

(2012) 01 DEL CK 0047

In the Delhi High Court

Case No : I.A. 4552 of 2009 and I.A. No. 4553 of 2009 in CS (OS) No. 719 of 2006

Green Acre Holdings Ltd.

APPELLANT

Vs

MKJ Developers

RESPONDENT

Date of Decision : 23-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 8 Rule 1A(3), 151

Citation : (2012) 190 DLT 9 : (2012) 128 DRJ 259

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Rajiv Nayar with Mr L.K. Bhushan and Ms Swaty S. Malik, for the Appellant; N.K. Kaul, with Mr K. Datta and Mr Atul Singh, for the Respondent

Judgement

Manmohan Singh, J.—The above mentioned suit has been filed by the plaintiff for partition and case is pending adjudication in this court. The defendant needs to amend the written statement as there are some typographical errors in the same. The present application has been filed by the defendant under Order VI Rule 17 of the CPC being IA No.4552/2009 and IA No.4553/2009 for taking the additional documents on record.

2. The brief facts as per the plaint are that the property situated at No.3 Barapulia Road, Nizamuddin East, New Delhi admeasuring about 4321 sq.yds. (hereinafter referred to as the suit property) was sold to the plaintiff and the defendant each having 50% share by virtue of a sale deed dated 22nd August 1994 which was executed by the erstwhile owner Late Mrs. Sushila Jarmani Dass. The said sale deed was duly registered on 29th September 1994 and numbered as Document No. 7059, Additional Book No. 1 Volume No. 8423 on pages 145 to 156. The total consideration paid was 3,83,67,429/- (rupees three crores eighty three lacs sixty seven thousand four hundred and twenty nine). The said property was purchased so that it can be developed as a Joint Venture between the defendant and the plaintiff. But, due to some subsequent events, the

property could not be developed by the parties and it was abandoned.

3. The defendant has contested the said suit by filing written statement. However, the defendant wants to amend the written statement and hence, has moved an application bearing IA No.4552/2009.

4. Firstly the defendant states that the date of agreement typed in the written statement, in paragraph No. 4 (c) in reply to merits, is 26th December 1996 whereas the correct date should read 12th December, 1996.

5. Secondly, the defendant has to amend paragraph no. 4 (e) (ii) (E) in reply to merits, which was wrongly typed. The word "unencumbered" has not been typed in place of the word "ready". which refers to the properties shown to the plaintiff in lieu of the suit property and document dated 17th March 2006 filed alongwith the written statement supports the contention of the defendant.

6. Paragraph 4 (i) of the reply on merits needs to be changed. In the reply to the merits it was mentioned in the compromise recorded as "in suit no. 1227 of 1993 on April 8, 2002 money was deposited to Ishan Housing Projects Ltd." but instead the money was deposited by the defendant herein. The defendant states that the same is also for the record of this Court. Defendant states that as per direction of this Court, Registrar General of this Court was directed to nominate an officer to execute the sale deed but, as a matter of fact, it was not for execution of the sale deed but for the deed of relinquishment and defendant also wants this fact to be a matter of record for this Court.

7. Paragraph 4 (o) in the reply of merits also needs an amendment. The defendant states that the said paragraph is in present tense. It is written in the said reply that "Ishan Housing Projects is and has kept under its control following ready properties to convey title to the plaintiff". It was being referred to the time and year of institution of the suit at Calcutta. The defendant states that while filing the written statement these properties mentioned in this paragraph were not available to the defendant. Thus, the defendant wishes to make grammatical corrections. The defendant further states that the properties mentioned as "ready properties" are to be read as "unencumbered ready property" the same being a typing error. No other detail is added apart from the details of the property.

8. Defendant states that paragraph 4 (p) also needs an amendment. According to the defendant, the properties shown to the plaintiff were already in the knowledge of the plaintiff and the period has already lapsed, thus the word "are" and "is" are to be changed to "were" and "was" respectively.

9. Further, the defendant wishes to add another paragraph as "paragraph No. 4 (pa) to reply on merits in reference to an agreement dated 6.9.2000 between the plaintiff and the defendant. Defendant states that it was already agreed by the parties that the defendant was ready and willing to convey unencumbered properties by way of balance of payment. Thus, the amended paragraph is in a

form of a proposal being made by the defendant, that he is willing to compromise/mediate with the plaintiff, as per direction of this Court.

10. The defendant also wishes to amend paragraph 4 (u) of the reply on merits. The defendant states that he has denied all allegations made by the plaintiff in the foregoing paragraphs 1-5. But, due to a typographical error, the defendant did not type "paragraph 1-5".

11. Defendant further wants to amend paragraph No. 5 of the reply on merits. Defendant states that defendant alone settled the claim of Smt. Sushila Jarmani Das and defendant is the only one who paid the amount in full to the heirs of Smt. Sushila Jarmani.

12. It was stated in the application that the abovesaid amendments are necessary in order to determine the dispute between the parties. The reasons and justifications for the said paras are given in detail in the application. The amendments sought are given in the application and the same read as under :

(a) para No.4 (c) of reply on merits- The plaintiff on December 12, 1996 entered into an agreement for sale with Ishan Housing Projects Ltd. for sale of its undivided one half shares of the said premises for an aggregate consideration of Rs.550 lac of which Rs.100 lac was paid in advance by Ishan Housing Projects Ltd. This agreement dated December 12, 1996 was in supersession of the earlier agreements between the plaintiff and Belevedere Commercial Ltd. dated August 24, 1994 and Belevedere Commercial Ltd. and ITC Classic Finance Ltd. dated August 26, 1994 and ITC Classic Finance Ltd. and CREF Finance Ltd dated September 25, 1995. The said Belevedere Commercial Ltd., ITC Classic Finance Ltd. and CREF Finance Ltd. were also joined as confirming parties in the said agreement for sale dated December 12, 1996. In the meantime, a suit had been filed by the defendant and the plaintiff in the Delhi High Court being Suit No.1227/1993 concerning the transfer of right of Sushila Jaramani Das pursuant to an agreement for sale dated November 30, 1992.

(b) para No.4 (e)(ii)(E) of reply on merits - E) The said balance sum of Rs.2.65 crores would be payable by the defendant and its group to the plaintiff and its group by way of unencumbered properties in Kolkata of the value of Rs.2.65 crores.

(c) para No. 4(i) of reply on merits - In pursuance of the said agreement the defendant and its group also in the meantime settled the claim of Sushila Jaramani Das and the compromise was recorded in Suit No.1227/1993 on April 8, 2002. Pursuant whereto the defendant deposited the balance sum of Rs.70 lac in Court on November 27, 2003. In the meantime Sushila Jaramani Das died on May 31, 2002. Disputes thereafter arose between her heirs regarding their respective shares in the said amount of money. Under the settlement, the heirs of Sushila Jaramani Das had agreed to transfer their entitlement of 2075 sq. ft. in super built up area of the said premises in favour of the defendant and its group in consideration of money as recorded in the said compromise decree.

Ultimately, by an order dated February 14, 2005 passed by the Delhi High Court, the Registrar General was directed to nominate an officer of this Court initially to execute a sale deed thereafter instead of sale deed a deed for relinquishment conveying to the defendant the right, title and interest in one apartment measuring 2075 sq.ft. approximately with garden space, one servant quarter, one garage in the ground floor of plot No.3, Barapulia Road, Nizamuddin East, New Delhi. The registration fee was also deposited in Court by the defendant.

(d) para No.4 (o) of reply on merits- The said Ishan Housing Projects Ltd. at the time of institution of the suit at Calcutta High Court had kept under its control various properties including the following unencumbered properties with clear title in Kolkata which are suitable for the plaintiff. The defendant was in a position to convey title to the plaintiff in respect of under mentioned properties: (the defendant has attached a chart showing the list of the properties)

(e) Para No.4(p) of reply on merits - The availability of the aforesaid suitable properties were within the knowledge of the plaintiff who was free to select suitable properties of the agreed value of Rs.2.65 crores which the plaintiff however did not accept.

(f) Para No.4 (pa) of reply on merits

(pa) The defendant are ready and willing to convey and/or cause to be conveyed unencumbered properties as and by way of payment of the balance consideration amount in terms of the agreement as recorded in paragraph 4 and sub paragraph (e) of the written statement. In case the plaintiff refuses to accept any of the properties then in that case the defendant is ready and willing to make payment in cash or in such other form as may be so directed by this Court in lieu of property.

(g) Para No.4 (u) of reply on merits - Save as aforesaid and save what may appear from relevant records all allegations in the paragraph 1 to 5 under reference are denied and disputed. It is denied in particular that the agreement for development came to be abandoned as alleged or at all or that no step was taken by the defendant for development of the said property. There are old structures at the said property which is in possession of the defendant. New construction has not yet been started because of non-cooperation and breach of the development agreement by the plaintiff.

(h) Para No.5 of reply on merits - With reference to paragraphs 6 and 7 of the plaint, the defendant states that diverse steps have been taken in respect of the said properties which have been delineated hereinbefore. All the said facts are well within the knowledge of the plaintiff but have been suppressed in the plaint. The defendant states that the defendant alone is in possession of the said premises and allegation inconsistent therewith are denied. Save as aforesaid all allegations in the paragraphs under reference are denied and disputed. The claim of Smt Sushila Jarmani Das in respect of the apartment of 2075 sq. ft. arising under the deed of sale has been settled by the defendant alone and the

defendant has paid alone to the heirs of Smt Sushila Jarmani Das the amounts in full settlement of the claim.

13. The defendant states that this amendment is necessary for the ends of justice otherwise no fresh case is made out and no prejudice would cause to the plaintiff if this amendment is allowed.

14. In reply, plaintiff states that the amendment filed by the defendant is totally a new case and is inconsistent with the earlier defense. Plaintiff also states that these are delay tactics and abuse of process of law.

15. The plaintiff states that the defendant is evasive. The defendant was issued notice on 4.8.2006 directing written statement to be filed. But the defendant entered appearance on 10.07.2006 and sought some more time to file written statement. Thereafter also defendant failed to file and on 18.07.2007 and 30 days" more time was granted on request. Seeing the evasiveness/motive of the defendant, this Court closed the right of the defendant to file his written statement vide order 03.12.2007. Thereafter, a review application bearing No. 27/2008 was filed by the defendant and then also defendant did not appear on 25.01.2008. However, on 08.02.2008 the application was allowed and the written statement was notarized and thereafter taken on record.

16. The plaintiff states that it is evident that the defendant has almost taken two years to file the written statement and hence, is trying to delay the process. The present application is filed with a frivolous intent. It is not moved with a bonafide intention and it is just a strategy to delay the process of law.

17. Plaintiff states that the defendant is trying to change the whole case made out in the written statement under the garb of amendment. It is well settled law that the party by way of amendment cannot take inconsistent plea and set up totally new case.

18. The plaintiff further states that the law applicable in cases where plaints are sought to be amended is also applicable in cases where written statements are sought to be amended. Hence, no inconsistent and new plea can be taken in either plaint or written statement.

19. Plaintiff states that he has no trouble if the typographical errors are corrected by the defendant. But, he has serious objection to addition of new paragraphs to the written statement as it would change the whole case.

20. The plaintiff states that the defendant should have known whether the properties were "encumbered" or "ready". According to the plaintiff, all the contentions of the defendant are misleading and misconceived. The plaintiff states that the defendant by adding the word "unencumbered" is changing the whole case and that it is unbelievable as to how the defendant did not notice this while filing the written statement.

21. Further, as far as grammatical errors are concerned, the plaintiff has no

objection to that until and unless the nature of the case is not changed. Plaintiff also submits that defendant can bring on record facts which are not on record until and unless the nature of the case is not changed. Plaintiff has no objection to the amendment. But, through this application, the defendant is merely trying to bring out a new case and that should not be allowed.

22. Mr Rajiv Nayar, learned Senior Counsel, appearing on behalf of the plaintiff has handed over a convenient chart about the amendment sought by the defendant in the present application. The detail of the same is given as under:

S. No.

Original Written Statement

Amended sought

1.

Para 4(c)? Sale Deed dated 26.12.1996

??12.12.1996

2.

The said balance sum of Rs.2.65 crores would be payable by the defendant and its group to the plaintiff and its group by way of ready properties in Kolkata of the value of Rs.2.65 crores.

Para 4 (e) (ii) (E). the balance sum of Rs.2.65 crores would be payable by the defendant and its group to the plaintiff and its group by way of unencumbered properties in Kolkata of the value of Rs.2.65 crores.

3.

In pursuance of the said agreement the defendant and its group also in the meantime settled the claim of Sushila Jaramani Das and the compromise was recorded in Suit No.1227 of 1993 on April 8, 2002. Pursuant where to Ishan Housing Projects Ltd. deposited the balance sum of Rs.70 lac in Court on November 27, 2003. In the meantime Sushila Jaramani Das died on May 31, 2002. Disputes thereafter arose between her heirs regarding their respective shares in the said amount of money. Under the settlement, the heirs of Sushila Jaramani Das had agreed to transfer their entitled of 2075 sq. ft. in super build up area of the said compromise decree. Ultimately by an order dated February 14, 2005 passed by the High Court of Delhi, the Registrar General was directed to nominate an officer of this Court to execute a sale deed conveying to the defendant the right, title and interest in one apartment measuring 2075 sq. ft. approx. with garden space, one servant floor of plot No.3 Barapulia Road, Nizamuddin East, New Delhi .the registration fee was also deposited in Court by the Defendant.

Para 4 (i). In pursuance of the said Agreement the defendant and its group and

also in the meantime settle the claim of Sushila Jarmani Das and the compromise was recorded in Suit No.1227 of 1993 on April 8, 2002. Pursuant where to the defendant deposited the balance sum of Rs.70 lacs. Ultimately by an order dated 14.2.2005 passed by the High Court of Delhi the Registrar General was directed to nominate an officer of the Court initially to execute a sale deed; thereafter instead of sale deed a deed for relinquishment conveying to the defendant the right, title and interest in one apartment. ?..

4.

The Ishan Housing Projects Ltd. kept under its control the following ready and unencumbered properties with clear title in Kolkata which are suitable for the plaintiff. The defendant is in a position to convey the title of the plaintiff in respect of the mentioned properties

Para 4(o) ? The said Ishan Housing Projects Ltd. at the time of institution of the suit at Calcutta High Court had kept under its control various properties including the following unencumbered properties with clear title in Kolkata which are suitable for the plaintiff. The defendant was in a position to convey the title to the plaintiff in respect of the mentioned properties.

5.

The availability of the aforesaid suitable properties are within the knowledge of the plaintiff who was free to select suitable properties of the agreed value of Rs.2.65 cr.

Para 4(p). The availability of the suitable properties were within the knowledge of the suitable properties of the agreed value of Rs.2.65 cr. which the plaintiff however did not accept.

6.

This pleading was not there in the written statement filed.

Pa) The defendant are ready and willing to convey and/or cause to be conveyed unencumbered properties as and by way of payment of the balance consideration amount in terms of the agreement as recorded in paragraph 4 and sub paragraph of the written statement. In case the plaintiff refuse to accept any of the properties then in that case the defendant is ready and willing to make payment in cash or in such other forms as may be so directed by the Hon"ble Court in lieu of property.

7.

Save as aforesaid and save what may appear from relevant records all allegations in the paragraph under reference are denied and disputed. It is denied in particular that the agreement for development came to be abandoned as alleged or at all or that no step was taken by the defendant for development of the said property. There are old structures at the said property which is in

possession of the defendant. new construction has not yet been started because of non-cooperation and breach of the development agreement by the plaintiff.

Para 4(u) Allegations under para 1 to 5 under reference were denied and disputed.

8.

The defendant states that diverse steps have been taken in respect of the said properties which have been delineated hereinbefore. All the said facts are well within the knowledge of the plaintiff but have been suppressed in the plaint. The defendant states that the defendant alone is in possession of the said premises and allegation inconsistent therewith are denied. Save as aforesaid all allegations in the paragraph under reference are denied and disputes. The claim of Smt. Sushila Jarmani Das in respect of the apartment of 2075 sq. ft. arising under the deed of sale has been settled by the defendant and the defendant has caused to be paid through Ishan Housing Projects Ltd. to the heirs of Smt. Sushila Jarmani Das the amounts in full settlement of the claim...

Para 5 ? The claim of Smt. Sushila Jarmani Das in respect of the apartment of 2075 sq. ft. arising under the deed of sale has been settled by the defendant alone; and the defendant has paid alone to the heirs of Sushila Jarmani Das the amount in full settlement of claim.

23. In the present case, the amendment has been sought by the defendant in the written statement. It is settled law that the Court should be more liberal when the amendment is sought in the written statement than in the plaint. The following are the decisions which are necessary to be discussed for the purpose of deciding the present application :

(a) In the case of Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., , it was observed:

8. It is well settled by various decisions of this Court as well as the High Courts in India that Courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference can be made to a decision of the Privy Council in Ma Shwe Mya v. Maung Mo Hnaung (AIR 1922 P.C. 249) in which the Privy Council observed:

All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit.

14. As noted herein earlier, the case set up by the plaintiff/respondent No.1 was

that his parents had no money to purchase the suit property and it was the plaintiff/ respondent No.1 who paid the consideration money. In the written statement, this fact was denied and further it was asserted in the written statement that the suit property was in fact purchased by their parents and they had sufficient income of their own. In the application for amendment of written statement it was stated that the plaintiff/respondent No.1 did not have any income to pay the consideration money of the suit property and in fact the parents of the plaintiff/respondent No.1 had sufficient income to pay the sale price. It was only pointed out in the application for amendment that after the death of their parents, the suit property was mutated in the joint names of the plaintiff/respondent No.1 and the defendants in equal shares. Therefore, the question whether certain admissions made in the written statement were sought to be withdrawn is concerned, we find, as noted herein earlier, there was no admission in the written statement from which it could be said that by filing an application for amendment of the written statement, the appellants had sought to withdraw such admission. It is true in the original written statement, a statement has been made that it is the defendant No.1/appellant No.1 is the owner and in continuous possession of the suit property but in our view, the powers of the Court are wide enough to permit amendment of the written statement by incorporating an alternative plea of ownership in the application for amendment of the written statement. That apart, in our view, the facts stated in the application for amendment were in fact an elaboration of the defence case. Accordingly, we are of the view that the High Court as well as the Trial Court had erred in rejecting the application for amendment of the written statement on the ground that in the event such amendment was allowed, it would take away some admissions made by the defendants/appellants in their written statement. That apart, in the case of *M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.*, , this Court held that even there was some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff/respondent No.1 so as to take away any accrued right.

(b) In the case of *Suraj Prakash Bhasin Vs. Smt. Raj Rani Bhasin and Others*, , it was observed:

6. The liberal principles which guide the exercise of discretion in allowing amendments have been laid down in numerous decisions of this Court. Multiplicity of proceedings being avoided is one criterion. Amendments which do not totally alter the character of the action are readily granted while case is taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under pretense of amendment of pleadings. The Court must be guided by the rule of justice expressed by the Privy Council in AIR 1922 249 (Privy Council) .

8. Counsel also urged that there had been gross remissness, to say the least on the part of the plaintiff respondent in seeking amendment at a late stage and with a tricky touch. In such cases we must remember the power of the Court to resort to the universal panacea for the pathology of negligence, indifference, slipshodness and other delinquencies of litigants. The Court, while allowing amendments, will, in such cases, order heavy costs. In the present case, the amendment has been allowed, but the condition of payment of costs has been imposed. In these circumstances, we do not find our way to do anything else except to dismiss the appeal."

(c) It is further trite that the correctness and falsity of the amendment cannot also be gone into at the stage of the amendment *Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others*, Further, in the case of *Usha Devi (supra)* it was held as follows:

As to the submissions made on behalf of the respondents that the amendment will render the suit non- maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and it will be open to the defendants-respondents to raise their objection in regard to the amended plaint by making any corresponding amendments in their written statement.

(d) In the case of *Shri Saif-ul-Islam Co. L.P. v. Roshan Lal Arora*, 2003 AIHC 2966 (2968) (Del), it was held that where pleadings are defective, amendment would be allowed. It is also settled law that amendments to plead material facts left by oversight and which does not cause prejudice to other side would be allowed.

24. The Supreme Court, in *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*, , observed in para 63 as under:

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment-

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and,

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

25. After having considered the facts of the matter and the decisions referred, I am of the view that the application for amendment in the written statement is to be allowed as the controversy between the parties still remains the same and I do not agree with the submission of the plaintiff that the entire character of the defence would be changed as no fresh case has been made in case, the amendments sought by the defendant are allowed. Accordingly, the application is allowed, subject to cost of Rs.50,000/- which shall be paid by the defendant to the plaintiff within four weeks from today. The amended written statement be filed by the defendant within four weeks.

26. The application is disposed of.

I.A. No.4553/2009

27. This is an application filed by the defendant under Order VIII Rule 1A(3) read with Section 151 CPC for taking on record the additional documents as mentioned in para 3 of the application.

28. Since the case is at the initial stage and issues in the matter have not been framed so far and since order of the amendment of the written statement has been passed in I.A. No.4552/2009, the additional documents as mentioned in para 3 of the application are taken on record.

29. The application is disposed of.

CS (OS) No.719/2006

30. Replication to the amended written statement be filed by the plaintiff within four weeks thereafter. List the matter before the Joint Registrar for admission/denial of the documents on 16.05.2012 and before Court for framing of issues on 25.07.2012.