SUPREME COURT OF INDIA

Chander Kanta Bansal

Vs.

Rajinder Singh Anand

C.A.No.1893 of 2008

(Arijit Pasayat and P. Sathasivam JJ.)

11.03.2008

JUDGMENT

P. Sathasivam, J.

1. Leave granted.

2. This appeal is directed against the order dated 22.11.2006 passed by the learned single Judge of the High Court of Delhi in C.M. (Main) No. 136 of 2005 whereby the High Court allowed the petition filed by the respondent herein.

3. Brief facts:

> "The appellant and the respondent, being members of Adarsh Bhawan House Building Cooperative Society, Delhi were jointly allotted a plot bearing No. 13/20, Punjabi Bagh Extension, New Delhi admeasuring 426 sq. yds. Vide perpetual lease deed dated 12.05.1981. After the allotment, the plot was partitioned with the mutual consent of the parties. The front portion was allotted to the appellant and the back portion was allotted to the respondent. The appellant raised construction in the year 1983 and completed the same in the year 1984. The respondent also started raising the construction on the back portion and completed the same in the year 1985. Both the parties were in use and occupation of their respective portions of the property after the respective construction. In the year 1986, the respondent herein filed a suit for mandatory injunction being Suit No. 261 of 1986 alleging that the drive way, which is 10' wide from gate facing 30' road up to the road facing 15' vide service lane at the back, has been encroached upon by the appellant and the appellant is not permitting him to use the drive way. Written statement was filed and the witnesses were examined. On 12.5.2004, the appellant herein filed an application under Order VI Rule 17 read with Section 151 CPC for amendment of written statement and sought the permission of the Court to file a written agreement executed between the parties on 10.9.1982. The respondent herein filed a reply to the application denying the execution of the agreement and claimed that the same is forged and fabricated document. The trial Court, after hearing the arguments, allowed the amendment application on 18.11.2004. Against that order, the respondent herein filed a C.M.(Main) No. 136 of 2005 before the High Court of Delhi. By order dated 22.11.2006, the High Court allowed the petition and set aside the order passed by the trial Court on 18.11.2004 in the amendment application. Aggrieved by the said order, the appellant preferred the present appeal by way of special leave before this Court."

4. Heard Mr. Ranjit Kumar, learned senior counsel appearing for the appellant and Mr. Altaf Ahmed, learned senior counsel appearing for the respondent.

5. The respondent herein (plaintiff) filed a suit No. 261 of 1986 on the file of Senior Sub-Judge, Delhi praying a decree for mandatory injunction against the defendant (appellant-herein) to remove all obstructions at point "X" and lock at point "Y" in the site plan of the property No. 13/20, Punjabi Bagh Extn. New Delhi and also not to put the lock at main gate of the property.

In the same prayer, the plaintiff has prayed that the defendant may further be directed not to obstruct the plaintiff, his family members or relations from using the common drive way from point "Y" to "Z" in the site plan. The said suit was filed on 23.05.1986; the defendant filed a written statement even in the year 1986 itself. While so, on 12.05.2004, the defendant filed an application for amendment of written statement under Order VI Rule 17 read with Section 151 CPC. The main reason for seeking the amendment in the written statement is that the defendant is the house wife and earlier was assisted by his son, namely, Sunit Gupta, who was a Chartered Accountant. He died at the young age i.e. in 1998. According to the defendant, he was following the litigation and the document/agreement pertaining to the parties was in his custody. Only her another son, namely, Navneet Agrawal searched the papers/documents of his brother Sunit Gupta and located an agreement dated 10.09.1982. Since the said agreement is material one and has a bearing on the dispute between the parties and the execution of the same is admitted by the plaintiff, her application may be allowed by permitting the defendant to raise the plea of the agreement dated 10.09.1982 is her written statement and mark the same as a document of the defendant.

6. The said application was resisted by the plaintiff by filing an objection. It was stated that the suit was filed by the plaintiff in the month of May, 1986 and after more than 18 years, the present application has been moved with a view to frustrate the claim of the plaintiff. The trial has completed and after the final arguments when the defendant came to know that she is going to lose her case she is changing her stance by filing the present application for amendment in the written statement. It was further stated that the alleged agreement/partition dated 10.09.1982, which itself is not admissible in the eye of law wince it is a forged document and on the basis of the said document, the proposed amendment cannot be allowed.

7. The Civil Judge, based on the claim of both the parties, particularly accepting the explanation offered by the defendant allowed the said application and permitted the defendant to incorporate the proposed amendments in the written statement on payment of cost of Rs.3,000/-. Questioning the said order, the plaintiff has filed a C.M. (Main) No. 136 of 2005 before the High Court of Delhi. On going through the entire materials and details, namely, filing of the suit in the year 1986, the application for amendment of written statement filed only in 1994 and of the fact that nothing has been stated in the written statement as well as in her evidence by the impugned order set aside the order of the trial Court and rejected the application filed by the defendant seeking to amend the written statement. Aggrieved by the said order of the High Court, the defendant has filed the above appeal by way of special leave.

8. In order to find out whether the application of the defendant under Order VI Rule 17 for amendment of written statement is bonfire and sustainable at this stage or not, it is useful to refer to the relevant provisions of CPC. Order 6 Rule 17 read thus:

> "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.
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> "This rule was omitted by the Code of Civil Procedure (Amendment) Act, 1999. However, before the enforcement of the Code of Civil Procedure (Amendment) Act,

1999, the original rule was substituted and restored with an additional proviso. The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment."

9. With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy leading to protest all over the country. Thereafter, the rule was restored in its original form by amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, 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. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.

10. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

11. Keeping the above broad principles in mind, let us ascertain whether the defendant has justifiable cause to file an application praying for amendment of a written statement for bringing an agreement dated 10.09.1982. We have already referred to the fact that the plaintiff had approached the court seeking a decree for mandatory injunction as early as on 1986. We also refer to the fact that within a short duration i.e. in 1986 itself, the defendant has filed a written statement. Absolutely, there is no whisper about the prior partition agreement dated 10.09.1982. No doubt, in the application for amendment, it was stated that her son who is a Chartered Accountant all along was looking after this suit and he died in the year 1998. It is also available from the very same application that apart from her first son, namely, Sunit Gupta, defendant has another son by name Navneet Agarwal. Admittedly, the son who looking after the suit was none else than a Chartered Accountant. In such circumstances, if the alleged agreement dated 10.09.1982 between the plaintiff and defendant was in existence nothing prevented her son, Chartered Accountant, to bring it to the notice of her counsel and refer it in the written statement filed in the year 1986. It is relevant to mention that in the reply, the plaintiff has specifically denied the same and asserted that the alleged agreement/partition deed dated 10.09.1982 is a

forged document and based on the same, the proposed amendment cannot be allowed. It is also not in dispute and best known to both parties the suit which is of the year 1986 came to be taken up for trial only in 2004 and admittedly on the date of filing of the petition for amendment, the trial was on the verge of completion. It was brought to our notice that both sides have closed their evidence and completed their argument, but only at this stage the defendant filed the said application for amendment of her written statement. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunit Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness.

12. As rightly referred to by the *High Court in Union of India vs. Pramod Gupta (dead) by LRs and Others*[1], this Court cautioned that delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings.

13. As observed earlier, the suit filed in the year 1986 is for a rite of passage between two portions of the same property dragged for a period of 21 years. In spite of long delay, if acceptable material/materials placed before the court show that the delay was beyond their control or diligence, it would be possible for the court to consider the same by compensating the other side by awarding cost. As pointed out earlier, when she gave evidence as D.W.1, there was no whisper about the written document/partition between the parties. On the other hand, she asserted that partition was oral. Now by filing the said application, she wants to retract what she pleaded in the written statement, undoubtedly it would deprive the claim of the plaintiff. We are also satisfied that she failed to substantiate inordinate delay in filing the application that too after closing of evidence and arguments. All these aspects have been considered by the High Court. We do not find any ground for interference in the order of the High Court; on the other hand, we are in entire agreement with the same.

14. In the light of the above discussion, the appeal fails and the same is dismissed. No costs. It is made clear that we have not expressed anything on the stand taken by both parties in the suit

and it is for the trial Court to dispose of the same uninfluenced by any of the observation made above within a period of three months from the date of receipt of copy of this judgment.

[1] *(2005) 12 SCC 0001*