

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

153

CR-2160-2023

Date of decision: 20.10.2023

JIWAN KUMAR AND OTHERS

..Petitioners

Versus

MALKIAT SINGH AND ANOTHER

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Kanwal Goyal, Advocate
for the petitioners.Mr. Rakesh Gupta, Advocate
for respondents.ANIL KSHETARPAL, J(Oral)

1. In this revision petition, the plaintiffs assailed the correctness of the order passed by the trial Court on 27.03.2023 while dismissing their application for permission to amend the plaint. The plaintiffs pray for a limited amendment in the plaint. They have filed a suit for recovery of Rs.1,73,11,500/-, which includes principal amount of Rs.1,25,00,000/- paid pursuant to an agreement to sell. During the pendency of the suit, the defendants for the first time in December, 2022, produced a copy of notice dated 28.10.2013 to prove that the defendants had given a notice to the plaintiffs while forfeiting the amount of earnest money.

2. In view of the judgment passed in *I.S. Sikandar (dead) by LRs vs. K. Subramani and others, (2013) 15 SCC 27*, the plaintiffs pray for permission to amend the plaint so as to seek relief of declaration that such forfeiture of earnest money was bad in law.

3. The learned trial Court has dismissed the plaintiffs application on the following grounds:-

- i. If the amendment is allowed, it will totally change the nature of the suit as new facts are being introduced.
- ii. The said facts were in the knowledge of the plaintiffs.
- iii. The period of limitation to seek amendment in question has already lapsed.
- iv. The case is fixed for defendants evidence and some evidence has already been led by the defendants.

4. This Bench has heard the learned counsel representing the parties at length and perused the paperbook.

5. The learned counsel representing the petitioners (plaintiffs) contend that for the first time, the notice dated 28.10.2013 was produced by the defendants in the evidence of DW-2 in December, 2022. He submits that a formal amendment has been sought in the plaint in order to avoid any technical objection to the maintainability of the suit.

6. On the other hand, the learned counsel representing the respondents (defendants) contend that previously the plaintiffs filed a suit for permanent injunction in the year 2013. In the aforesaid suit, the defendants filed the written statement and in para 9, it was pleaded that the amount of earnest money paid by the plaintiffs has been forfeited. He further submits that the plaintiffs while appearing in evidence have admitted that the defendants had sent a vague reply to the notice. He submits that the plaintiffs have failed to plead and prove their due diligence.

7. This Court has considered the submissions of the learned counsel representing the parties.

8. The suit filed by the plaintiffs is based upon an agreement to sell entered into between the parties. Under the aforesaid agreement, Rs.1,25,00,000/- was paid by the plaintiffs to the defendants. The plaintiffs have not sought the relief of specific performance of the agreement to sell but have only sought refund of the earnest money along with the interest. It is the pleaded case of the plaintiffs that notice dated 28.10.2013 got issued by the defendants on 28.10.2013 was for the first time produced in evidence on 13.12.2022. Before that date, the plaintiffs did not have the knowledge of the allegations of forfeiture of the earnest money by notice dated 28.10.2013. Hence, the Court has wrongly erred in refusing the petitioners to amend the plaint.

9. This Court has analyzed the arguments of the learned counsel representing the parties.

10. On a careful reading of the pleadings of the previous suit filed by the defendants for the grant of permanent injunction, it is evident that the notice/reply dated 28.10.2013 was not pleaded. It is also evident from the reading of affidavit of the plaintiffs in lieu of the examination-in-chief that the plaintiffs only asserted that a vague reply to their notice was given, however, the notice dated 28.10.2013 was not in the knowledge of the plaintiffs.

11. While filing the written statement to the plaint filed for recovery of the amount, the defendants did not specifically plead with regard to the notice dated 28.10.2013.

12. Even if the amendment is allowed, the suit filed by the plaintiff would continue to remain as a suit for recovery of the amount. Hence, there is no change in the nature of the suit.

13. As regard to the second reason, it may be noticed that a notice sent by the party to the agreement to sell while declaring that the agreement to sell has come to an end resulting in forfeiture of the amount is not required to be specifically challenged by seeking a specific declaration. In fact, the judgment passed in **I.S. Sikandar's case (supra)** has been held to have been decided on the facts involved in the judgment passed by the Supreme Court in **Mrs. A. Kanthamani vs. Mrs. Nasreen Ahmed, 2017(4) SCC 654**. In fact, this Court in **RSA-1770-2014, titled as "Surinder Mohan Batra and others Vs. Gurbinder Pal Singh Tiwana and another", decided on 03.08.2023**, has discussed the matter in detail and found that there was no necessity to seek declaration of notice cancelling the agreement. In any case, the suit for recovery of amount has already been filed. Only an additional prayer is sought to be made in order to avoid technical objection. In these circumstances, it would not be appropriate to reject the prayer for permission to amend the plaint. The Court can decide the issue of limitation after appreciating the evidence while finally deciding the suit.

14. The next reason assigned by the Court is also without substance because it is the plaintiffs case that the document in question has been produced for the first time in the evidence of DW-2. Thus, the plaintiffs filed the application immediately when defendants evidence was being recorded.

15. Moreover, in **Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and another, 2022 SCC Online SC 1128**, the

Supreme Court has explained that the amendments which go to the roots of the matter should be allowed in order to advance the cause of justice.

16. Keeping in view the aforesaid facts, the impugned order dated 27.03.2023 is set aside.

17. The revision petition is allowed.

18. The plaintiff is permitted to amend the plaint.

19. The trial Court is requested to give an opportunity to the defendants to file reply to the amended plaint and thereafter, proceed to decide the matter.

20. All the pending miscellaneous applications, if any, are also disposed of.

October 20th, 2023

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(ANIL KSHETARPAL)
JUDGE

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