Bhag Singh,Advocate for the plaintiff/petitioner.

Mr.JS Cooner, Advocate for respondent/defendant no.1.

Nidhi Gupta,J.

Present revision petition has been filed by the plaintiff/ petitioner for setting aside the order dated 3.7.2017 passed by Civil Judge (Jr. Div.), Ambala in Civil Suit bearing No.523-RBT/25.4.2013/02.01.2015 whereby his application for amendment of the plaint has been dismissed.

Brief facts of the case are that the petitioner/plaintiff filed a suit for possession by way of partition of 1/4th share in the residential double storey house bearing No.7918/4 (known as Anand Bhawan)Nai Basti, Ambala City on the ground that the suit property is a joint family residential house of the parties.

Upon notice, respondents/defendants 1 and 2 filed written statement though admitting that the house in question was owned by the plaintiff and defendants to the extent of 1/4th share each, yet simultaneously denying the right of the petitioner/plaintiff of having any share in the house, since the plaintiff is residing separately for the last 35 years and after the death of their father the

plaintiff had relinquished his share in the house in favour of defendant no.1, though no formal documentation to this effect was done.

Separate written statement dated 6.9.2013 (Annexure P-2) was filed by the legal heirs of defendant no.3 taking the plea that the plaintiff has filed the suit in respect of double storey residential house as described above; but has not included the other joint property of the parties consisting of a vacant plot measuring 28' x 40' situated opposite the residential house in question across the road, which has been shown in open space in the incomplete site plan of the plaintiff. It was further submitted in their written statement that this other joint property of the parties consisting of vacant plot measuring 28' x 40' situated across the road opposite the residential house in question be also included in the suit and the same be also partitioned amongst the parties to the extent of 1/4th share each and the defendant no.1 be restrained from raising any further construction in the said plot jointly owned and possessed by the parties.

Subsequently, the plaintiff/petitioner filed an application dated 3.11.2014 (Annexure P-5) under Order 6 Rule 17 read with Section 151 CPC for amendment of the plaint to include the prayer that the parties to the suit are also jointly owner-in-possession of the vacant site measuring 28' x 40' and the said vacant plot be also partitioned amongst the parties along with old residential house. Defendants 1 and 2 filed reply dated 5.1.2015 to the abovesaid application objecting to the same.

Vide impugned order dated 3.7.2017 the learned trial Court has dismissed the aforesaid application of the petitioner/plaintiff seeking amendment of his plaint to the abovesaid extent primarily on the ground that the petitioner/plaintiff ought to have exercised due diligence and should have

included the suit property for partition in the civil suit, and since the petitioner/ plaintiff has failed to act in due diligent manner this application was dismissed.

It is inter alia submitted by the learned counsel for the petitioner that after legal heirs of defendant no.3 took the plea for including the above-described vacant plot in the partition suit, the trial court ought to have framed the issue. It is submitted that either the trial Court should have framed the issue or allowed the amendment. It is further submitted that in a suit for partition first a preliminary decree has to be passed regarding entitlement of the parties; and only on that basis final decree of partition will be passed.

In response, learned counsel for the respondents submits that plot inclusion of which is sought/ issue is sought to be framed is not jointly owned. It is submitted that a civil suit for injunction was filed regarding the said vacant plot which was dismissed and appeal against that was also dismissed, as well as RSA against those orders of dismissal was also dismissed holding that the parties herein, neither the petitioner nor the respondents, are in possession of the said plot. A copy of the judgments and orders passed by the Courts below and this Court in the proceedings emanating from said civil suit bearing No.526-CS of 81/90 is handed over in Court today.

No other argument has been raised on behalf of either of the parties.

I have heard learned counsel for the parties.

Perusal of the paper book/ record of the case reveals that the plaintiff had filed a replication to the written statement dated 6.9.2013 (Annexure P-2) filed on behalf of legal heirs of defendant no.3. In pursuance to the order dated 25.7.2017 passed by this Court, petitioner has placed the said replication dated 31.5.2014 on record of this revision vide C.M. 25630-CII/2017, where in para 9 of the said replication the petitioner clearly took the plea that:-

“....The plot measuring 28’ x40’ being joint property of the parties is also liable to be partitioned amongst the parties to the suit to the extent of 1/4th share each; thus the suit by including the plot, may please be decreed with costs, as prayed for in the plaint, in the interest of justice, law and equity”.

Even in the replication dated 22.5.2014 (Annexure P-3) filed by the petitioner to the written statement of defendants 1 and 2, the petitioner has clearly stated in para 2 thereof that “.....*The plaintiff has no objection for inclusion of the vacant plot measuring 28’ x 40’ in this suit: as the said plot is also joint property of the family.*”

However, despite the fact that the petitioner had raised a categorical averment/ prayer regarding the inclusion of vacant plot in the suit for partition, the learned trial Court did not frame an issue to this effect. Issues were framed in this case vide order dated 5.8.2014 (Annexure P-4). Accordingly, when no issue was framed by the Id. Trial Court, the petitioner was left with no other alternative but to file an application under Order 6 Rule 17 CPC for amendment of the plaint on 3.11.2014.

It is established law that in a suit for partition, all properties amongst the parties are required to be partitioned. In view of the specific averments/pleas made by the petitioner as also the defendants, in this behalf, it was incumbent upon the trial Court to frame an issue to this effect regarding the vacant plot in suit for partition; or in the alternative allow the petitioner’s application for amendment of the plaint. A perusal of the record shows that issues were framed in the present case on 5.8.2014, and the petitioner filed application for amendment of plaint on 3.11.2014, as such, there is no delay on behalf of petitioner in filing the application for amendment of the plaint, and he has evidently not slept over his rights and has exercised due diligence. Further, in

the considered view of this Court, this amendment of plaint will cause no prejudice to the defendants, and is in fact, necessary for the proper adjudication of the matter.

Accordingly, this revision petition is allowed, impugned order dated 3.7.2017 passed by Civil Judge (Junior Division) Ambala is set aside and application under Order 6 Rule 17 CPC moved by plaintiff/petitioner for amendment of the plaint is allowed and the trial Court is directed to frame an appropriate issue accordingly.

Disposed of.

Application(s),if any, also stand disposed of.

(Nidhi Gupta)
Judge

November 24,2022.
Joshi

Whether speaking/reasoned

Yes

Whether reportable

Yes/No