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

Reserved on: 03rd October, 2023

Date of Decision: 04th January, 2024

+ CM(M) 1737/2019 & CM APPL. 52416/2019

NARENDRA PANDEY

..... Petitioner

Through: Mr. Ratish Kumar, Advocate

versus

JAGTAR SINGH & ORS

..... Respondent

Through: Mr. C.M. Sharma and Ms. Sana Hayat, Advocates

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. This Petition filed under Article 227 of the Constitution of India impugns the order dated 04.09.2019 passed ADJ-06, West District, Tis Hazari Courts, Delhi ('Trial Court') in C.S. No. 11789/2016, titled as **Narender Pandey v. Jagat Singh & Ors.**, whereby the Trial Court dismissed the application filed by the plaintiff i.e., the Petitioner herein under Order VI Rule 17 of the Code of Civil Procedure, 1908 ('CPC'), seeking amendment in the plaint by incorporating the relief of Specific Performance of the contract (i.e., the alleged unregistered Agreement to Sell ('ATS') dated 16.11.2011).

1.1. For the sake of convenience, the parties are being referred to as per their rank and status before the Trial Court. The Petitioner herein is the plaintiff and the Respondents herein are defendants before the Trial Court.



1.2. The plaintiff filed a suit for possession, recovery of mesne profit and permanent injunction on 28.08.2014, on the specific plea that he was illegally dispossessed by the defendants in July, 2018 by breaking open the locks of the first floor (consisting of flats measuring 60 Sq. Yds. on front side and 40 Sq. Yds. on back side) and second floor (consisting of flats measuring 60 Sq. Yds. on front side and 40 Sq. Yds. on back side) of built-up property no.3, land measuring 100 sq. yards, out of Khasra no. 689 & 690, situated at village Nawade colony known as Om Vihar Phase-IA, Uttam Nagar-110059 ('suit property') under his possession and prayed for the following relief:

" a) To pass a decree of possession in respect of the Suit Property i.e. the entire first and second floor without roof rights of built up property No. 3, area measuring 100 Sq. yds. out of Khasra No. 689-690 situated at Nawada Majra Hastal colony known as Om Vihar, Phase-1, now phase 1-A, Uttam Nagar, New Delhi-110059 consisting front side 60 sq. Yds. and back side 40 Sq. Yds. on the first and second floor each along with four two wheeler parking rights on the ground floor in stilt parking area of the said building which has been more specifically shown in the red colour in the site plan annexed with the plaint in favour of the Plaintiff and against the Defendants.

b) To pass a decree of Mesne profit and damages at the rate of Rs. 25000/- per month w.e.f. filing of the present suit till the handing over the peaceful and vacant possession of the Suit Property to the Plaintiff in favour of the Plaintiff and against the Defendants.

c) To pass a decree of permanent injunction in favour of the Plaintiff and against the Defendants thereby restraining the Defendants, their assignees, legal heirs, attorneys agent etc. from parting with the possession or creating any third party interest in the Suit Property i.e the entire first and second floor without roof rights of built up property No. 3, area measuring 100 Sq. Yds. out of Khasra No. 689-690 situated at Nawada Majra Hastal colony known as Om Vihar, Phase 1, now Phase 1-A, Uttam Nagar, New Delhi-110059 consisting front side 60 Sq. Yds. and back side 40 Sq. Yds. on the first and second floor each along with four two wheeler parking rights on the ground floor in stilt parking area of the said building which has been more specifically shown in the red colour in the site plan annexed with the plaint.

d) Cost of the suit may also be awarded in favour of the Plaintiff and against the Defendants.



e) Any other relief which this Hon'ble Court deed fit and proper may also be passed in favour of the Plaintiff and against the Defendants.”

(Emphasis supplied)

1.3. The abovesaid suit has been filed by the plaintiff on the basis of collaboration agreement dated 29.08.2011 with regard to reconstruction of the built-up property no.3, land measuring 100 sq. yards, out of Khasra no. 689 & 690, situated at village Nawade colony known as Om Vihar Phase-IA, Uttam Nagar-110059. As per the said collaboration agreement the plaintiff agreed to reconstruct the entire property of the defendant no.1 from his own funds, against which the defendant no.1 agreed to transfer the ownership of the suit property in favour of the plaintiff. It is stated in the suit that subsequently a General Power of Attorney ('GPA'), ATS, affidavit, payment of receipt, possession letter and Will dated 16.11.2011 was executed by defendant no. 1 with respect to the suit property in favour of plaintiff as per the collaboration agreement dated 29.08.2011.

1.4. The defendants filed their written statement to the said suit on 09.01.2015 and denied all the averments in the plaint except that they entered into a collaboration agreement dated 29.08.2011 with the plaintiff.

1.5. The issues in the suit were framed by the Trial Court on 03.06.2017 and the matter was fixed for plaintiff evidence. It was at this juncture that the plaintiff filed an application under Order VI Rule 17 CPC seeking amendment in the prayer clause of the plaint, for a decree of specific performance of the alleged ATS dated 16.11.2011 in favour of the plaintiff. Reply of the defendants to the said application was filed on 20.03.2019, wherein they denied all the contentions of the plaintiff made in the said



amendment application and averred that the relief claimed is barred by limitation.

1.6. The Trial Court vide the impugned order dated 04.09.2019 dismissed the said amendment application on the ground that; (i) no reason has been given by the plaintiff as to why the amendment application has been filed after the trial has started; (ii) the amendment if allowed would change the nature of the suit; and (iii) the plaintiff has failed to prove that there was due diligence on his part in seeking the amendment.

Arguments of the Petitioner i.e., plaintiff

2. The learned counsel for the plaintiff states that the existing reliefs in the unamended plaint is premised on the ATS dated 16.11.2011. He states that a decree of possession has already been prayed for; however, the prayer for specific performance of the ATS dated 16.11.2011 was inadvertently not included in the plaint. He states that the mistake was committed by the erstwhile counsel who at the time of the drafting the plaint failed to pray for specific performance of the said ATS. He relies upon the judgment of Supreme Court in *Varun Pahwa v. Renu Chaudhary*¹ to contend that a party must not suffer on account of the mistake of the counsel.

2.1 He states that all necessary averments and documents including the ATS dated 16.11.2011 are on record; and therefore, the plaintiff seeks an amendment limited to adding a prayer clause for specific performance of the ATS dated 16.11.2011 and no further. He relies upon the judgment of the Supreme Court in *Life Insurance Corporation of India v. Sanjeev*

¹ (2019) 15 SCC 628



Builders Private Limited and Another² and more specifically paragraph 70 (x) therein.

2.2 He states that the defendant's objection to the aforesaid amendment on the plea of bar of limitation is inapplicable since the plaintiff herein is seeking amendment of the existing suit. He states that the bar of limitation would have become applicable if a subsequent suit was filed for the relief of specific performance. He relies upon the judgments of the Supreme Court in ***Ragu Thilak D. John v. S. Rayappan and Others***³ and ***Pankaja and Another v. Yellapa (Dead) by LRs. And Others***⁴ to contend that an application for amendment was allowed in these judgments in respect of time barred claims.

Arguments of the Respondents i.e., the defendants

3. In reply, learned counsel for the defendants states that the amendment application has been rightly dismissed by the Trial Court in view of the proviso to Order VI Rule 17 of the CPC. He states that the amendment application was filed after the trial has commenced and the plaintiff had examined formal witnesses. He relies upon the judgment of the High Court in ***Pradeep Bhardwaj v. Indian Bank and Others***⁵ to contend that application for amendment filed after the commencement of trial, failing to show due diligence on the part of the party claiming amendment is to be dismissed.

3.1 He states that the defendants had raised a preliminary objection on the maintainability of the frame of the suit in the written statement and

² 2022 (12) SCALE 850

³ (200) 2 SCC 472

⁴ (2004) 6 SCC 415

⁵ 2019 SCC OnLine Del 9483



issues on maintainability have also been framed. He states that therefore, the plaintiff was at all times aware of the objection of the non-maintainability of the suit. He states that the alleged ATS is dated 16.11.2011 and the plaint itself was filed on 28.08.2014 which is barred by delay and laches.

3.2 He states that in the suit the plaintiff has averred that he was put in possession of the suit property in furtherance of the alleged unregistered ATS dated 16.11.2011. He states that the defendants have raised an objection on the admissibility of the said document on account of its non-registration under Section 17 of the Registration Act, 1908 read with Section 53-A of the Transfer of Property Act, 1882.

Analysis and findings

4. This Court has considered the submissions of the learned counsel for the parties and perused the record.

5. The Trial Court has dismissed the amendment application filed by the plaintiff on the following grounds that the nature of amendment if allowed, shall change the nature of the suit and would also cause extreme prejudice to the defendant. The Trial Court further held that the plaintiff had failed to show due diligence and therefore, the application filed after commencement of trial cannot be entertained. The operative portion of the order of the Trial Court, which reads as under:

*“4. I have heard ld counsel for parties and perused the case file. Ld counsel for plaintiff has relied upon **Saleem Advocates Bar Association Vs. Union of India (2005) SLT 653.***

5. In the present case, issues were framed on 03.06.2017 and evidence of as many as 09 witnesses has already been recorded. In the application for amendment, no reason whatsoever has been given by the plaintiff as to why the application for amendment has been filed after the trial has started and



the only reason that is given in the application that inadvertently prayer for specific performance has not been made.

6. Order 6 Rule 17 CPC provides that no application for amendment shall be allowed after trial has started unless there is a due diligence on the part of the party seeking amendment. **Perusal of the record reveals that number of witnesses have already been examined by the plaintiff. The nature of amendment if allowed, shall change the nature of the suit and would also cause extreme prejudice to the defendant.** Post-trial amendment can only be allowed when it is shown that there was no lack of due diligence on the part of party seeking the amendment.

7. **The present application did not provide any reason or justification that there was due diligence on the part of plaintiff in seeking the amendment and in the application no grounds were mentioned except that “inadvertently the prayer for specific performance was not made at the time of filing of the suit”.** The reference can be had to ***Pradeep Bhardwaj Vs. Indian Bank & Ors, CM (M) No.335/2018 dated 06.08.2019***, wherein application for amendment failing to show the due diligence was dismissed. In this judgment, Hon'ble High Court has dealt with number of judgments of Hon'ble Supreme Court of India as to how an application for amendment of pleading, post-trial was considered.

8. ***Salem Bar Association*** (Supra) as cited by Id counsel for plaintiff is not applicable to the present case as the application fails to show that there is due diligence on the part of plaintiff.”

(Emphasis supplied)

New Cause of Action and Time Barred Claim

6. The finding of the Trial Court that the proposed amendment seeks to change the nature of the suit/bring in new cause of action is correct and is duly borne out from the averments made in the unamended plaint. In this regard, it would be relevant to refer to the cause of action paragraph no.25 of the plaint and the prayers sought in the unamended plaint.

6.1 On one hand the entire premise of the unamended plaint is that the plaintiff is the ‘owner’ of the suit property, who was in possession of the suit property and was illegally dispossessed on 26.07.2013. It is on these averments that the suit has been filed seeking a decree of possession, mesne profits and permanent injunction.



6.2 On the other hand, by way of amendment the plaintiff is seeking to include a relief of specific performance wherein the plaintiff seeks a direction to the defendants to execute a sale deed in his favour for the suit property. However, necessary averments of readiness and willingness for seeking the said direction of specific performance have not been pleaded in the unamended plaint. Therefore, the contention of the plaintiff that all necessary averments already exist for the new relief in the unamended plaint is incorrect. This is significant since defendants filed their written statement and denied the averments in the plaint with respect to plaintiff ever being put in possession in furtherance of ATS dated 16.11.2011 and disputed his claim of illegal dispossession. The parties have thus, proceeded to trial on the issue of proof of possession, if any, of the plaintiff in pursuance to the alleged ATS dated 16.11.2011.

6.3 On the premise of 'ownership', the plaintiff sought the relief of possession, mesne profits and permanent injunction against the defendants in the said facts. However, the relief of specific performance seeking a direction to the defendants to execute a sale deed (as per the amendment application) is contrary to plea of ownership asserted in the plaint and is inconsistent with the plea of mesne profits. It is trite law that a plaintiff cannot raise inconsistent pleas in the suit.

6.4 Further the objection raised by the defendants that the relief of specific performance is time barred is significant. The plaintiff in its written submissions dated 09.10.2023 has admitted that the claim has become time barred and a subsequent suit for the said relief would not be maintainable in view of Article 54 of the Limitation Act, 1963.



6.5 In view of the above facts, it would be relevant to refer to the judgment of the Supreme Court in the case of *M/s Ganesh Trading Co. v. Moji Ram*⁶ wherein the Supreme Court observed as under:

“5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional Court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.”

(Emphasis supplied)

6.6 The Supreme Court further reiterated the abovesaid principle in the judgment of *L.I.C. of India v. Sanjeev Builders Private Limited* (supra) and held that an amendment cannot be permitted to introduce a time barred claim. The relevant portion of the judgment reads as under:

“70. Our final conclusions may be summed up thus:

- (i) ...*
- (ii) ...*
- (iii) The prayer for amendments is to be allowed*
- (i) ...*

⁶ (1978) 2 SCC 91.



- (ii) To avoid multiplicity of proceedings, provided
 - (a) ...
 - (b) ...
 - (c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).
- (iv) A prayer for amendment is generally required to be allowed unless
 - (i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,
 - (ii) the amendment changes the nature of the suit,”

(Emphasis supplied)

6.7 This Court is therefore of the opinion that in light of the facts and law discussed above, if the proposed amendment is allowed, it would indeed change the nature of the suit and bring in a new cause of action which is admittedly time barred, hence the Trial Court has rightly dismissed the prayer for amendment to bring in a new relief which is time barred.

6.8 The reliance placed by the plaintiff on the judgments of **Ragu Thilak D. John v. S. Rayappan** (supra) and **Pankaja v. Yellapa** (supra) is not attracted in the facts of this case, since in both these judgments the Courts came to the conclusion that the plea of the defendant therein that the amendment was barred by time was arguable. However, in the facts of the present case, the plaintiff admits that the claim of specific relief has become time barred. And this is also evident from the record since the alleged ATS is dated 16.11.2011 and the application for amendment seeking to incorporate the relief of specific performance was filed on 13.02.2019 (i.e., after eight (8) years).



Lack of due diligence

7. The Trial Court held that the application for amendment was also not liable to entertained in view of the proviso to Order VI Rule 17 CPC. The relevant provision reads as under:

“ORDER VI

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.

(Emphasis supplied)

7.1 In the facts of this case, the suit was filed on 28.08.2014 and therefore, there is no dispute that the proceedings are governed by the proviso to Order VI Rule 17 CPC. The issues were framed on 03.06.2017 and plaintiff examined witnesses in January, 2018. The plaintiff filed affidavits in chief of its remaining witnesses including the plaintiff. Therefore, admittedly trial had already commenced in the suit when the application for amendment was filed.

7.2 As per the proviso to Order VI Rule 17 CPC the Trial Court has discretion to permit the amendment only if the party satisfies the Court that it could not have raised the matter before the commencement of the trial. In the facts of this case, the plaintiff has pleaded ‘inadvertence’ as the ground for seeking amendment. The relevant pleading in the amendment application reads as under:

“5. That despite relying on the Agreement to Sell dated 16/11/2011, the prayer for Specific Performance of the Agreement to Sell dated 16/11/2011 has not been made in the body of the plaint. However, the plaintiff is entitled



*to claim the relief of Specific Performance against the defendant no.1 on the basis of the Agreement to Sell dated 16/11/2011. **Inadvertently, the prayer for Specific Performance was not made at the time of filing of the suit. The suit was filed on 28/08/2014.***

(Emphasis supplied)

7.3 The Supreme Court in the case of *Vidyabai v. Padmalatha*⁷ while dealing with a matter wherein the application for amendment was allowed by the concerned High Court even when the proviso to Order VI Rule 17 CPC was attracted in the facts of the said case, observed as under:

*“9. 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.***

(Emphasis supplied)

7.4 Therefore, this Court finds no infirmity in the finding of the Trial Court that the explanation offered by the plaintiff for seeking the amendment at the belated stage when the trial had already commenced, fails to satisfy the test of due diligence required by the party applying for amendment and consequently the Trial Court did not have the jurisdiction to allow such an application. The jurisdictional facts for entertaining the amendment application after the trial has commenced do not exist in the facts of this case.

7.5 Further the Trial Court has rightly relied upon the judgment of the High Court in *Pradeep Bhardwaj v. Indian Bank* (supra) as the ratio of the

⁷ (2009) 2 SCC 409.



said judgment is applicable to the facts of this case. In this case as well, the averments in the amendment application are inadequate to substantiate the plea of due diligence of the nature required. The relevant portions of the judgment of the High Court reads as under:

“9. As held by the Supreme Court inter alia in Mohinder Kumar Mehra v. Roop Rani Mehra, (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.”

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12. The aforesaid averments are wholly inadequate to support a plea 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.”

(Emphasis supplied)

8 It has also come on record that as on 07.10.2023 all material witnesses of the plaintiff stand examined and discharged; only two (2) formal witnesses are to be examined.

9 This Court does not find any infirmity in the impugned order dated 04.09.2019 and the same is correct in law and fact. There is no error of jurisdiction or any other error warranting exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

10 Accordingly, the present Petition is dismissed.

11 Pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA, J
JANUARY, 4 2024/msh/sk

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