Anita v. Rita Kapadia , 2019 PLRonline 3503

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PUNJAB AND HARYANA HIGH COURT

Justice Amol Rattan Singh

ANITA – Appellant,

Versus

RITA KAPADIA – Respondents

Civil Revision no.1570 of 2017

17.07.2019

CPC O. 6 R. 17 – Though I fully agree that the application under Order 6 Rule 17 CPC having been filed at a stage when admittedly the respondent-plaintiff had testified as regards her examination-in-chief, the bar contained in proviso to Rule 17 of Order 6 of the Code of Civil Procedure would normally stand in her way, thereby debarring her from seeking an amendment at that stage, especially with 7 years having gone by after the suit was first filed; however, the petitioners not being able to deny the factual position that even in paragraph 7 of the original plaint, it had been stated by the plaintiff that the loss caused to her by fraudulent acts of the defendants can only be compensated by way of damages and delivery of possession of the property back to her, that would show that what has been stated in paragraph 1 thereof (the plaint), to the effect that she is absolute owner in possession of the suit property, is possibly a drafting error – However, since it cannot be positively determined that what is stated in paragraph 1 is the result of deliberate drafting to avoid higher court fee, and undoubtedly in paragraph 7 it has been stated that the plaintiff deserves delivery of possession of the suit property, in my opinion the impugned order allowing amendment need not be interfered with, but heavy costs need to be imposed upon the plaintiff, prior to her amendment in her plaint being permitted – Specific Relief Act, 1963, Section 40.

[Para 25]

Mr. Aashish Chopra, for the petitioner (in CR no.1570 of 2017). Mr. Jai Vir Yadav, and Mr. Tapan Kumar Yadav, for the petitioners (in CR no.1596 of 2017). Mr. Amandeep Singh, for respondent no.1 in both petitions.

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Amol Rattan Singh, J. – By these two revision petitions, the petitioners therein have impugned the same order passed by the learned Civil Judge (Junior Division), Sohna, on January 12, 2017, vide which the application filed by the respondent plaintiff under Order 6 Rule 17 of the Code of Civil Procedure, read with Section 40 of the Specific Relief Act, 1963, has been allowed, thereby allowing the plaintiff to amend her plaint.

The single petitioner in CR no.1570 of 2017 and the two petitioners in CR no.1596 of 2017, are all defendants in the said suit, with the petitioner in CR no.1570 of 2017 having been impleaded as such subsequently, upon an application filed by her under Order 1 Rule 10 CPC (on January 10, 2015), on the ground that she was a subsequent purchaser of the suit property.

2. The history of the suit property, as given by the petitioner in CR no.1570 of 2017, is that the sale deed on the strength of which (proforma) respondents no.2 and 3 in the said petition (petitioners in CR no.1596 of 2017), purchased the property, was contended by the plaintiff (respondent no.1 in both petitions) to be a fraudulently executed one, of which she was actually not the executant (being the owner of the suit property), and therefore the subsequent sales made by respondents no.2 and 3 in favour of respondents no.7 and 8 herein, were also not binding on respondent no.1, i.e. the plaintiff.

The petitioner in CR no.1570 of 2017 claims to have purchased the suit property from one Karamwati, who had in turn purchased it from respondents no.7 and 8.

3. Be that as it may, nothing further is being stated on the merits of all contentions raised before the trial court, with the suit obviously still to be adjudicated upon by that court, upon evidence led before it.

What is pertinent to now notice, after seeing the aforesaid background of the lis given by the petitioner in CR no.1570 of 2017, is that in the original plaint filed by respondent no.1 herein, she had sought a decree of declaration of ownership of the suit land, also further seeking decrees of perpetual and mandatory injunction, the former relief being to the extent of restraining the defendants from entering into any further transaction qua the suit property and the latter being a direction to pay damages to the plaintiff for the loss suffered by her, and to also bear the costs of all proceedings initiated by her against them, alongwith the interest pendente lite, till realisation of the damages.

She had also sought that the sale deed dated 13.10.2005, bearing Vasika no.3948/2005, registered in the office of the Joint Sub-Registrar, Sohna, be cancelled.

The said suit was filed on July 23, 2007, with the application for amendment of the plaint having been filed on May 30, 2015.

Vide the said application (copy Annexure P-6), the respondent- plaintiff sought to also incorporate a prayer seeking the relief of possession of the suit property after paying the requisite court fee (ad valorem).

It was contended in paragraph 4 of the application that the suit for permanent and mandatory injunction was instituted on the ground that the plaintiff was in absolute possession of the suit land, and therefore the defendants had no right, title or interest in the same. In the same paragraph itself it is stated that the prayer already made, in effect is one seeking title and possession of the suit property, and therefore it would be in the interest of justice if the plaintiff was permitted to amend the suit to be one seeking vacant possession of the suit land, instead of the relief of mandatory injunction.

4. Consequently, paragraph 7-A was sought to be added in the plaint (after paragraph 7 thereof), with the new paragraph reading as follows:-

"7 A. That the Plaintiff has suffered wrongful loss and irreparable injury due to the fraudulent acts of the Defendants, which can be only compensated by way of delivery of possession of the Suit Property to the Plaintiff. The plaintiff is the rightful and legal owner of the Suit Property and no other person/entity has a better title to the Suit Property. In any event, the Plaintiff is the rightful owner of the suit property and entitled for decree for the peaceful and vacant possession of the suit property."

After having said that in the proposed paragraph 7-A of the application, it is stated that paragraph 7 also needs to be amended, with the following line sought to be added after the original paragraph 7 in the plaint:-

"In any event, the Plaintiff is the rightful owner of the suit property and entitled for decree for the peaceful and vacant possession of the suit property."

An additional prayer clause was also sought to be added, to the following effect:-

"(iva) Mandatory injunction directing the Defendants in possession of the Suit Property to restore/ hand over the peaceful and vacant possession of the Suit Premises (more particularly detailed in Paragraph No.1 of the Plaint) to the Plaintiff."

5. The defendants, including the three petitioners in these two petitions, filed their separate replies, with petitioner Anita (defendant no.8) having filed a reply on her own behalf, and the two petitioners in CR no.1596 of 2017 having filed a joint reply opposing the application on various grounds, including the delay in filing it, as also on the merits thereof.

6. However, the learned trial court after considering the matter held that the law relating to amendment of pleadings being "quite liberal" and the amendment sought being one that would not change the nature of the suit, hence in order to even decide the case on merits, the amendment deserved to be allowed.

While allowing the said application, costs of Rs.2000/- were ordered to be imposed on the plaintiff, to be paid to the Legal Services Authority.

7. Before this court, Mr. Aashish Chopra, learned counsel for the petitioner in CR no.1570 of 2017, first submitted that the application having been filed 8 years after the suit had been filed, the trial court wholly erred in allowing it.

He then pointed to the fact that in the plaint filed by the respondent-plaintiff, (copy Annexure P-1), in paragraph no.1 it is specifically stated as follows:-

"That the plaintiff is absolute owner in possession of agriculture land bearing khewat no....."

He further pointed out that the prayer clause of the plaint reads as follows:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to pass:-

(i) A declaratory decree in favour of the plaintiff to the effect that the plaintiff is absolute owner-in-possession of land fully detailed in para no.1 of the plaint above and the defendant have got not right, title or interest with the same, in any manner.

(ii) An order for cancellation of the sale deed dated 13.10.2005 bearing Vasika no.3948/2005 registered with Joint Sub Registrar, Sohna, may also be passed, and

(iii) Consequent relief of permanent injunction restraining the defendants from entering into any other further transaction regarding the land in question, in any manner.

(iv) Mandatory injunction directing the defendants to pay damages to the plaintiff for loss suffered by her and also bear the costs of all proceedings initiated against them including counsels fee along with pendente lite interest @ 18% per annum till its realization.

(v) Any other order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the present case may also be passed to meet the ends of justice."

He further submitted that defendants no.1 and 2, i.e. the petitioners in CR no.1596 of 2017, had filed an application under Order 7 Rule 11 of the CPC seeking that the plaint be rejected on the ground that court fee ad valorem, as per the value of the suit land, had not be affixed with the plaint.

8. Though the reply filed to the said application by the respondent- plaintiff is not on record, on query learned counsel for respondent no.1 (plaintiff) produced in court (on 27.02.2019) a copy of a reply filed by the plaintiff to another application filed under the same provision, by defendants no.6 and 7 in the suit, that application also having been decided along with the application filed by defendants no.1 and 2, i.e. the petitioners in CR no.1596 of 2017.

A perusal thereof shows that the reasoning given by the respondent-plaintiff, as to why court fee ad valorem is not to be paid, is that the sale of the suit land having been due to a conspiracy hatched between the defendants (and therefore a fraud having been played upon her), such fee was not payable.

Thereafter however, it is stated in the same reply, that if the Court still came to the conclusion that such court fee is payable ad valorem, the plaintiff would comply with the direction of the Court.

9. Mr. Chopra thereafter pointed to the order passed by the trial Court on those applications (copy Annexure P-3), in which the reasoning given for dismissing the applications and holding that the court fee, ad valorem, is not payable, is that the plaintiff was not seeking the relief of possession.

After observing as aforesaid, that Court finally held as follows in its order dated 26.09.2012:-

"This apart, the careful perusal of the relief column clearly reflects that she is claiming the relief of declaration as to her ownership and possession over the suit property. It is also settled that the plaint is to be read as whole, accordingly, mere averments as to delivery of possession in para no.7 of the plaint will not add the relief of possession. Admittedly, the suit property is agricultural land. The present suit was valued at the rate of Rs.60/- per acre, as the suit property is Chahi land, and accordingly, sufficient court fee has been paid. In view of aforesaid, applications under consideration are dismissed, being devoid on merits. Now, to come up on 06.10.2012 for filing of written statement."

10. Mr. Chopra also pointed to paragraph 7 of the said application, in which, he admitted that, no doubt, the plaintiff has stated that delivery of possession of the property be given back to her. However, he submitted that the trial court duly having held a recital to that effect in paragraph 7 would not 'add the relief of possession', and it having therefore virtually held that no relief of possession was sought, eventually allowing of the application under Order 6 Rule 17 CPC on the ground that it would not change the nature of the suit, is a wholly perverse finding.

11. Yet further, he submitted that no cause of action has been disclosed by the plaintiff in her application under Order 6 Rule 17 CPC, as to why the relief of seeking possession of the suit property should be added at a stage when the trial was well in progress, with even the cross-examination of the plaintiff having been conducted. Thus, without her even making an averment that she has been dispossessed at any subsequent stage after the suit was filed, she could not having been allowed to incorporate an amendment by which the entire nature of the suit changed.

He also submitted that the application under Order 6 Rule 17 CPC is also bereft of any reason as to why, despite due diligence, the relief now sought could not have been added in the plaint at the time of filing of the suit, even if it is to be presumed that she had been dispossessed earlier.

12. Next, he also pointed to the fact that the prayer for mandatory injunction as contained in the plaint, is only with regard to payment of damages to the plaintiff, her assertion being that she be declared to be the owner in possession of the suit land.

Thus he submitted that the impugned order, by which the application has been allowed, is wholly without any reasoning given, as to why the statutory provision contained in the proviso to Rule 17 or Order 6 CPC, should be relaxed in favour of the plaintiff.

13. In support of his arguments, he relied upon a judgment of the Supreme Court in

Ajendraprasadji N.Pande and another v. Swami Keshavprakeshdasji N. and others 2007 (1) RCR (Civil) 481 from which he pointed to paragraphs 54 and 57, which read as follows:-

"54. It is submitted that the date of settlement of issues is the date of commencement of trial. [Kailash v. Nankhu & Ors. (supra)] Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination in chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter affidavit which proves lack of due diligence on the part of the defendant nos.1 and 2 (appellants).

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57. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in respect of due diligence. As held by this Court in Kailash v. Nankhu & Ors. (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence."

14. Mr. Chopra further relied upon another judgment of the Supreme Court in Vidyabai and others v. Padmalatha and another 2009 (1) RCR (Civil) 763 to similar effect, specifically, drawing attention of this court to the following passage from that judgment:-

"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 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.

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'."

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14. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

He also relied upon a judgment of a coordinate Bench of this court in Prem Chand v. Chetan Dass 2006 (1) RCR (Civil) 164, to the similar effect.

15. He next drew attention to a judgment of a coordinate Bench of this court in Mamta Rani and another v. Daya Wanti 2014 (69) RCR (Civil) 832, in which another judgment of the Supreme Court, in J. Samuel and others v. Gattu Mahesh and others (2012) 2 SCC 300, has been cited to the following effect:-

"Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order VI Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [vide Aniglase Yohannan vs. Ramlatha and Others, (2005) 7 SCC 534, Ajendraprasadji N. Pandey and Another vs. Swami Keshavprakeshdasji N. and Others, Chander Kanta Bansal vs. Rajinder Singh Anand, (2008) 5 SCC 117, Rajkumar Guraward (dead) through LRs. v. S.K.Sarwagi and Company Private Limited and Another, (2008) 14 SCC 364, Vidyabai and Others vs. Padmalatha and Another, (2009) 2 SCC 409, Man Kaur (dead) By LRs vs. Hartar Singh Sangha, (2010) 10 SCC 512.

16. Mr. Jai Vir Yadav and Mr. Tapan Yadav, learned counsel for the petitioners in (CR no.1596 of 2017), reiterate what Mr. Chopra argued and further submitted that the application under Order 6 Rule 17 CPC was filed on 30.05.2015, with the suit having been instituted on 23.07.2007, i.e. after a period of almost 8 years, with the issues having been framed on 22.02.2014 and the first affidavit by way of examination-in-chief of the plaintiffs' witness having been tendered on 28.04.2014, after which the plaintiff has also been cross-examined, as already noticed herein above.

He thus submitted that at such a belated stage, the nature of the suit could not have been changed, with no reasoning given at all as to why, despite due diligence, an amendment as is sought, was not incorporated at the time when the suit was filed.

17. Mr. Yadav next submitted that Section 6 of the Specific Relief Act, 1963, postulating that even a suit seeking possession of a property from which a plaintiff contends that he has been dispossessed, only being capable of being instituted within a period of six months

of such dispossession, the said provision would also come in the way of the respondent-plaintiff despite her contention made in paragraph 8 of the original plaint that construction was being raised by the petitioners-defendants (as alleged by the plaintiff), because an amendment seeking a decree of possession, filed at a stage far beyond six months of that initial plea having been taken, would be barred by limitation.

18. In response, learned counsel for respondent no.1 in both the petitions, first pointed to paragraphs 7 and 8 of the plaint (copy annexed as Annexure P-1), which reads as follows:-

"7. That the plaintiff has suffered wrongful loss and irreparable injury due to the fraudulent acts of the defendants, which can only be compensated by way of damages, along with the delivery of possession of the property back to the plaintiff. The plaintiff has a better title upon the property and as such, the defendants be restrained from further transacting upon the said property so that the plaintiff may be spared for further loss.

8. The cause of action to file the present suit first arose on 13.10.2005, when the defendants entered into and executed the alleged sale deed in the absence and without the knowledge or consent of the plaintiff. The cause of action further arose in the month of May 2006, when the defendant failed to cooperate with the police authorities where despite many attempts (sic). The cause of action arose in the month of May, 2007 when the plaintiff became aware of the fact that construction activity was being conducted at her property, of which the defendants have got no right, title or interest to do so. The cause of action continues and subsists. Hence, the present suit."

(Emphasis applied in this judgment only).

19. He next drew attentions to what is stated in paragraph 1 of the application filed by the defendants no.6 and 7 (respondents no.7 and 8 herein), to the effect that the plaintiff (the present respondent no.1 being the plaintiff) has also sought the possession of the suit property.

He thereafter drew attention to paragraph 1 of the reply to submit that she has not denied that she has sought possession of the suit property.

20. He then drew attention to the testimony of the respondent- plaintiff by way of her affidavit, to contend that she had nowhere stated that she is in possession of the suit property.

21. Consequently, he submitted that an improper drafting of the plaint, wherein in the opening line of paragraph 1, it is stated that the plaintiff is absolute owner in possession of agriculture land bearing Khewat no.343, would not take away from the fact that the plaintiff-respondent no.1 is not actually claiming to be in possession, she having very clearly stated in paragraph 7 of the original plaint that she seeks delivery of possession.

He submitted that this would be further so because the petitioners, i.e. the defendants, have even undertaken construction upon the suit land, obviously proving that the respondent-plaintiff is not in possession and therefore she seeks possession.

22. He next submitted that even at the time when the respondent- plaintiff filed an application under Order 6 Rule 17 of the CPC on May 30, 2015, to which a reply was filed by the present petitioners in both the cases, even then they did not raise the objection that the plea of possession had not been taken in the plaint, though the application under Order 7 Rule 11 of the CPC had already been adjudicated upon in the year 2012.

23. Therefore, he submitted that the impugned order has been correctly passed by the trial court, which does not require to be interfered with.

24. Mr. Chopra, in rebuttal, submitted that even in the light of the submissions made on behalf of the respondent-plaintiff in this court, to the effect that the plaintiff had actually claimed possession in her plaint at the outset but it was only due to improper drafting/inadvertently that the first para said otherwise, that reasoning should have been given in the application under Order 6 Rule 17 itself, which is not so.

He further submitted that no explanation whatsoever has been given as to what due diligence the respondent-plaintiff had exercised despite which she could not incorporate earlier, the amendment she is now seeking, well after her evidence had already been led in toto (as regards her own testimony).

25. Having considered the matter, though I fully agree with Messrs. Chopra and Yadav that the application under Order 6 Rule 17 CPC having been filed at a stage when admittedly the respondent-plaintiff had testified as regards her examination-in-chief, the bar contained in proviso to Rule 17 of Order 6 of the Code of Civil Procedure would normally stand in her way, thereby debarring her from seeking an amendment at that stage, especially with 7 years having gone by after the suit was first filed; however, with learned counsel for the petitioners (defendants in the suit), obviously also not being able to deny the factual position that even in paragraph 7 of the original plaint, it had been stated by the plaintiff that the loss caused to her by fraudulent acts of the defendants can only be compensated by way of damages and delivery of possession of the property back to her, that would show that what has been stated in paragraph 1 thereof (the plaint), to the effect that she is absolute owner in possession of the suit property, is possibly a drafting error, though naturally it cannot be ruled out that a deliberate attempt to try and avoid paying court fee ad valorem at that stage was resorted to, by supposedly clever drafting, including in the prayer clause.

However, since it cannot be positively determined that what is stated in paragraph 1 is the result of deliberate drafting to avoid higher court fee, and undoubtedly in paragraph 7 it has been stated that the plaintiff deserves delivery of possession of the suit property, in my opinion the impugned order need not be interfered with, but heavy costs need to be imposed upon the plaintiff, prior to her amendment in her plaint being permitted.

26. Of course, Mr. Chopra and Mr. Yadav are also right that the trial court after stating in its earlier order, when the application under Order 7 Rule 11 was filed, that the relief of possession would not be added, could not have thereafter allowed the amendment thereby allowing the relief of possession to be added, which may again point to deliberate drafting

in the original plaint; yet even so, the allegation being that the respondent-plaintiff has been defrauded his property (without this court making any comment on the merits of that contention), and to repeat again, it also having been stated in the original plaint itself that she deserves the relief of possession being restored to her, in my opinion the impugned order need not be interfered with, except to the extent of imposing much heavier costs upon the respondent-plaintiffs prior to her application under Order 6 Rule 17 being accepted.

27. Naturally, the ratio of the judgments cited by Mr. Chopra, on the issue of an amendment in the plaint not being permissible after the trial has commenced (unless it is shown that despite due diligence the amendment sought could not have been incorporated in the original plaint), is also irrefutable; still, for the reason already given hereinabove, to the effect that the respondent-plaintiff having at least stated in the body of the plaint that possession deserves to be delivered to her, I would not interfere with the essence of the impugned order.

28. Consequently, while dismissing these petitions, it is directed that the respondent-plaintiff shall pay costs of Rs.20,000/- to each of the contesting defendants in the suit, she having sought an amendment after the trial had effectively commenced, with her examination-in-chief also having been conducted, subject to which payment, her application under Order 6 Rule 17 would stand allowed as has been already ordered by the learned trial court vide the impugned order.

These petitions thus stand dismissed subject to the aforesaid costs being paid by the respondent-plaintiff; if such costs are not paid by her, the petitions would be deemed to have been allowed with the impugned order set aside and the application of the respondent-plaintiff under Order 6 Rule 17 CPC would be deemed to have been dismissed. If the costs are paid, naturally these petitions stand dismissed as held hereinabove.