
High Court Of Delhi

Civil Miscellaneous (Main) No. 208/2015

Judgment Date:

21-08-2015

Sonia Mehra

..Petitioner

Manisha Rawat

..Respondent

Bench :

{ HON'BLE JUSTICE PRATIBHA RANI }

Citation :

2015 (152) DRJ 396 ;

Judgment

Pratibha Rani, J.

CM(M) 208/2015

1. The petitioner is aggrieved by the order dated 19.2.2015 whereby the two applications filed by her, one under Order VI Rule 17 CPC with a prayer to amend the written statement and the second application under Order IX Rule 7 CPC for setting aside the ex parte order and giving her an opportunity for leading defence evidence stand dismissed.

2. In the Civil Suit No. 198/2014 filed in the year 2008, the petitioner was sued as defendant seeking a decree for specific performance in respect of the agreement to sell and purchase dated 19.4.2005 as well as decree for possession and injunction.

3. Written statement to the said plaint was filed on 20.11.2008. In paragraph 11 of the said written statement the plea taken by the petitioner/defendant reads as under:

“11. Para 11 of the plaint is wrong and denied. It is submitted that on 19.4.2005 a sum of ` 2,00,000/- was paid by the plaintiff to the defendant as loan and not as bayana/advance/part consideration as alleged. It is denied that on 2/06/05 further consideration of Rs. 1 lac was paid to the defendant as alleged. It is denied that on 20/06/06 the plaintiff served any legal notice to the defendant. It is denied that there is any cause of action. It is denied that on 26/07/08 that the defendant refused to perform her part as there is no question of such action.“

4. Mr. S.P. Kalra, learned Senior Counsel for the petitioner has submitted that the purpose of seeking amendment in the written statement was to give necessary details in respect of loan transaction pleaded in the written statement and also to bring on record the facts and circumstances about the real transaction between the parties. The petitioner despite her due diligence could not raise these pleas at the stage of filing the written statement. The petitioner also wanted to place on record the facts relating to the friendly transaction between the respondent/plaintiff and the petitioner/defendant's brother-in-law as well as the circumstances under which the loan amount was given and the said document came to be signed by the petitioner/defendant. The

petitioner also wanted to raise preliminary objection about the enforceability of the agreement to sell and also plead the financial crisis she faced after the death of her husband.

5. Mr. S.P. Kalra, learned Senior Counsel for the petitioner has submitted that after the death of her husband, the petitioner is not the sole legal heir as she has two children also who were minor at that time. At the time of filing written statement, she was not in fit state of mind. Even her counsel Mr. Khattar was ill and later on expired. The amendment sought are more in the nature of explaining the facts and circumstances already pleaded. All these facts are necessary to be brought on record for proper adjudication of the controversy between the parties and had the amendment been allowed by the learned trial Court, no prejudice would have been caused to the respondent/plaintiff.

6. Learned Senior Counsel for the petitioner has relied upon *Mahila Ramkali Devi & Ors. vs. Nandram (D) Thr. LRs & Ors.* AIR 2015 SC 2270 and submitted that in view of the principles laid down in the above judgment wherein even after lapse of 40 years, the amendment of plaint was allowed by the Apex Court observing that 'rules of procedure are intended to be a handmaid to the administration of justice', the impugned order rejecting the prayer of the petitioner to amend the written statement may be set aside and the amendment sought for by the petitioner may be allowed.

7. I have considered the submissions made by learned counsel for the petitioner. By common order dated 19.2.2015, learned trial court dismissed both the applications filed by the petitioner. The application under Order VI Rule 17 CPC has been dismissed by learned trial court noting that the amendment to incorporate the state of mind of the defendant at the stage of filing the written statement is without any basis and so far as legal issue challenging enforceability of the agreement to sell is concerned, the same being a legal issue can be argued at the appropriate stage. The amendment has been declined by the learned trial Court observing that in the instant case the evidence by both the parties stands concluded. The case was at the stage of final argument when the application under Order VI Rule 17 CPC was filed. Finding no merit in the said application, it was dismissed with cost of ` 2,000/-.

8. The question that requires consideration by this Court is whether the amendment sought for by the defendant at the stage of final arguments was necessary for adjudication of the issue in controversy between the parties and it satisfies the test laid down in proviso to Order 6 Rule 17 CPC. Before examining the above question, it is necessary to refer to the case law relied upon by the learned Senior Counsel for the petitioner and its applicability in the given facts. Placing reliance on the decision of *Mahila Ramkali Devi's case (supra)*, learned counsel for the petitioner referred to paragraphs 17 to 20 of the judgment which are extracted hereunder:

“17. The application for amendment of plaint filed by Appellant No. 1 to make Appellant Nos. 2 to 5 fall under Class XVII of the Madhya Pradesh Land Revenue Code was rejected by learned Single Judge of the High Court on the ground that the same would change the nature of the suit which was filed 40 years ago, as the claim was made solely on the basis of Will and not on the basis of inheritance. The High Court allowed the appeal vide the impugned judgment as the Appellants had no locus standi to file the suit as Ajuddhibai could not have transferred her interest through a Will. Hence, present appeal by special leave by the Plaintiffs.

18. While rejecting the amendment petition, the High Court observed as under:

“16. During the course of hearing an application is filed by the Respondents under Order 6 Rule 17 Code of Civil Procedure for amendment to the effect that the Respondents Dinesh, Satish, Sanjay and Rajendra fails under Class XVII of the Madhya Pradesh Land Revenue Code. This amendment, at this stage, in fact cannot be allowed because the same is going to totally change the nature of the suit. The suit is filed in the year 1964 the suit was filed on the premises that Ramkali Devi has inherited the property from Ajuddhibai on the basis of will. By the amendment in the pleadings Dinesh, Satish, Sanjay and Rajendra have joined as party. That amendment was incorporated on 18.7.1994 and their names were added as Plaintiffs in the suit. In the cause title also the word 'Plaintiff' is substituted by the word 'Plaintiff'. However, there is no amendment in the

averments made in the rest of the pleadings in the plaint. In such circumstances, now, it will not be in the interest of justice to allow the application for amendment which totally goes to change the premises of the suit after a lapse of more than 40 years. In the present case the Plaintiffs have based their title solely on the basis of a will executed by Ajudhibai and, therefore, allowing an application for amendment making claim on the basis of inheritance that too through Hardayal cannot be permitted at this stage. Hence, the amendment application is rejected.

19. It appears thus while disposing of the appeal, the High Court has not gone into the amended plaint. By amendment, the Plaintiff-Appellant not only sought to add the names of Dinesh, Satish, Sanjay and Rajendra sons of Baijnath Prasad Saxena in the category of Plaintiffs, but also sought to make necessary amendment in paragraph 3 of the plaint. The averment sought to be incorporated in paragraph 3 of the plaint by amendment is reproduced hereunder:

“Vikalp me yadi vasiyatnama vaidya na mana jave to be Ajudhibai ke karibtar varies vadini ke ladke Rajendra, Dinesh, Satish aur Sanjay hi hai jo abhi nabalig hai aur yeha dava unke hito ko represent karte huai unki maliki ke adhar par bhi prastut hai. Vadini ke dekh-rekh me ladke rahte hai. Garj yahe hai ki har halat me prativadigan ki koi swatva v mukable vadini avam uske ladke nahi hai. Aur vadini vivadagrust aaraji ka kabja apne tatha ladkon ko aur se pane ki patra hai.”

As translated in English

“In alternative, if the will is not held valid, yet the Plaintiff's sons Rajendra, Dinesh, Satish, Sanjay, who at present are minors are near relations of Ajudhibai and this suit is submitted to represent their interests on basis of their ownership. The sons live in care of Plaintiff meaning thereby in every condition there is no right of Defendants competing Plaintiff. And the Plaintiff herself and on behalf of her sons is entitled to get possession of the suit land.”

20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The Court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting malafide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.”

9. This is a case where the proposed amendment has to be dealt with under Order VI Rule 17 CPC as it stands amended vide Civil Procedure Code (Amendment Act), 2002. The provision to Order VI Rule 17 CPC (after amendment) reads as under :-

'Order VI Rule 17.

Rule 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 question 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.'

10. Order VI Rule 17 CPC as it stands amended by Civil Procedure Code 2002 recognizes the power of Court to allow amendment albeit with certain limitations contained in the proviso added to the rule. It can be inferred that the amendments sought by the petitioner at the stage of final arguments were well within the knowledge of the petitioner from very inception. The legal position is well settled that the power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far reaching discretionary powers is governed by

judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court.

11. In order to find out whether the application filed by the petitioner seeking amendment of written statement satisfies the requirement of provision of Order VI Rule 17 CPC, legal position is well settled that the power of the Court to grant amendment is with limitation contained in provision added to Rule 17 of Order VI CPC.

12. The question whether pleadings can be directed to be amended after the commencement of trial, has been considered by the Supreme Court in the decision reported as Vidyabhai & Ors. vs. Padmalatha & Anr. AIR 2009 SC 1433. In Vidyabhai's case the plaintiff had filed a suit on 16.12.2003 for specific performance of an agreement of sale. Written statement was filed in the said suit on 17.04.2004. When the case was at the stage of cross examination of witnesses, an application under Order 6 Rule 17 CPC seeking amendment of written statement was filed on 08.11.2006. The amendment application was dismissed by the learned Trial Court rejecting the contention that the respondent could not gather the material and information necessary for drafting proper written statement earlier. The order rejecting the amendment was challenged before the High Court of Karnataka. In exercise of writ jurisdiction, the High Court of Karnataka allowed the amendment application observing as under:-

'..... According to Order 6 Rule 17, an amendment application can be filed at any stage of the proceeding. Filing of affidavit by way of evidence itself is not a good ground to reject the application filed seeking amendment of written statement. It is not out of place to mention that the parties must be allowed to plea. Such a valuable right cannot be curtailed in the absence of good ground.'

Aggrieved by the said order, Civil Appeal No. 7251 of 2008 (Arising out of SLP (Civil) No. 4740 of 2008) was filed impugning the order of High Court allowing the amendment in the written statement after the trial has commenced. The relevant paras noting the rival contentions and explaining the legal position are as under:

5. Mr. S.K. Kulkarni, learned Counsel appearing on behalf of the appellants, would submit that in view of the proviso appended to Order VI Rule 17 of the Code, the High Court committed a serious illegality in passing the impugned judgment.

6. Ms. Kiran Suri, learned Counsel appearing on behalf of the respondents, on the other hand, would contend that the proviso appended to Order VI Rule 17 of the Code is not attracted in the instant case as by reason of the amendment to the written statement, no new case has been made out. It was submitted that 'leave' to amend the written statement was filed for the purpose of elaborating the defence which had already been taken by the defendants and in that view of the matter, this Court should not exercise its jurisdiction under Article 136 of the Constitution of India particularly when it is well-known that an application for amendment of written statement should be dealt with liberally.

7. By reason of the civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI 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 therefore 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.

8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition.

The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

13. The scope of power of this Court under Article 227 of the Constitution is not in the nature of appellate jurisdiction and so, the extent and scope of power with this Court is limited and restrictive in nature, and in the normal circumstance, it is exercised where there is want of jurisdiction, error of law or perverse findings by the trial Court. Such power is to be exercised to keep the subordinate court within limits of their jurisdiction and authority and it is not to act as an Appellate Court for correcting the decisions of the subordinate courts. This court would not substitute its opinion or interfere with the findings of the facts of the trial Court, if there was no infirmity or perversity. Thus, in the absence of there being any material illegality or perversity, the order of the court below is not to be faulted with or interfered with by this court in its supervisory power under Article 227.

14. Since the suit for specific performance has been filed in the year 2008 and the written statement has also been filed in November, 2008, in order to seek amendment to the pleadings it is necessary that the party seeking amendment satisfies the Court that the facts sought to be pleaded by way of amendment could not be pleaded before commencement of trial despite due diligence. In the instant case on the date of filing the written statement on 20.11.2008, the petitioner/defendant has pleaded in preliminary objection No. 4 the factum of death of her husband in January, 2002 leaving behind three legal heirs including the petitioner and their two children who have succeeded to his estate. A bare reading of the written statement makes it clear that at the time of filing the written statement more than six and half years had lapsed from the date of death of her husband. No physical or mental disability has been pleaded in the application under Order 6 Rule 17 CPC which could have affected the capacity of the petitioner to plead all the pre-existing facts.

15. The facts now sought to be pleaded in the written statement by way of amendment do not satisfy the test laid down in the proviso to Order VI Rule 17 CPC. Thus, petitioner is not able to derive any advantage by placing reliance on Mahila Ramkali Devi's case (supra). It is worth noting here that the respondent/plaintiff had examined three witnesses who have been duly cross-examined by the petitioner/defendant. The plaintiff's evidence was closed on 7.9.2012 and thereafter the petitioner also filed her affidavit as defence witness, copy of which is placed on record bearing the date of attestation as 20.11.2012. After framing of issues when the trial commenced, the parties have availed opportunity to lead evidence. The petitioner cannot be permitted to seek amendment in the written statement thereby raising pleas which were well within her knowledge at the stage when the written statement was filed.

16. Since the impugned order disallowing the application under Order VI Rule 17 CPC does not suffer from any error of law, no interference is warranted by this Court.

17. Another prayer made by the petitioner is for setting aside the order passed by learned trial Court whereby her application under Order IX Rule 7 CPC was dismissed and she has been denied the opportunity to lead defence evidence despite the fact that affidavits of defence witnesses have already been filed. The application under Order IX Rule 7 CPC has been dismissed by learned Trial Court noting that plaintiff's evidence was closed on 7.9.2012 but defendant failed to lead any evidence till 22.4.2014. The defendant has failed to explain any reason for not leading defence evidence despite repeated ample opportunities being given and even cost was imposed. The defence evidence was closed by the Court as despite ample opportunities being granted, defendant failed to lead evidence.

18. On behalf of the respondent Shri Rajesh Sharma, Advocate has submitted that the respondent/plaintiff has no objection if one opportunity is granted to the petitioner to lead defence evidence by tendering the DWs whose affidavits have already been filed before the learned trial Court and that he shall cross-examine the defence witnesses on the date already fixed by the learned Trial Court. Learned counsel for the respondent submits that while granting such opportunity to the petitioner/defendant, she may be subjected to

such conditions as deemed fit by this Court.

19. In view of the above submissions made on behalf of the parties, the petitioner/defendant is given one last opportunity to examine defence witnesses whose affidavits have already been filed, subject to payment of costs of ` 20,000/-.

20. Parties are directed to appear in person before the learned Trial Court on the date already fixed i.e. on 14.09.2015. On that date the petitioner/defendant shall lead defence evidence. The cost shall be paid by the petitioner/defendant to the respondent/plaintiff before examining the defence witnesses. It is made clear that on 14.09.2015 counsel for the petitioner/defendant shall remain present before the learned Trial Court and will not seek any accommodation or adjournment in the matter. However, in case the Presiding Officer happens to be on leave on 14.09.2015 the matter shall be listed on the next working day and on that date the petitioner/defendant shall avail the opportunity to lead his defence evidence.

21. Petition stands disposed of in above terms.

As prayed, a copy of this order be given dasti to learned counsel for the parties.

CM No. 4488/2015

Dismissed as infructuous.