

(2005) 10 DEL CK 0020

In the Delhi High Court

Case No : IA 6326 and 6327 of 2005 in CS (OS) 1009 of 2003

Davinder Singh

APPELLANT

Vs

Surjit Malhotra

RESPONDENT

Date of Decision : 19-10-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 151

Citation : (2006) 126 DLT 102 : (2006) 143 PLR 24

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : V.K. Shali, for the Appellant; A.B. Dial and Navnit, for the Respondent

Judgement

Anil Kumar, J.—These are applications by defendant for amendment of written statement under order 6 Rule 17 of CPC and u/s 151 of CPC for permission to place on record photocopy of Special Power of Attorney dated 20th July, 1990; Photocopy of Power of Attorney dated 24.3.2001 executed by Sh. Ashok Kumar Gulati in the U.S.A, photocopy of perpetual sub lease dated 12.8.1970 and photocopy of FIR No. 119/2000 dated 18.4.2000 in P.S Kotla Mubarakpur, New Delhi and notification of land rates of Land and Development Office.

2. The plaintiff filed this suit for the specific performance of an agreement in respect of property number GI/23, G.T. Karnal Road, industrial area, Delhi. The defendant has contested the pleas of the plaintiff contending that an exchange agreement was entered into between the parties in respect of G.T. Karnal Road property and house No. A-122 Gujranwala Town, Delhi. Since the title of the property of Gujranwala Town, Delhi was doubtful as the original lease deed was not produced and reliable Explanation about it was also not given, Therefore, the agreement dated 2.4 2003 was cancelled. In the alternative the defendant has sought a counter claim for specific performance in respect of property No. A-122, Gujranwala Town, Delhi 110033 in his favor.

3. On the pleadings of the parties issues were framed and thereafter, the

evidence of the plaintiff was recorded. After the evidence of the plaintiff was recorded the defendant filed his evidence on affidavit dated 30th May 2005 and appeared for cross examination before the Local commissioner. The plaintiff, however, did not cross-examine the defendant and raised objections regarding the deposition made by the defendant in the affidavit filed as evidence. The plaintiff contended that the deposition of the defendant in the affidavit is beyond his pleadings. The plaintiff also objected to the documents filed by the defendant with the affidavit.

4. In the application for amendment of written statement the defendant/applicant has contended that in April- May 2005 he came to know as to why the plaintiff was not having the original documents of Gujranwala Property. The plaintiff had got the Gujranwala property converted into free hold property from lease hold property on the basis of a certified copy of the lease deed on the ground that the original lease deed was lost. However, it has now transpired that in fact the original was never lost and the plaintiff made a false statement in this regard to the Delhi Development Authority. Another person has claimed rights in the property on the basis of original documents of the Gujranwala property. Consequently the Delhi development authority has filed a police complaint against the plaintiff.

5. The defendant/applicant, Therefore, contended that after coming to know these new facts, which were not within his knowledge earlier despite due diligence on his part, these new fact were also incorporated by him in his deposition in the affidavit filed by him before the learned local commissioner. As the plaintiff objected to these facts as beyond pleadings, consequently the defendant/applicant has filed the application for amendment seeking incorporation of these new facts which came to his knowledge in April/ May 2005.

6. The defendant by amendment wants to incorporate the facts that Shri Ashok Kumar Gulati, original owner of the property could not have sold the property to Shri Sant Ram on the basis of General Power of Attorney dated 21st July,1987 as when the alleged General Power of attorney was executed, he was not in India. Ashok Kumar Gulati migrated to U.S.A about 30 to 40 years back. Before migrating to U.S.A he had executed a Special Power of Attorney in favor of his Uncle, Banarsi Das Sethi (Mama) dated 20.7. 1970 and had also given original lease deed to him. The defendant/applicant contended that he came to know about these facts when he met Balkishan Sethi and Rohit Sethi who also informed him about a suit No. 2243 of 1998 filed by him against Shri Devinder Singh, plaintiff in the above suit.

7. The defendant/applicant stated that Shri Devinder Singh at the time of transaction had told him that the original lease deed had been lost and Ashok Kumar Gulati had sold the property on the basis of General Power of Attorney to Sant Ram who had transferred it to Subash Chand Verma. The defendant had been informed that Subash Chand Verma had got the Gujranwala property converted into freehold property and the plaintiff had purchased the property

from Subash Chand Verma vide sale deeds dated 20.11.200 and 15th January, 2003. The defendant stated that he came to know about the suit No. 2243 of 1998 filed against Devinder Singh, plaintiff, by Balkishan Sethi and Rohit Sethi in April/may, 2005 which was never revealed by the plaintiff, who concealed a vary material information from the Hon''ble Court. In the suit which was filed against the plaintiff for Gujranwala Property in 1998, the following relief were claimed:

a) the documents executed by defendant No. 4 be declared as null and void and illegal obtained by fraud, coercion and by misrepresentation by defendants No. 1 to 3 or their agents, servants, attorneys or assignees with respect of property bearing No. A-122, Gujranwala Town, Part-I, G.T. Karnal Road, Delhi 110009 and the same document may be ordered to be cancelled.

b) the decree for permanent injunction be passed, restraining the defendants 1 to 3 their agents, servants and attorneys or assignees from parting with possession of the property, transferring from alienating or subletting the property bearing No. A-122, Gujranwala Town, Part-I, G.T. Karnal Road, Delhi 110009 or receiving the consideration amount with respect to the property

c) that the above-mentioned property may be ordered to sealed so to protect it from the strangers;

d) that the decree for mandatory injunction be passed, directing the defendant No. 3, their agents, servants and attorneys and assignees to handover the documents obtained by them with respect to above-mentioned property from defendant No. 4. The Defendant No. 4 be also directed to cancel the documents executed by them in the absence of the plaintiffs which the defendants 1 to 3 obtained, without consent, knowledge and permission of the plaintiffs rather the same were obtained by fraud and misrepresentation and committing a forgery;

e) That the suit of the plaintiff be decreed with cost against the defendants in terms of the prayer made above.

f) or such other decree, order or relief be also granted as this Hon''ble Court deems fit and proper under the circumstances of the case.

8. The defendant/applicant thus contended that the suit is now pending in the Court of Shri H.S. Sharma Additional District Judge, Delhi. The defendant has disclosed various orders passed in that suit and he wants to incorporate those orders and other facts in his written statement by way of amendment. The defendant categorically contended that the plaintiff never disclosed to him about any litigation pending regarding the Gujranwala property between the plaintiff and the Banarsi Dass Sethi. Had the plaintiff disclosed about the litigation between him and Banarsi Dass Seth about the Gujranwala property, he would have never entered into an exchange transaction with the plaintiff on 2.4.2003. The plaintiff, according to defendant, has thus played a fraud upon him and willfully suppressed the material particulars which have come to the knowledge of the defendant recently and Therefore, the defendant wants to amend the

written statement incorporating these facts which are relevant for the determination of real controversies between the parties.

9. The defendant/applicant has relied on Harish Chander Vs. Bharti Bhardwaj, National Agro-Chemical Industries Ltd. Vs. National Research Development Corporation, , Sampath Kumar Vs. Ayyakannu and Another, , Sampath Kumar Vs. Ayyakannu and Another, , Sampath Kumar v. Ayyakannu and Anr. to contend that amendment should not be refused in the present facts and circumstances.

10. The plaintiff/non-applicant has contested the application for amendment on the ground that amendment should not be allowed after the trial has commenced and the plaintiff has also concluded his evidence and relied on Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar, and Kailash Vs. Nanhku and Others, According to the plaintiff, the trial is deemed to commence when the issues are framed and the case is set down for recording the evidence. The plaintiff further contended that the facts now sought to be incorporated in the written statement are such facts which could have been known by the defendant on being diligent. The plaintiff/non-applicant stated that all the facts were rather within the knowledge of the defendant. The plaintiff/non-applicant contended that by the present amendment the defendant is setting up an altogether new case alleging fraud on the part of the plaintiff which cannot be permitted. The plaintiff has also opposed the amendment on the ground that the amendment to the written statement is actuated by malafides as the trial has already commenced and the plaintiff has concluded his evidence in affirmative and by the present application for amendment defendant is indulging in dilatory tactics.

11. Shri V.K. Shalli, learned counsel for the plaintiff, has also very emphatically opposed the application for amendment and for production of additional documents on the ground that after the affidavits of evidence were filed by the defendant incorporating the facts which were not pleaded and thereafter when an application was filed on behalf of plaintiff seeking direction to the defendant to file a fresh affidavit incorporating only those facts which have been pleaded by the defendant and not to take the documents filed by the defendant with the affidavit, that the present applications for amendment and production of new documents has been filed by the defendant to counter his application. The learned counsel also contended that the amendment is not germane to the disputes and in any case the application is belated. Opposing the documents filed by the defendant/applicant, it was contended that as per Order xviii Rule 4, where documents are filed with affidavits, the proof and admissibility of such documents shall be subject to the orders of the court and there is no ground for review of order dated 16th November, 2004 whereby a Local Commissioner was appointed to record the evidence and the parties were directed to file evidence in the form of affidavit. The learned counsel also produced a copy of order dated 23rd August, 2005 dismissing the suit of Shri Ashok Kumar Gulati and Banarsi Das Sethi filed against the plaintiff being Suit No. 2243/1998 in default on 23.8.2005.

12. I have heard the counsel for the parties at length and have also perused the application and the replies filed. It cannot be denied that defendant has claimed the relief of specific performance pertaining to Gujranwala property in his counter claim. The suit was filed on 8th May, 2003 and the counter claim No. 1554/2003 on 5th August, 2003. In reply to the pleas raised by the defendant/applicant in the counter claim, the plaintiff did not disclose that the suit No. 2243/1998 for declaration with consequential relief for permanent injunction as well as for mandatory injunction was filed by the original allottee of Gujranwala property, Shri Ashok Kumar Gulati in 1998 which is pending adjudication against him. The plaintiff rather pleaded that his title is legally clear. A relevant portion of the plea raised by the plaintiff is extracted for reference:

"It is specifically denied that at the time of execution of the documents in respect of plaintiff's property, the plaintiff disclosed that he did not have the original allotment letter and related documents evidencing the allotment of this property by Delhi development authority, to the original allottee, which is a baseless allegations. The plaintiff is in possession of all the relevant documents pertaining to his property No. A-122, Gujranwala Town, Part I, Delhi and his title is legally clear. However, it is submitted that the agreement to sell pertaining to the aforesaid property was got cancelled by the defendant himself and he cannot permitted to take the benefit of his own wrongs by way of filing the present false counter claim."

13. The plaintiff did not disclose anything pertaining to the suit which was pending against him in the reply to the counter claim and the defense which has been set up by the plaintiff is that he has all the documents and his legal title is clear. If the suit was filed by the original allottee against the plaintiff in 1998 and it was pending on the date, the written statement to counter claim was filed, how the title of the plaintiff was clear and why the information about the suit was not relevant had not been disclosed by the plaintiff even in the reply to the application for amendment filed by the defendant. The reply to the application for amendment is dated 22nd August, 2005 with an affidavit sworn on 12th September, 2005. In the reply the plaintiff asserted that there is no suit pending as on date and his title is clear. However in the reply, it was not disclosed as to why the facts pertaining to the suit filed by the original allottee were not relevant and why they were not disclosed in the written statement to the counter claim filed by the plaintiff and why these facts were not disclosed at the time of entering into agreement with the defendant. The plaintiff has also failed to explain as to how his title was clear despite an interim order passed in the suit filed by the original allottee. The plaintiff has not only concealed the facts but, it appears, has tried to mislead this Court by his pleadings by contending that if the defendant is ready to purchase the property of the plaintiff, he is ready for that on the same terms and conditions which were mentioned in Agreement to sell executed by the plaintiff in favor of defendant. The relevant pleading of the plaintiff is extracted as under:

"4. That the counter claim of the defendant is liable to be dismissed and he has never willing and ready to perform his part of obligation in respect of the property of the plaintiff i.e. A-122, Gujranwala Town, Part I, Delhi 110033 as the agreement to sell of same was got cancelled by defendant himself after taking refund of his money and in case the defendant is ready to purchase the property of the plaintiff the ready for that on the same terms and conditions which were mentioned in agreement to sell executed by the plaintiff in favor of the defendant which was got cancelled by the defendant and for which he has to file a separate suit for a specific performance as both the Agreements were got executed separately and one was cancelled by the defendant himself."

14. The plea of the plaintiff that the amendment sought is not germane to the controversies between the parties, is not born from perusal of the pleadings between the parties and the issues framed pertain to exchange of Gujranwala property and specific performance of this property. Except the bald statement and argument by the counsel for the plaintiff that the facts pertaining to Gujranwala property are not germane, the counsel was unable to reason as to how these facts are not relevant and germane for determination of real controversies between the parties. If the suit filed against the plaintiff succeeds, then the plaintiff will not have any right in the Gujranwala property and consequently the exchange agreement between the parties will fail and soil plaintiff's averment that he is ready to sell the Gujranwala property on the same terms and conditions. In the circumstances, by no rational it can be deduced that the facts pertaining to a suit challenging the rights of the plaintiff in Gujranwala property are not relevant for determination of present controversies between the parties.

15. The defendant/applicant stated that he could not know about the pendency of the suit filed by the original allottee against the plaintiff and his transferee Shri Subhash Verma in April/May 2005 as the pendency of the suit which was filed in 1998 was not disclosed by the plaintiff to the defendant in any of the documents nor in the pleadings. The defendant is not a party to the suit which was filed by the original allottee against the plaintiff. Nothing has been shown by the plaintiff which will indicate that the defendant had knowledge about the pendency of the suit by original allottee against the plaintiff. Rather plaintiff has failed to show and give any plausible Explanation about non disclosing about the suit filed against him where an interim order was passed against him.

16. The plaintiff himself concealed the facts pertaining to challenge to his rights pertaining to Gujranwala property and yet has contended that the defendant/applicant ought to have known about these facts. How the defendant could know about the pendency of the suit in which he was not a party and in respect of which nothing was disclosed by the plaintiff? The plaintiff's plea that the defendant could have known these facts with due diligence is without any rational and legal basis, when he himself concealed these facts and information. I am unable to comprehend as to how the defendant could have known about

these facts with due diligence. The plea of the plaintiff that the defendant ought to have known these facts and could have known with due diligence is thus not plausible and acceptable.

17. The purpose and object of Order 6 Rule 17 is to allow either party to alter or amend his pleading in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down in various precedents. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayer should not adopt a hyper technical approach. Liberal approach is the general rule particularly in cases where the other side can be compensated with costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation. Mere delay usually cannot be a ground for refusing a prayer for amendment because merits of amendment sought to be incorporated by way of amendments are not to be judged at the stage of allowing prayer for amendment. Reliance can be placed on B.K.N. Narayana Pillai Vs. P. Pillai and Another, M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., ; Akshaya Restaurant Vs. P. Anjanappa and Another, ; Delhi Municipal Corporation Vs. Kanwar Natwar Singh and Another, and Shri Kanwal Kishore Manchanda Vs. Ms. Raksha Arora and others, , Kanwal Kishore Manchanda v. Ms. Raksha Arora and Ors. In B.K. Pillai (supra), it was held that the application for amendment should not be rejected, especially when the party opposing amendment can be compensated by cost and the application does not suffer from any delay. Similarly, in M/s. Estralla Rubber (supra), the Apex Court held that it is open for the defendant to take an alternative or additional defense and merely because there was delay in making an amendment application will not cause any prejudice or shall take away any right accrued and in such circumstances the amendment should not be rejected. A single Judge of this Court in Kanwal Kishore (supra) had held that the object of allowing the amendment in the averments of the parties is to iron out and solve the tangle and not to complicate them or to leave certain points for decision in future litigation and the endeavor of the Court should always be to settle the matter by taking into consideration all the facts. In Lt. Col. Gaj Singh Yadav (supra), these principles for amendment of the written statement were noted and it was held that those amendment which do not constitute addition of a new cause of action or raises different case but amounts merely to a different or additional approach to the same facts should be allowed which amendments are necessary for determination of real controversies between the parties and re just for decision of the matter.

18. It was held in Harish Chander Vs. Bharti Bhardwaj, National Agro-Chemical Industries Ltd. Vs. National Research Development Corporation, that amendment cannot be refused on technical grounds and amendment which is necessary for determination of real controversies between the parties on account of

concealment of facts should be allowed to advance cause of justice and fact that no intentional delay was caused by and on behalf of the party seeking amendment and when the other party can be allowed to lead further evidence and can be compensated by way of cost. Similarly in Sampath Kumar Vs. Ayyakannu and Another, it was held that mere delay by itself should not be a ground for rejecting the application where the delay can be compensated by imposing cost and the same should be allowed in case basic structure is not altered by the proposed amendment. Dipak Chandra Ruhidas and Kailash Dipak v. Nanhku and Ors. (supra) relied by the plaintiff do not lay down the proposition propounded by the plaintiff. The plea of the plaintiff that after commencement of trial amendment can not be allowed is not born out from the judgments relied on by the plaintiff.

19. The plea of the plaintiff that the defendant is now raising the plea of fraud and can not be allowed, can not be accepted in the present facts and circumstances. If the alleged fraud committed by the plaintiff has come to the notice of the defendant now, the defendant can not be deprived of his rights against the alleged fraud perpetrated by the plaintiff.

20. Similarly the plea of the plaintiff that the suit filed against the plaintiff by the original allottee has been dismissed in default, does not make the amendment sought and the documents produced by the defendant not necessary and irrelevant. The dismissal of the suit filed against the plaintiff can be one of the plea which may be taken to counter the claims set up by the defendant but on that ground neither the proposed amendment can be declined nor the documents sought to be produced by the defendant, becomes irrelevant.

21. In the circumstances all the pleas of the plaintiff opposing amendments sought by the defendant fail and it is to be held that the amendments are necessary for the determination of real controversies between the parties and there is no impediment against allowing such amendment to the written statement and counter claim of the defendant.

22. On the same reasoning it is inevitable to infer in the facts and circumstances that the documents now sought to be produced by the defendant are necessary for the determination of controversies between the parties and are relevant for effectual determination of controversies and could not be produced by the defendant earlier despite due diligence on his part.

23. Therefore, for these reasons, the applications are allowed. The defendant is allowed to incorporate amendment sought by him in the written statement. Since the plaintiff failed to disclosed the relevant information no costs is awarded to him against the defendant. However, since the plaintiff has concluded his evidence in affirmative he will be entitled to lead such further evidence as may be deemed appropriate by him to counter the pleas of the defendant. The amended written statement filed by the defendant is taken on record. The application for taking on record the additional documents filed by the defendant

is also allowed and the additional documents are also taken on record. The plaintiff shall be entitled to file within two weeks such other ad further documents as may be deemed appropriate by him to rebut the additional documents filed by the defendant. With these observations applications are allowed and the parties are left to bear their own costs.