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Court : Mumbai Goa

Decided On : Apr-11-2014

Judge : S.B. Shukre

Appeal No. : Writ Petition No. 625 of 2013

Appellant : Conception Fernandes and Another

Respondent : Tasneem Shaikh and Others

Judgement :

1. This Writ Petition is directed against the order dated 2.9.2013 passed on an application at Exh.84 filed under Order 6, Rule 17 CPC in Regular Civil Suit No. 20/2010/A by the Civil Judge, Senior Division, Vasco-da-Gama.

2. The petitioners, who are original defendants filed an application under Order 6, Rule 17 CPC for amendment of their written statement. By the proposed amendment, the petitioners submit certain clarifications were sought to be introduced in the written statement so as to elaborate the stand and the defence taken by the petitioners. It was their contention that these pleadings were necessary for deciding the real controversy involved in the case and could not have been incorporated by them in the written statement earlier inspite of due diligence on their part. They submitted that their earlier counsel was instructed on these facts by them but he was of the opinion that it was not necessary to include them in the written statement as basic facts were already stated therein. It is also

submitted by them that they believed in the ability and extra ordinary knowledge of the advocate on record and therefore, did not press for inclusion of these pleadings in the written statement.

3. Amendment application was strongly opposed by the respondents/original plaintiffs. It was their contention that the trial of the suit having been commenced and no ground having been shown by the petitioners in terms of the proviso to Rule 17, Order 6 CPC, the application could not be allowed.

4. After hearing both sides, the learned Civil Judge, Senior Division found that the petitioners failed to establish that amendments were of such a nature as, inspite of due diligence, could not have been made earlier and therefore, rejected the application by his order which is impugned herein.

5. Heard learned counsel for the petitioners and learned counsel for the respondents. The only point that arises for my determination in this Writ Petition is:-

Whether the impugned order dated 2.9.2013 suffers from vice of arbitrariness and unreasonableness?

6. Learned counsel for the petitioners has submitted that the principles that apply to amendment of written statement are slightly different from those which apply to the amendment of plaint as in case of amendment of written statement the question of prejudice is far less important than in the latter case. Therefore, what is required to be seen by the Court is whether or not the plea sought to be raised is necessary for deciding the real controversy involved in the case. He also submits that while applying the principle of due diligence? Court must be conscious of the fact that it is for the Court to decide whether or not parties could have raised the matter earlier after exercise of due diligence and that the application cannot be dismissed simply on the ground that such pleading is not made in the application. He also submits that pleadings can be amended at any stage of the suit, even at the appellate stage and, if this is so, the application filed in the instant case by the petitioners ought to have been granted by learned Civil Judge, Senior Division.

7. In support of his submissions, the learned counsel for the petitioners has placed reliance upon the following cases:-

(i) Piedade Fernandes Vs. Charlene Leitao, 2012(1) Mh. L. J.

(ii) Rohit A. Kapadia and another Vs. Perviz J. Modi, 2013(4) Mh. L. J. 940.

(iii) Shyamabai Surajkaran Joshi Vs. Madan Mohan Mandir Sanstha, 2014(10 ALL MR 810.

(iv) Kamlesh Jagannath Suryavanshi Vs. Kalyan Shirshir Kumar Dutta, 2013(6) ALL MR 537.

8. On the other hand, learned counsel for the respondents has submitted that since the amendment of pleadings was sought to be made after commencement of the trial in the instant case, the application was required to fulfill the criteria laid down in the proviso to Rule 17, Order 6 of CPC. According to this proviso, learned counsel submits, no application for amendment can be allowed after the trial has commenced unless the Court is satisfied that inspite of due diligence, the parties could not have raised the matter before the commencement of the trial. He submits that ground that inspite of the petitioners adequately briefing the earlier counsel, the earlier counsel did not incorporate these pleadings in the written statement cannot be seen as satisfying the test of due diligence. If such a ground is to be accepted, it would be very easy for the parties to circumvent the said provision, so submits learned counsel for the respondents. Thus, he urges that there is no merit in the petition and it deserves to be dismissed.

9. In support of his submissions learned counsel for the respondents has placed reliance upon the following cases:-

(i) Ajendraprasadji N. Pandey Vs. Swami Keshavprakeshdasji N., (2006) 12 SCC 1.

(ii) Kishor R. Pande Vs. Narendra D. Shah, 2012(2) Bom. C.R. 629.

10. A careful perusal of the above referred judgments discloses that amendment of pleadings can be allowed at any stage of the proceedings even at the appellate

stage, if the same is necessary to decide the real controversy involved in the case and that while exercising power to allow amendment, liberal approach should be adopted, as the provisions of Order 6, Rule 17 CPC are intended to secure proper administration of justice. It is further seen that after introduction of the new Rule 17, Order 6, by the amendments to the CPC made by Amendment Act, 2002 which came into force w.e.f. 1.7.2002, some change has occurred in the sense that width of power of Court to allow the amendment of pleadings at any stage has been reduced. The new Rule does not place any restrictions on the power of the Court to allow amendment before beginning of trial and the only rider is that it should be necessary to decide the real controversy. But, the Rule narrows the range of this power of the Court, if it is to be exercised after commencement of trial. It lays down that the power can be exercised after beginning of trial only when the Court is satisfied that the plea could not have been raised earlier, inspite of due diligence. It is also seen from the these cases that averment of plea of due diligence is not so much important as the satisfaction of the Court about the same is.

11. Learned counsel for the petitioner has submitted that learned Civil Judge has ignored the above referred principles and dismissed the application simply on the ground that there was no averment in the application that inspite of due diligence, the petitioners could not have raised the matter earlier. He has invited my attention to the observations made in this regard in paragraph 20 of the impugned order.

12. Learned counsel for the respondents, on the other hand, submits that even though said observations are found to be in paragraph 20, later on the learned Civil Judge has made some amends and in paragraph 31 has held that ground that advocate on record, inspite of being duly instructed did not incorporate certain facts, cannot be taken to be the sufficient ground for allowing of the amendment application after commencement of the trial and this observation satisfies the criteria laid down in the case of Rohit A. Kapadia (supra) that presence or absence of pleadings of due diligence does not matter and it is the application of mind of the Court to the facts and circumstances of the case and a decision taken in the light of these facts and circumstances are what matter.

13. In the instant case, the statement that inspite of being duly instructed, the learned Advocate on record did not incorporate the pleading as sought to be raised is the only justification for not raising the plea earlier. However, it cannot be taken to answer the test of due diligence? as required by the proviso under Rule 17, Order 6 CPC. The proviso contemplates parties to exercise due care and caution in raising the matter before the Court and once trial commenced, no new or additional plea can be permitted to be raised unless the party shows that with all diligence at its command, it could not raise it before commencement of the trial. The due diligence prescribed by the proviso is of the parties and of nobody else including the Advocate on record. If Counsel of the party refuses to take up certain pleas wished by his client to be taken up, the least and perhaps the only thing the client can do to get his wish fulfilled is to go to another counsel who will pay heed to him or else accept the judgment of his counsel for good. If he adopts the latter course, he cannot say later on, almost as an after thought and by way repentance, that although he toiled hard, he could not raise the plea earlier due to the stand taken by his earlier counsel. If a party chooses to accept the advice of Advocate completely believing in him and his extra ordinary experience? as mentioned in the petitioner's amendment application in the present suit, instead of going to another Advocate well in time, he cannot be heard to say and imply that he was diligent when he duly instructed? the Advocate but was helpless when his Advocate refused to follow the particular instructions. Due diligence contemplated by the said proviso is something akin to situation of helplessness or of things, beyond one's own control. Such is not the case here. A party always has the choice of Advocates.

14. A party can of course say, he being not a legal expert, would not know immediately that decision of his Advocate is not sound and so he would not be in a position to promptly exercise his choice of Advocates and would be able to do so only after passage of sometime, when he would learn or be told about the incorrectness of approach of his Advocate. Even this justification, in my opinion, cannot answer the test of due diligence. The reason being that a representative or Advocate and the party being represented in a case are not two separate identities in that case, so far as conduct of the case is concerned. Whatever an Advocate does on behalf of the client is considered to be done by the party himself. The acts

of the Advocate before the Court are binding upon the party he represents and what he submits before the Court on facts is only what the party says and what he says in law is with the approval, express or assumed, of the party. In other words, all actions taken before the Court by an Advocate, are the actions of the party. So, there is no splitting of concept of due diligence, one of the party and the other of the Advocate, so as to enable the party to be excused for negligence of the Advocate just by showing his own diligence. If such a ground is to be taken as a good ground, it may provide an effective tool to the lazy and indolent parties to conveniently get over the rigour of due diligence test prescribed under the proviso to Rule 17 Order 6 CPC. All that he would have to do is change the Advocate blaming it on the previous Advocate.

15. Viewed in this way, I am of the opinion that the learned Civil Judge was right in holding that the amendment application could not have been allowed only on the ground that there was failure of the Advocate to raise the matter inspite of he been duly instructed by the petitioner.

16. Learned Civil Judge in para 20 of the impugned order has observed that the petitioners have not averred any facts to show that they had exercised due diligence before signing and verifying the written statement prepared by their Advocate on record. But, as rightly submitted by learned counsel for the respondents, learned Civil Judge has made some amends in his approach to the amendment application and later on, as seen from his observation in paragraph 31, the learned Civil Judge considered the very ground of failure of the Advocate on record to incorporate the pleadings inspite of he being duly instructed and found that it was not a sufficient ground to enable the Court to exercise its discretionary power under rule 17 Order 6 of the CPC. This later observation indicates application of mind on the part of learned Civil Judge, to the facts and circumstances of the case, thereby satisfying the test laid down in the case of Rohit Kapadia (supra). The criterion is not whether any averment regarding due diligence is made, and the real test is whether the Court has, by taking into account the facts and circumstances of the case, decided as to whether or not the party could have raised the matter earlier after exercise of due diligence.

17. Thus, I see neither any perversity nor any arbitrariness nor any unreasonableness in the order passed by the learned Civil Judge, which is impugned herein. The point is answered as in the negative.

18. In the result, Writ Petition stands dismissed. Parties to bear their own costs.

19. Rule is discharged.

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