

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 31.07.2024

Pronounced on: 09.08.2024

CM(M) No.169/2023

GURMEET SINGH & ORS.

... PETITIONER(S)

Through: - Mr. Sheikh Mushtaq, Advocate.

Vs.

DALGIT SINGH & OTHERS

...RESPONDENT(S)

*Through: - Mr. J. H. Reshi, Advocate.
Mr. Tawheed Ahmad, Advocate.
Mr. Bikramdeep Singh, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioners have challenged order dated 24.07.2023 passed by learned Munsiff, Magam, whereby application under Order VI Rule 17 of CPC filed by them, has ben dismissed.

2) It appears that the petitioners have filed a suit for permanent injunction before the Court of learned Munsiff, Magam (hereinafter referred to as "the trial court"). In the said suit, the petitioners/plaintiffs have claimed that they are owners in possession of land measuring approximately 02 kanals falling under Survey No.20 situated at Hardu Suresh Khag Tehsil Khag District Budgam, which, according to the plaintiffs, has devolved upon them from their ancestors. It has also been pleaded in the plaint that

the petitioners/plaintiffs and respondents/defendant Nos. 1 to 3 are recorded as joint owners of the property in question but the said defendants at the behest of other defendants and under the garb of an oral purchase, intend to grab the share of the plaintiffs in the suit property. It has been further pleaded that the respondents/defendants 4 to 7 are strangers to the suit property and that they are threatening to raise construction upon the share of the property belonging to respondents/defendants No.1 to 3 and when this was objected by the petitioners, the said respondents/defendants claimed that they have purchased the said land from the respondent/defendant Nos.1 to 3. According to the petitioners/plaintiffs, whole of the estate of the ancestors got devolved upon them and respondent Nos.1 to 3.

3) The respondents/defendants filed a joint written statement before the trial court in which they claimed that the land in question has never been in possession of the plaintiffs and that the entries in the revenue record are contrary to the actual position on spot. It has been submitted that the respondents/defendants No.4 to 7 have purchased the said property from Manjeet Singh etc. by virtue of an agreement to sell dated 28.12.2018. It has been further pleaded by the respondents/defendants that

defendant No.5 is residing in an old residential house existing on the suit land and that defendant No.6 has raised construction of a residential house upto roof top on the said land.

4) It seems that the trial court on the basis of the pleadings of the parties, vide its order dated 22.10.2019, framed issues and the parties were directed to lead evidence. It also appears from a perusal of the trial court record that trial of the case has concluded and at the stage of final arguments, the petitioners/plaintiffs filed an application under Order VI Rule 17 CPC seeking amendment of the plaint. In the said application, it was submitted by the petitioners/plaintiffs that defendant No.4 to 7 have, in their written statement, claimed that they have purchased land measuring 03 kanals and 11½ marlas under Survey No.20 from Manjeet Singh, Surjeet Singh, Amerjeet Singh and Tejinder Singh by virtue of an agreement to sell dated 28.12.2018 and because the said agreement to sell has allegedly been executed after the institution of the suit, therefore, they should be allowed to lay a challenge to the said agreement to sell by amending the plaint to this extent. It was also submitted in the said application that the plaint needs to be amended not only to the extent of challenging the said agreement to sell but a

relief of partition is also required to be incorporated in the plaint so as to avoid multiplicity of litigation.

5) The aforesaid application was resisted by the respondents/defendants by filing objections thereto. In the objections it was contended that a copy of the agreement to sell dated 28.12.2018 was annexed by the defendants along with their written statement at the time of filing their written statement as such existence of the agreement to sell was well within the knowledge of the plaintiffs. Thus, it is too late in the day for the plaintiffs to seek amendment of the plaint after trial of the suit has already concluded. It was also submitted by the defendants in their objections that if the proposed amendment is allowed to be incorporated, it would amount to change in nature of the suit which is impermissible in law.

6) The learned trial court after hearing the parties and on the basis of the record before it, passed impugned order dated 24.07.2023, whereby application of the petitioners/plaintiffs has been declined, primarily, on the ground that the plaintiffs have filed the said application at a blated stage and that if the amendment sought is allowed to be incorporated, it would change the nature of the suit and would cause prejudice to the defendants.

7) The petitioners have challenged the impugned order by contending that power of the Court to permit amendment of the pleadings is very wide and that amendment of the pleadings can be permitted at any stage. It has been contended that the learned trial court has taken a very hyper technical view while declining the application of the petitioners. It has been further contended that the proposed amendment is necessary for determination of real controversy between the parties and, therefore, the same deserves to be allowed and if the proposed amendment is not allowed to be incorporated in the plaint, the petitioners would be subjected to grave prejudice as it would not be open to them to file a separate suit for challenging the agreement to sell dated 28.12.2018.

8) I have heard learned counsel for the parties and perused the record of the case including the impugned order.

9) Before coming to the rival contentions of the parties, it would be apt to understand the scope and power of the court to permit amendment of the pleadings. In this regard it would be necessary to notice the provisions contained in Order VI Rule 17 CPC, which read as under:

“17. 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."

10) From a perusal of the aforesaid provision, it is clear that a Court has power to allow either party to amend his pleadings at any stage of the proceedings, which means that amendment of the pleadings can be permitted even at the final stage of the proceedings provided the same are necessary for the purpose of determining the real question in controversy between the parties. Proviso to Rule 17 quoted above, makes it clear that an application for amendment would not be allowed after the trial of the case has commenced unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter prior to the commencement of the trial.

11) The Supreme Court in the case of **Rajkumar Gurawara (Dead) through LRs vs. M/S. K. Sarwagi & Co. Pvt. Ltd. & anr.** (2008) 14 SCC 364, has, while interpreting the aforesaid provision, observed as under:

"The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the

purpose of determining the real questions in controversy. However, this rule is subject to proviso appended therein. The said rule with proviso again substituted by Act 22 of 2002 with effect from 01.07.2002 makes it clear that after the commencement of the trial, no application for amendment shall be allowed. However, if the parties to the proceedings able to satisfy the court that in spite of due diligence could not raise the issue before the commencement of trial and the court satisfies their explanation, amendment can be allowed even after commencement of the trial. To put it clear, Order VI Rule 17 C.P.C. confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and, in such event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso.

12) From the foregoing analysis of law on the subject, it is clear that the Court while considering an application under Order VI Rule 17 of CPC seeking amendment of the pleadings has to be liberal in its approach and generally when amendment sought to be incorporated is necessary for determination of the real issues in controversy, the same should be allowed but Proviso to Order VI Rule 17 casts an obligation on a party applying for amendment after the commencement of trial to offer an explanation to the satisfaction of the court that despite due diligence on his

part, the applicant could not raise the matter before the commencement of the trial. Even though proviso to Order VI Rule 17 of CPC uses the expression “shall” in it, yet, having regard to the fact that the provision contained in Order VI Rule 17 is procedural in nature and the purpose behind incorporating the said provision is to avoid multiplicity of litigation, the proviso is not to be taken as mandatory. However, unless the court is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, the prayer for amendment cannot be allowed.

13) The Supreme Court in the case of **Vidyabai & Ors. v. Padmalatha & Anr.** (2009) 2 SCC 409, has, while considering the scope of proviso appended to Order VI Rule 17 of the Code, observed as under:

“It is 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.”

14) From the above legal position, it is clear that while the Court has to be liberal in granting prayer for amendment of the pleadings, yet if the application for amendment of the

pleadings is made after the commencement of the trial, the discretion to allow the amendment has to be exercised only when the party applying for amendment satisfies the court that in spite of due diligence it could not make the application for amendment prior to the commencement of the trial.

15) Adverting to the facts of the instant case, the petitioners were, admittedly, in knowledge of the fact that the defendants, particularly defendant Nos.4 to 7, have based their defence to the suit on agreement to sell dated 28.12.2018. They had even annexed a copy of the agreement to sell along with their written statement, a copy whereof was provided to the petitioners/plaintiffs even before commencement of the trial. The plaintiffs in spite of this, waited for making an application for amendment to incorporate challenge to the aforesaid agreement to sell till the conclusion of the trial. The petitioners/plaintiffs have not offered any explanation, either in the present petition or in their application before the trial court, as to why they could not make the application for amendment prior to the commencement of trial or even at a stage prior to conclusion of the trial.

16) In proviso to Order VI Rule 17 CPC, the expression “due diligence” has been consciously used by the

legislature. “Due diligence” means taking of all reasonable precautions as the circumstances of a particular case would demand. In Law Lexicon by P. Ramanatha Aiyer, Second Edition, the expression “due diligence” has been stated to mean such watchful caution and foresight as the circumstances of the particular case demands. Thus, while examining the explanation offered by a party applying for amendment of the pleadings, a Court has to analyse the circumstances in which the party is seeking amendment. In the present case, the petitioners/plaintiffs have not offered any explanation, much less a plausible explanation for their delayed approach in seeking amendment. Thus, element of “due diligence” on the part of the petitioners/plaintiffs is missing in the instant case.

17) In view of the above, the jurisdictional fact necessary for exercising the power of allowing amendment of the pleadings by the Court has not been established by the petitioners/plaintiffs in this case. There was, thus, no power with the trial court to allow the prayer of the plaintiffs for amendment of the plaint at a stage when the trial of the case had already concluded.

18) Apart from the above, the petitioners/plaintiffs by seeking amendment were trying to change the nature of the suit, inasmuch as in the unamended suit filed them, they

had prayed for permanent injunction simplicitor whereas by way of amendment, they were seeking to incorporate the relief relating to partition of the suit property as also declaration with regard to agreement to sell dated 28.12.2018. If amendment of the petitioners/plaintiffs is allowed, it would certainly change the nature and complexion of the suit, which is impermissible in law.

19) In view of the above, the discretion exercised by the trial court in declining the application of the petitioners does not suffer from any error apparent on the face of the record nor the learned trial court has recorded a finding which is perverse in nature. Therefore, there is no ground available to this Court to entertain challenge to the impugned order passed by the trial court, while exercising its power under Article 227 of the Constitution.

20) For what has been discussed hereinabove, the petition fails and is dismissed accordingly.

21) A copy of this order be sent to the learned trial court for information.

(Sanjay Dhar)
Judge

Srinagar,
09.08.2024
“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No