



\$~

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

Judgment Reserved on :07.10.2013

Judgment Pronounced on: 24.01.2014

+ IA No.8419/2013 in CS(OS) 2154/2010

RAJ RANI & ANR

..... Plaintiff

Through

Mr.Ravi Gupta, Senior Advocate with
Mr.Lalit Gupta, Mr.Kamal Mehta and
Ms.Payal Gupta, Advocates

versus

SUMITRA PARASHAR & ANR

... Defendant

Through

Mr.Harish Malhotra, Senior Advocate
with Mr.B.C.Pandey and Mr.Rajinder
Aggarwal, Advocates**CORAM:****HON'BLE MR. JUSTICE JAYANT NATH****JAYANT NATH, J.****IA No.8419/2013 (Order VI Rule 17 CPC)**

1. The present application is filed for amendment of the plaint. The plaintiff has filed the present Suit seeking the relief of possession, recovery of damages/mesne profits, permanent and mandatory injunction pertaining to property No.53, Sector-12, Block-B, Dwarka, New Delhi. It is averred in the plaint that the parties to the Suit are close relatives i.e. plaintiff No.2 and defendant No.2 being real brothers while plaintiff No.1 is wife of plaintiff No.2 and defendant No.1 is the wife of defendant No.2. The suit property it is stated was originally allotted by DDA to one Ishwar Singh. The defendant No.2 at that time was working in the Land & Building Department of the Delhi Government situated at ITO. Plaintiff No.2 was



engaged in the business of sale and purchase of properties. It is stated that the defendant No.2 informed plaintiff No.2 that Shri Ishwar Singh was ready to sell his property. Accordingly, it is stated that the plaintiff purchased the rights of Shri Ishwar Singh for valuable consideration. It was stated that a registered General Power of Attorney dated 25.01.1994, two Special Power of Attorney of the same date, Agreement to Sell, possession letter, receipt etc. were executed.

2. It is stated that defendant No.2 offered to the plaintiff that he would get the suit property converted to freehold. Hence, the plaintiffs handed over the entire file containing all original documents to defendant No.2. Later defendant No.2 is stated to have claimed that the documents were misplaced. FIR No.971/2001 dated 20.08.2001 was got registered at Police Station Sarojini Nagar, Delhi.

3. In September, 2009 it is stated that the plaintiff learnt that defendant No.2 is raising construction on the suit property. Hence, the present Suit is filed seeking a decree of possession, mesne profit etc.

4. The Suit was filed on 23rd October, 2010. The defendant filed written statement on 3.1.2011 stating that the property was actually bought by Shri Ram Dhan Sharma, father of plaintiff No.2 and defendant No.2 from the said original allottee Shri Ishwar Singh. Shri Ishwar Singh is stated to have executed Agreement to Sell, Power of Attorney, receipt and Will etc on 27.5.1994 in favour of the said Shri Ram Dhan Sharma. The defendant No.1 was stated to have bought the said property vide Agreement to Sell



dated 11.7.2001 from Shri Ram Dhan Sharma. Thereafter on 17.10.2005 a Conveyance Deed was executed in favour of the defendants by DDA.

5. Issues were framed in this case on 28th November, 2011. Issue No.4 reads as follows:-

“4. Whether the suit is not maintainable without challenging the Conveyance Deed executed by DDA in favour of the defendants? (OPD)

6. List of witnesses were filed by the plaintiff. PW 1 Shri Bhagwan Sharma also tendered his evidence by way of Affidavit on 2nd May, 2012. Minimal examination-in-chief was done on the said date. Thereafter the plaintiff filed IA No.2703/2013 under Order 14 Rule 5 CPC seeking to delete the aforesaid issue No.4 on the ground that the same does not arise from the pleadings of the parties. The said application was dismissed on 18.2.2013 with a clarification that the said dismissal of the application will not come in the way of the plaintiffs/applicants, if so advised, to seek amendment of the plaint. Hence, the present application has now been filed seeking amendment of the Plaint.

7. By the present application plaintiff seeks to amend the plaint to add averments challenging the documents executed by Shri Ishwar Singh in favour of Shri Ram Dhan Sharma. A decree of declaration is sought declaring all documents of alleged transfer of title dated 27.5.1994 executed by Shri Ishwar Singh in favour of Shri Ram Dhan Sharma as forged and fabricated and also similar declaration qua the document executed by Shri Ram Dhan Sharma dated 11.7.2001 in favour of the defendants. Challenge



is also sought to be made to the Conveyance Deed dated 17.10.2005 executed by DDA in favour of the defendants. It is averred in the said application for amendment that at the relevant time, the defendants have admitted execution of various documents dated 25.1.1994. It is further stated that in the entire written statement filed by the defendants, it is nowhere pleaded that the present Suit filed by the plaintiff is not maintainable without challenging the Conveyance Deed executed by DDA in favour of the defendants. It is also averred that the plaintiff was not aware about existence of documents dated 27.5.1994, 11.7.2001 and Conveyance Deed dated 17.10.2005 at the time of filing of the Suit/Plaint. Hence, it is averred that there was no question of the plaintiff challenging the Conveyance Deed executed by DDA in favour of the defendants or other documents at the time of filing of the present Suit.

8. Reliance is placed on the liberty granted by this Court in its order dated 18.02.2013 permitting the plaintiff to file the present application.

9. Learned senior counsel appearing for the plaintiff submits that the powers of this Court are extremely wide and that the said amendments are necessary for the purpose of determining the real questions in controversy between the parties.

10. Learned senior counsel for the defendant, on the other hand, has vehemently opposed the present application. It is urged that the present application, apart from being barred under Order 6 Rule 17 CPC is nothing but a dilatory tactic. It is averred that issues were framed on 28.11.2011.



Evidence of PW 1 has been filed on 19.1.2012 and was tendered on 2.5.2012. Thereafter the plaintiff has filed an application under Order 14 Rule 5 CPC for dropping of issue No.4 which was also dismissed on 18.2.2013. In May, 2013 the present application is filed belatedly. It is further urged that the evidence has already commenced. Hence, in view of proviso to Order 6 Rule 17 CPC the present application is barred. Reliance is placed on the judgment of the Supreme Court in ***Rajkumar Gurawara versus S.K.Sarwagi and Company Private Limited and another* (2008) 14 SCC 364, Salem Advocate Bar Association versus Union of India, (2005) 6 SCC 344 and Vidyabai and others versus Padamlatha and another, (2009) 2 SC 409** to contend that the proviso to Order 6 Rule 17 is couched in a mandatory form and that the jurisdiction of this Court is taken away when evidence has commenced, unless the party seeking an amendment can show that in spite of due diligence the said party could not have raised the matter before commencement of trial.

11. Learned senior counsel for the plaintiff in rebuttal has stressed that no doubt the evidence by way of Affidavit of PW 1 has been filed and tendered in evidence. However, it is urged that cross-examination is yet to commence. Further, only nominal examination-in-chief took place on one date of hearing. He submits that no prejudice would be caused to the defendant in case the present amendment is allowed. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of ***Baldev Singh and others versus Manohar Singh and another, 2006(6) SCC 498*** and; ***Pankaja and Another versus Yellapa (2004) 6 SCC 415*** and judgment of this High Court in the case of ***Link Engineers (P.) Ltd. vs. ASEA Brown***



Boveri Limited & Ors., 140(2007) DLT 533 to contend that the proviso is applicable only once the entire pleadings are completed and the discretion of the Court in allowing an amendment has not been completely done away with but has only been curtailed.

12. The issue hence basically centers around whether in view of proviso to Order 6 Rule 17 CPC the present application can be allowed. Order 6 Rule 17 CPC reads as under:-

“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.”

13. The proviso which has been inserted w.e.f. 1.7.2002 states that no application of 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.

14. In my view, plaintiff has given a plausible explanation to show that despite due diligence he could not have inserted the amendments as now stated by the present application at an earlier stage i.e. prior to the alleged commencement of the trial. Issues were framed on 28.11.2011. An issue



was framed whether the Suit was not maintainable without challenging the Conveyance Deed executed by DDA. It is averred that there is no such averment made by the defendant in the written statement. There is no serious denial to this. It appears that the plaintiff seems to have realized that in the absence of any pleadings challenging the Conveyance Deed executed by DDA in favour of the defendants dated 17.10.2005, and in view of issue No.4 framed on 28.11.2011, the plaintiff may face a problem. The plaintiff hence filed IA No.2703/2013 under Order 14 Rule 5 CPC on 14.2.2013 for deletion of Issue No.4. The application was dismissed on 18.2.2013 but it was clarified that the dismissal of the said application will not come in the way of the plaintiff seeking amendment of the plaint. The present application is filed on 17.5.2013. Hence, a plausible explanation has been given for the delay in filing of the present application for amendment, at this stage.

15. However, even assuming that the present application has not been filed without due diligence, in my view the amendment as sought by the plaintiff cannot be shut out.

16. Reference may be had to the judgment of the Hon'ble Supreme Court in the case of ***Baldev Singh and others versus Manohar Singh (supra)*** where in paragraph 17 the Court held as follows:-

“17.Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet



commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.”

17. Further, the Supreme Court in the case of *Pankaja and Another versus Yellapa(supra)* the Court in paragraph 14 held as follows:-

“14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.”

18. Reference may also be had to the judgment of the Supreme Court in the case of *Pradeep Singhvi and Anr v. Heero Dhankani and Ors (2004)*



13 SCC 432 where in para 4, the Supreme Court has held as follows:

“4. Of course, by the time the defendants moved an application for amending the written statement, the trial had commenced but the proposed amendment, if allowed, would not have irreparably prejudiced the plaintiffs. At the most, the plaintiff would have been re-examined. We do not think that the trial court was justified in refusing the prayer for amendment in written statement which would have the effect of excluding the defendants from raising a plea material for their defence.”

Similarly, the Punjab and Haryana High Court in the case of ***Tejinder Singh vs. Surjit Rai and Anr (2011) 163 PLR 318*** in para 12 of the judgment, has held as follows:

12. Now coming to the other plea raised by the defendant that no amendment could be allowed after the trial has commenced. In this case, from the facts and circumstances as referred to above, it transpires that the trial had yet commenced as after framing of the issues, the plaintiff had tendered affidavits of the witnesses and only two witnesses were cross-examined. In such circumstances, where the element of diligence was found to be in favour of the plaintiff the amendment could be allowed. The Apex Court in a case has gone to the extent that since the court should look for determining the real question into controversy and if the amendment does not cause any prejudice and the opposite party, would have the opportunity to meet such amendment while leading evidence, then such amendment should be allowed and the prejudice could only arise after the completion of the evidence. A reference if any could be made to the judgment delivered by the Apex Court in case *Rajkumar Gurawara v. S.K. Sarwagi and Co. Pvt Ltd.* and another AIR 2008 SC 2303.”

19. Similarly, in ***Link Engineers (P) Limited versus M/s.Asea Brown Boveri Limited & Ors. (supra)*** this Court held that filing of Affidavits by



examination-in-chief cannot be considered as commencement of trial. In paragraph 17 this Court held as follows:-

“17. In my considered view, it is not in doubt that if the affidavits of examination-in-chief were not to be filed but the witnesses were to be examined the date for appearance of the witness itself would be the date for commencement of trial. The only difference in the present case is that in view of the present procedure the evidence is filed by way of affidavit. However, it is also true that the affidavit is taken into account and read in evidence on the appearance of the witness before the Court and accepting that he was tendering the affidavit as his examination-in-chief. The application for amendment has been filed after the last date for filing of affidavit of 23.10.2006 but before the date for appearance of witness on 4.12.2006.

20. In view of the judgment of the Hon'ble Supreme Court in the case of *Baldev Singh and others versus Manohar Singh and another (supra)*, the phrase completion of trial would have a flexible meaning. It cannot be merely because an Affidavit by way of evidence has been filed and the affidavit has been tendered in evidence and examination-in-chief has been partly recorded on only one date of hearing it would mean that plaintiff has been knocked out from being able to amend his plaint. Such an interpretation of proviso under Order 6 Rule 17 PC would clearly not have been envisaged.

21. Here evidence by way of affidavit having been filed by PW1, the same was tendered as Ex.PW1/A on 2.5.2012. In the short examination-in-chief that took place on that date, the said PW1 sought to tender various



documents all of which were objected to by learned counsel for the defendant. Hence, on the request of the plaintiff, further examination-in-chief was deferred as the plaintiff sought time to file an application for leave to place the documents on record. In my view, the examination-in-chief of PW1 is substantially incomplete. Keeping in view the legal position stated by the Hon'ble Supreme Court in the case of ***Baldev Singh versus Manohar Singh*** (*supra*, namely, that the proviso to Order 6 Rule 17 CPC must be understood in the limited sense and meaning final hearing of the Suit, examination of witnesses etc., it cannot be held that the evidence in the present case has commenced as envisaged under Order 6 Rule 17 CPC.

22. The reliance of the learned senior counsel appearing for the defendant upon the observations of the Supreme Court in the case of ***Rajkumar Gurawara versus S.K.Sarwagi and Company Private Limited and another*** (*supra*) does not alter the above position. In paragraph 13 the Supreme Court held as follows:-

“13.To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of



the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso.”(emphasis added)

Clearly after evidence is complete, the Court would be slow to allow amendments, unless the conditions set out in the proviso are satisfied. Somewhat similar is the position with respect to the judgment of the Hon’ble Supreme Court in the case of *Vidyabai and others versus Padamlatha and another (supra)* relied upon by senior counsel for the defendant. In paragraph 10 the Court held as follows:-

“10. ... 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.”

23. Hence proviso to Order 6 Rule 17 CPC does not apply to the facts of this case. It cannot be disputed that the amendments sought are necessary for the purpose of determining the real questions in controversy between the parties. In case the amendment is not allowed, it would tantamount to actually knocking out the case of the plaintiff as in the absence of the Conveyance Deed dated 17.10.2005 being set aside, the declaration of the title of the plaintiff would remain in dispute. No fundamentally new case is sought to be propounded.

24. As has been repeatedly held, procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the



administration of justice (See Mr. Shaikh Salim Haji Abdul Khayumsab v. Mr. Kumar and Ors. AIR 2006 SC 396). It would not be appropriate to knock out the case of the plaintiff on such a strict interpretation of the rules of the procedure.

25. Accordingly, the application is allowed subject to payment of costs of Rs.20,000/- payable to the defendant.

CS (OS) 2154/2010

List on 11.03.2014 before the Joint Registrar.

**JAYANT NATH
(JUDGE)**

**JANUARY 24, 2014
n/rb**