

201 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-7656-2019 (O&M)
DECIDED ON: 09.08.2023

RAJESH KUMAR AND ANOTHER

.....PETITIONERS

VERSUS

NARESH KUMAR AND ANOTHER

.....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE VIKRAM AGGARWAL.

Present: Mr. Parminder Singh, Advocate
for the petitioners.

Mr. Suryakant Gautam, Advocate
for the respondents.

VIKRAM AGGARWAL, J (ORAL)

1. The present revision petition assails the order dated 06.11.2019 (Annexure P-6) vide which the application filed by the respondents-plaintiffs under Order 6 Rule 17 CPC for amendment of the plaint was allowed.

2. The respondents-plaintiffs filed a suit for possession by way of specific performance of the agreement to sell dated 20.06.2012 executed with regard to house measuring 300 square yards situated in Mauja Gaddiwara, Krishanapura, Panipat. The total sale consideration was ₹95,00,000/-. Earnest money of ₹25,00,000/- was stated to have been paid. The suit came to be dismissed vide judgment dated 06.10.2015 (Annexure P-3). An appeal was preferred by the respondents-plaintiffs. During the pendency of the appeal, an application (Annexure P-4) was moved under Order 6 Rule 17 CPC for amendment of the plaint. A prayer for the grant of alternative relief of refund of earnest money of ₹25,00,000/- was sought to be incorporated. The application was opposed by way of a reply (Annexure P-5). By way of the impugned order dated 06.11.2019 (Annexure P-6), the application was allowed leading to the

filing of the present revision petition.

3. I have heard learned counsel for the parties.

4. Learned counsel for the petitioners has submitted that the trial Court gravely erred in allowing the application for amendment. Learned counsel has contended that the appeal was at the stage of arguments when the application for amendment was filed. It has been submitted that the trial Court had recorded a specific finding that a sum of ₹26,00,000/- had been refunded to the respondents-plaintiffs and, under the circumstances, there was no occasion for the First Appellate Court to allow the application for amendment. Learned counsel has submitted that no one can be permitted to fill up the lacunae by way of an application for amendment. It has also been submitted that acceptance of costs by the petitioners-defendants after the application for amendment having been allowed would not affect the rights of the petitioners-defendants to file the present revision petition. Learned counsel has also contended that the trial Court also erred in allowing the time barred relief by way of the amendment. Learned counsel has placed reliance upon a judgment of the Delhi High Court in ***FAO-103-2008*** titled as '***Surinder Kumar and Others Vs. Swarn Singh***', 2008(22) ***RCR (Civil)***637.

5. On the other hand, learned counsel for the respondents-plaintiffs has submitted that once the costs had been accepted by the petitioners-defendants, he would be estopped from challenging the impugned order. Reliance has been placed upon a judgment of the Division Bench of this Court in ***CR-845-1987*** titled as '***Amar Singh Vs. Perhlad and Others***', 1989 ***AIR (Punjab)*** 229. Learned counsel has submitted that there is no illegality in the order passed by the trial Court. Learned counsel has also contended that the judgment of the trial Court is still under challenge and has not attained finality and, therefore, the finding that ₹26,00,000/- had already been paid back to the

respondents-plaintiffs would not affect the merits of the case. Learned counsel has also submitted that the amendment which has been permitted to be made will not change the nature of the suit. Learned counsel has contended that the alternative plea is also devoid of merit and that the respondents-plaintiffs were very much entitled to claim the said relief. In support of his contentions, learned counsel has placed reliance upon the judgments passed by the Co-ordinate Benches of this Court in **CR-3470-1997** titled as '**Madan Lal Vs. Kabul Singh**', **CR-1715-1986** titled as '**Ram Chand Vs. Karamvir and Another**', **CR-2493-1988** titled as '**Sardara Singh and Another Vs. Shrimati Gulwant Kaur and Others**', **CR-845-1987** titled as '**Amar Singh Vs. Perhlad and Others**' and **CR-1059-1995** titled as '**M.F. Steels Vs. Punjab and Sind Bank**'.

6. I have considered the submissions made by learned counsel for the parties.

7. Admittedly, the suit filed by the respondents-plaintiffs was dismissed on 06.10.2015 leading to the filing of an appeal against the said judgment and decree. During the pendency of the appeal, at the stage of arguments, an application for amendment of the plaint was moved. An alternative relief of recovery of the earnest money was sought to be incorporated. The application was opposed but the same was allowed by way of the impugned order. The costs imposed while allowing the application were duly accepted by the petitioners-defendants. Under the circumstances, in view of the Division Bench judgment of this Court in the case of '**Amar Singh Vs. Perhlad and Others**'(*supra*), once the costs imposed had been accepted by the petitioners-defendants, he would be estopped from challenging the order. In this case, there was a divergence of opinion expressed by two different Benches. Under the circumstances, the matter was taken up by the Division Bench to determine the question as to whether after acceptance of costs as awarded by the Court, while

allowing the application for amendment of the plaint, whether under protest, certain order could be challenged. After examining the entire law on the subject, the Division Bench came to the conclusion that once costs had been awarded and the same had been accepted, though under protest, it would not be open for the party accepting the costs to challenge the order in revision. It was held that the party accepting the costs had to accept the order as a whole. Accepting the costs and challenging the order on merits would not be permissible. It was held by the Division Bench as under:-

“In the present case, the petitioner having accepted costs awarded in the order while allowing amendment of the plaint further mentioned that he was accepting the amount under protest. This was a unilateral act on the part of the petitioner. Even if he had not accepted the costs, the same would have been deposited in the Court by the plaintiff. If the petitioner had withdrawn the costs from the Court unilaterally stating that the withdrawal would be under protest, he could not approbate and reprobate, that is accepting benefit of the order and at the same time objecting to the passing of the order. He had to accept the order as a whole. What he did was that he accepted the costs and thereby acquiesced in the correctness of the order passed. Although at the time of acceptance of the costs the petitioner stated that he was doing so under protest, that will not make any difference as the opposite party had not consented to the statement of the petitioner in this aspect. If in fact the petitioner wanted to challenge the order of amendment of the plaint, there was no compulsion for him to accept the costs. The costs would have remained deposited in the Court. The right of the petitioner to the costs imposed by the Court on the plaintiff while allowing amendment of the plaint was not based on any right of the petitioner in the suit. The costs were ordered by the Court to compensate the petitioner for the inconvenience caused during the pendency of the suit till the plaint was amended. Such an order regarding costs was made on term

*or condition for amendment of the plaint in view of Order 6 Rule 17, Civil Procedure Code. Such an order could not be accepted in part/ either of the party while denouncing the other part. The plaintiff could not be amended plaint stating that he could pay costs at the time of final decision of the suit. Likewise the defendant could not say while accepting the costs that he would challenge the order in appeal or revision or that he would return the costs withdrawn if the order of amendment of plaint is set aside. The crux of the matter to be seen is as to what the petitioner did and not what he said. By acceptance of costs, he accepted the order as correct. He has taken benefit of the order. He cannot now turn around and say he will also challenge the order. By allowing him to challenge the order would amount to nullifying the effect of acceptance of costs. In such circumstances, he cannot approbate and reprobate. His own act would estop him. At the most it can be said that the petitioner had two options, one to accept the costs and to treat the order as correct, the other not to accept the costs, he exercised his choice in accepting the order as correct. His lodging the protest in such circumstances is meaningless. Reference here may be made to the decision of Madras High Court in *R. Samudra Vijyam Chettiar Vs. Srinivasa Alwar*, AIR 1956 Madras 301 laying down the following principle-*

"Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one he cannot afterwards pursue the other which after the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their application,"

*Similar view was taken by the Madras High Court in **K. Shanmugham Pillai v. S. Shanmugham Pillai**. AIR 1968 Mad 207. The view expressed by the Madras High Court in *Ramaswami Chettiar v. Chidambaram Chettiar's case**

appears to be correct. The said High Court reiterated the view subsequently in H.G. Krishna Reddy v. M.M. Thimmiah's case. The view expressed in Randhir Singh v. Kamlesh's case, thus, cannot be accepted.

8. I have gone through the judgment of the Delhi High Court in the case of '*Surinder Kumar and Others Vs. Swarn Singh*'(supra). No doubt, the Delhi High Court did take a view that a revision petition under such circumstances would not be barred, the same was taken in view of the fact that the costs which had been paid by way of a cheque had not been encashed. Under the circumstances, it was held that the payment of costs by way of the cheque would not result in the waiver of the right to file an appeal. The judgment is, therefore, distinguishable on facts. In any case, in view of the categorical decision of the Division Bench of this Court in Amar Singh's case (supra), this Court holds that once the petitioners had accepted the costs imposed by the trial Court while allowing the application for amendment, the petitioner would lose the right to file the present petition.

9. Since it has been held that the petitioners would have no right to file the present revision petition, the other arguments raised on the merits of the controversy are not being discussed.

In view of the above, I do not find any merit in the revision petition and the same is accordingly dismissed.

(VIKRAM AGGARWAL)
JUDGE

09.08.2023
Prince Chawla

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