
(2018) 05 SHI CK 0083
In the High Court Of Himachal Pradesh
Case No : CMPMO No. 285 of 2017

Madan Singh

APPELLANT

Vs

Mundi Ram

RESPONDENT

Date of Decision : 31-05-2018

Acts Referred:

Code of Civil Procedure 1860 — Order 6 Rule 17

Citation : (2018) 05 SHI CK 0083

Hon'ble Judges : VIVEK SINGH THAKUR

Bench : Single Bench

Advocate : Vinod Chauhan, Malay Kaushal

Final Decision : Allowed

Judgement

Vivek Singh Thakur, J.

1. Present petition has been filed assailing order, dated 18th April, 2017, passed by the Civil Judge (Senior Division), Court No. 1, Paonta Sahib, District

Sirmaur, (hereinafter referred to as 'the trial Court') in Case No. 123 of 2015, titled Madan Singh versus Mundi Ram, whereby the application filed by

petitioner-plaintiff (hereinafter referred to as 'plaintiff') for amendment of the plaint for inserting para-1a and adding alternative prayer clause has

been dismissed.

2. Plaintiff filed a suit for permanent prohibitory injunction for restraining the respondent-defendant (hereinafter referred to as 'defendant') from

interfering in the peaceful possession of plaintiff and from taking forcible possession of the suit land without paying the amount of Rs.23,000/- on the

ground that the suit land is in possession of plaintiff after the mortgage deed executed on 20th December, 2006, by the defendant in favour of the

plaintiff for Rs.23,000/-.

3. Defendant filed written statement refuting the case of the plaintiff on various grounds, including that of disputing the execution of mortgage deed

and also the possession of the plaintiff over the suit land.

4. After filing of the written statement by the defendant, plaintiff had filed an application for amendment in the plaint stating therein that at the time

when mortgage deed was executed between plaintiff and defendant, defendant had never disclosed the fact that he was not owner of the suit land to

the extent of half share and other co-sharers had never come forward to object the mortgage deed with possession of the suit land in favour of the

plaintiff and for that reason, entire share in possession of plaintiff had been shown as half of the suit land whereas as per revenue record, defendant

was owner of only one-fourth share measuring 12 bigha. It had further been averred in the application that defendant, having strong muscle

power, always threatened the plaintiff to dispossess him from the suit land without repaying the mortgage money of Rs. 23,000/- and, thus, there was

possibility of dispossession of the plaintiff by defendant at any time and in such eventuality, the suit might be frustrated and, therefore, plaintiff had

proposed insertion of para 1a in the plaint and alternative prayer in prayer clause, which read as under:

Para 1a : That the defendant and his brother Dharam Singh were in the possession of the entire suit land in equal share. The defendant told to

the plaintiff that the suit land is under the ownership of defendant and his brother Dharam Singh in equal share and same status was dictated in

mortgage deed executed by defendant. The plaintiff shown faith on him and mortgage deed was executed and mortgage money was given. That's

why the Mortgage deed has shown the share of defendant as 1/2 Share in the suit land. That plaintiff is illiterate rustic villager do not

have knowledge of revenue records. Prayer Clause : in alternative the defendant can dispossess the plaintiff any time by using his strong muscle

power and if it will be found in evidence that the plaintiff is out of possession, in that event the decree of Rs. 23000/- (mortgaged money) along with

interest 12% may kindly be passed in favour of plaintiff against the defendant. The plaintiff shall pay the court fee over the decretal

amount.

5. Application for amendment was opposed by defendant by filing reply stating therein that major mistake occurred in mortgage deed itself proved that no mortgage deed was executed by the defendant and for that reason only, major mistake had occurred in the said document. Further that the amendment proposed was an afterthought based on a false story as it was evident from the documents filed with the written statement that plaintiff was out of possession. It was also averred that the plaintiff had filed the application for amendment to improve his case whereas the only remedy with plaintiff was to withdraw the suit and file a suit for recovery on the basis of alleged mortgage deed by proving the same on record. It was further stated in the reply that the amendment sought by plaintiff would have changed the entire nature of suit and after filing of the written statement, plaintiff had proposed to add two new pleas to fill up the lacuna, which was impermissible under law, at that stage.

6. The trial Court has dismissed the application for amendment on the ground that proposed amendment would change the nature of the suit and is also dependent on future eventuality.

7. Being aggrieved by the said order of dismissal, plaintiff has questioned the same by the medium of present petition.

8. I have heard learned counsel for the parties and also gone through the record available on the file.

9. Learned counsel for the plaintiff has contended that para 1a, proposed to be inserted in the plaint, is only elaboration of the existing plea already taken in the plaint and the prayer proposed to be added in prayer clause will also not change the nature of the suit for the reason that since beginning, it is case of the plaintiff that suit land is in possession of the plaintiff after execution of mortgage deed for Rs.23,000/ and by way of proposed addition of prayer, only alternative prayer has been sought to be added whereas the frame of original plaint shall remain the same as it was earlier.

10. Relying upon pronouncements of apex Court in cases titled as Sushil Kumar Jain versus Manoj Kumar & Anr., reported in AIR 2009 Supreme Court 2544, and State of Bihar and others versus Modern Tent House and another, reported in (2017) 8 Supreme Court Cases 567, learned counsel for the plaintiff has argued that amendment sought only to elaborate and amplify the plea already taken, which could not be clarified earlier

inadvertently, without changing the nature of suit is always permissible. He has further argued that in the plaint, there is a specific reference of execution of mortgage deed executed in favour of the plaintiff by the defendant to the extent of his share in the suit land, for Rs. 23,000/Â, on the basis of which decree for permanent prohibitory injunction has been prayed against the defendant and, therefore, there is nothing proposed, which can be stated to be an afterthought to counter the plea taken in the written statement.

11. On the other hand, learned counsel for the defendant has argued that though amendment of pleading can be permitted at any stage, however, parameters for allowing the amendment in the plaint and written statement differ considerably.

12. Placing reliance upon judgment of the apex Court in case titled as Jagan Nath (Deceased) through LRs versus Chander Bhan and others, reported in (1988) 3 Supreme Court Cases 57, learned counsel for the defendant has argued that once a stand has been taken by the plaintiff, he could not subsequently be allowed to wriggle out of that situation and withdraw the admissions made by him and in case such amendment is allowed, it will take away valuable right of the defendant as altogether a new plea has been proposed to be added in the plaint, which is not permissible under law.

13. RelyingÂ uponÂ judgmentÂ ofÂ theÂ apexÂ CourtÂ in Baldev Singh and others versus Manohar Singh and another, reported in (2006) 6 Supreme Court Cases 498, it is contended by the learned counsel for the defendant that amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle as adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action, therefore, amendment of written statement is permitted more liberally than that of a plaint and question of prejudice is likely to operate more rigourously in case of plaint.

14. It is contended on behalf of the defendant that allowing the proposed amendment would amount to permit the plaintiff to substitute his cause of action materially resulting into change of nature of the suit.

15. Relying upon judgment of the apex Court in case titled as Smt. Ganga Bai versus Vijay Kumar and others, reported in (1974) 2 Supreme Court

Cases 393, it is also contended that proposed amendment will amount to permitting the plaintiff to file a time barred suit for recovery of amount and, therefore, proposed amendment is impermissible under law.

16. Though, learned counsel for the defendant has raised plea that relief sought to be added by proposed amendment is time barred, but, nothing specific substantiating the said plea has been stated. Therefore, without commenting upon the ratio of law laid down in the judgment (supra) and applicability thereof in present lis, in the given facts and circumstances of the case, the issue with regard to maintainability of the plea taken in the plaint, including the proposed amendment thereof and as to whether such relief is time barred or impermissible under law or is vanishing the case set up by the plaintiff, is left open to be raised in the trial Court and decided by the said Court on conclusion of the trial, in accordance with law.

17. Further, Order VI Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'CPC') provides that pleadings can be permitted to be amended at any stage with rider 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, party could not have raised the matter before the commencement of trial. Before commencement of trial, pleadings can be altered or amended at any stage of the proceedings and all such amendments are to be permitted as may be necessary for the purpose of determining the real question in controversy between the parties.

18. It is now settled that commencement of trial is after framing of issues at the time of starting the recording of evidence.

19. Definitely, the commencement of trial will take place after the first hearing of the suit. In case titled as Siraj Ahmad Siddiqui versus Prem Nath Kapoor, reported in (1993) 4 Supreme Court Cases 406, the apex Court, after considering the provisions of CPC, has held that date of first hearing of a suit under CPC is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit.

20. After relying upon Siraj Ahmad Siddique's case (supra) and other earlier pronouncements, the apex Court has reiterated the same principle in case titled as Kanwar Singh Saini versus High Court of Delhi, reported in (2012) 4

Supreme Court Cases 307.

21. Referring the judgment in Vidyabai and others versus Padmalatha and another, reported in (2009) 2 Supreme Court Cases 409, wherein it has

been observed that the date, on which the issues are framed, is the date of first hearing and filing of affidavit in lieu of examination—chief of the

witness would amount to commencement of proceedings, the apex Court in Mohinder Kumar Mehra versus Roop Rani Mehra and others, reported in

(2018) 2 Supreme Court Cases 132, has held that after issues are framed and case is fixed for hearing of the party having right to begin is to produce

his evidence, the trial of suit commences.

22. Applying ratio of law laid down by the apex Court in the cases (supra) to the instant case, trial has not commenced yet in the present case, as only

written statement has been filed by the defendant.

23. The apex Court in case titled as Sampath Kumar versus Ayyakannu and another, reported in (2002) 7 Supreme Court Cases 559, has held that

pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion

thereof, as in the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the

case of the plaintiff as amended and in the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by

reference to the facts and circumstances of each individual case, but, no straitjacket formula can be laid down.

24. In case titled as Rameshkumar Agarwal versus Rajmala Exports Private Limited and others, reported in (2012) 5 Supreme Court Cases 337, the

apex Court has held that the power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice as

the main purpose of allowing the amendment is to minimize the litigation and the plea that the relief sought by way of amendment was barred by time

is to be considered in the light of the facts and circumstances of each case. Relying upon the aforesaid judgment, the apex Court in Abdul Rehman

and another versus Mohd. Ruldu and others, reported in (2012) 11 Supreme Court Cases 341, has further held that if necessary factual basis for

amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit and the amendment should be

allowed.

25. In para 1 of the plaint, it is specific plea of the plaintiff that share of the defendant in the suit land is measuring 12 bigha. In para 2, it has

been pleaded that defendant has mortgaged his entire share measuring 12 bigha in favour of the plaintiff for Rs. 23,000/-.

26. In para 3 of the written statement, it has been stated that in the document, defendant has been shown as co owner to the extent half share

mortgaging the same in favour of the plaintiff whereas the defendant has only one third share in the suit land and on this ground, mortgage deed has

been stated to be null and void in the eye of law. In the proposed para 1a, plaintiff has clarified the mention of share of defendant as half share in the

suit land.

27. I find that para 1a, sought to be incorporated by way of amendment, is only elaboration of the plea already taken in the plaint. It is not changing

the nature of the suit for the reason that with this para or without this para, crux of the plea of the plaintiff is that defendant had mortgaged his share in

the land, referred in para 1 of the plaint, in favour of the plaintiff for ₹ 23,000/- and the measurement of that share has also been described as 12

bigha. It only explains and elaborates the facts under which the mortgage deed has been alleged to be executed. Whether the said area was

one half or one third of the entire land can be ascertained from revenue record. So far as mention of the said area as half share of the suit land in the

mortgage deed is concerned, such plea certainly is to be proved on the basis of evidence to be led by the parties during the trial.

28. Further, it is not a case where plea taken earlier has been proposed to be withdrawn or altered in contradiction thereof. New para proposed to be

added is only extension of earlier plea.

29. Plaintiff, in the present case, is claiming execution of mortgage deed for ₹ 23,000/- and execution whereof is denied by the defendant. Plaintiff is

claiming possession over the suit land after execution of the mortgage deed whereas defendant is refusing the same and asserting his own possession.

Defendant has questioned the execution of mortgage deed on the basis of mention of incorrect share of the defendant in the suit land whereas plaintiff

has proposed to insert a para in the plaint clarifying the said mention of the share of the defendant. The objection of the defendant has been raised in

the preliminary objections which could have also been replied by the plaintiff in reply to those preliminary objections at the time of filing the replication

as the plaintiff has right to rebut such plea taken by the defendant in the written statement.

30. So far as addition of alternative prayer is concerned, the same is also not based upon new cause of action, rather, the same finds strength from the

pleadings of the plaint itself as it has specifically been pleaded in the plaint that land is being cultivated by the plaintiff since 20th December, 2006, as

per mortgage, but the defendant alongwith his brother Dharam Singh and family members is threatening the plaintiff to dispossess him forcibly without

paying the amount of ₹ 23,000/-. In the plaint prayer for any other relief has also been made. In case, finally the plaintiff is not found to be in

possession, but, able to prove the execution of the mortgage deed, definitely, there would be occasion for considering as to whether plaintiff is entitled

for a decree for recovery of Rs. 23,000/- against the defendant, including the question of limitation for seeking such decree. Therefore, prayer clause

proposed to be added is a natural corollary of the pleadings already made by the plaintiff in the plaint.

31. The plea taken in para 1a, proposed to be inserted in the plaint, is not a new plea and also not contrary to the plea already taken in the plaint,

rather, the same is in consonance with the pleadings of the original plaint. Cause of action for filing the plaint and making prayer for permanent

prohibitory injunction and also for passing a decree for recovery of ₹ 23,000/- in alternative, is one and the same, i.e. alleged threatenings by

defendant or his brother or his family members to dispossess the plaintiff from the possession of the suit land as claimed in the plaint. There is no

proposed amendment which can be termed withdrawal of any admission made in the original plaint by the amendment sought to be introduced in the

plaint.

32. As the trial has not commenced yet, defendant would have ample opportunity to rebut the pleadings of the plaintiff sought to be incorporated in the

plaint and the prayer clause and, thus, no prejudice is going to be caused to the defendant in case proposed amendment is allowed at this stage.

33. Therefore, finding of the trial Court that the proposed amendment would change the nature of the suit is not sustainable. So far as denial of

proposed amendment on the ground that it is dependent upon future eventuality is concerned, the same is also not sustainable for the reason that

alternative pleas in the suit, like the present one, will always depend upon the future eventuality, as in a suit filed for protecting the possession, if the

plaintiff is dispossessed during the pendency of the suit, instead of relegating the plaintiff to file a fresh suit for possession, it is always advisable to

take alternative plea for restoration of possession of the suit property based upon the future eventuality. In present case, the suit land has been claimed

to be in possession of the plaintiff after execution of the mortgage deed and, therefore, in case plaintiff succeeds in proving the execution of the

mortgage deed, but, is dispossessed during the pendency of the suit or is not found in possession of the suit land, his right to recover the amount of

mortgage, if mortgage and payment of mortgaged amount is proved, would have to be considered.

34. In view of above discussion, impugned order is set aside and the amendment sought by the plaintiff is permitted.

35. Parties are directed to appear before the trial Court on 11th June, 2018, whereafter the trial Court shall proceed further, in accordance with law.

36. Petition is allowed in aforesaid terms. No order as to costs.