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Court : Delhi

Decided On : Apr-11-1989

Reported in : 1989(17)DRJ38; 1989RLR257

Judge : Mahesh Chandra, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 17

Appeal No. : Civil Revision Appeal No. 585 of 1986

Appellant : Uttam Chand

Respondent : Ramkishan

Advocate for Pet/Ap. : M.L. Kohli and; Jawahar Chawla, Advs

Judgement :

Mahesh Chandra, J.

(1) This is plaintiff's revision directed against the order dt, 19.7.86 of Shri Nand Kishore. Sub Judge, whereby the application of the defendant-filed under Order 6 rule 17 read with Section 151 Civil Procedure Code for amendment of the w/s was allowed subject to payment of Rs. 250.00 as costs.

(2) I have heard the learned counsel for the parties at length. After giving my considered thought to the matter before me, I have come to the conclusion that the

impugned order cannot be sustained and is liable to be set aside.

(3) Briefly stated the facts are that the plaintiff filed a suit for specific performance of the contract of sale of suit property in 1971 on the ground that the defendant had agreed to sell the same to him vide agreement dated 20.10.1958 and in furtherance thereof had already delivered possession thereof to the plaintiff & had received, part payment & deposited balance with the Deptt. of Rehabilitation. The defendant filed w/s in 1972 and in due course evidence of the plaintiff was completed in 1977 where after statement of D.W. I was also recorded. It was thereafter that on 17.2.83 application for amendment of w/s was filed by the defendant which was allowed by the impugned order.

(4) The contention of learned counsel for petitioner is that such of the amendments as were necessary for the disposal of the real question in controversy between the parties could only be allowed under Order 6 Rule 17 read with Section 151. Civil Procedure Code and amendments which were not relevant or necessary for the purpose of disposal of the said suit or any amendment by which a new relief was sought to be claimed by the defendant could not be allowed.

(5) At this stage, it would be appropriate to see what was the precise amendment which was sought by the respondent defendant by this application. Perusal of the application under Order 6, Rule 17 CPC shows that the proposed amendment was to incorporate addition in the prayer clause of the w/s. The said addition reads :

'IT is most humbly alternatively prayed that if this Hon'ble court comes to the conclusion and adjudicates finally against the plaintiff and in favor of the defendant then the physical possession and occupation of the suit property bearing No. B - 44, Subhadra Colony Sarai Rohilla, Delhi may kindly be awarded and decreed in favor of the defendant and the plaintiff be dispossessed there from, in the interests of justice, equity and good conscience and the special costs under Section 35A, Civil Procedure Code may also be awarded to the defendant'.

(6) Considering the scope of this proposed amendment, it would be difficult to accept that it is just, proper and equitable to allow this amendment Order 6 Rule 17 Civil Procedure Code reads.

'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'.

(7) It cannot by any stretch of imagination be said that the proposed amendment in the prayer clause is necessary for the purpose of determining the real question in controversy between the parties. It also cannot be said that the said amendment was sought to be taken up by way of defense to the suit of the plaintiff. To allow such an amendment would be allow the defendant to present a totally distinct, new and inconsistent case. There is no gainsaying that the power and discretion of court to allow the amendment is wide and may be exercised at any stage of the proceeding even at appellate stage, as long as it is needed in the interest of justice for determination of the dispute between the parties in as much as the exercise of such discretionary power is governed by judicial consideration and has to be exercised with circumspection on the part of the courts. Amendments which would have a tendency to cause prejudice to the other side, and such prejudice as cannot be compensated in costs, would not ordinarily be allowed. The object of Order 6, Rule 17 Civil Procedure Code is to enable the courts to decide the matter in suit and nothing beyond that. It cannot be said by any stretch of imagination that the proposed amendment is either relevant or necessary for the purpose of disposal of the matter in dispute. therefore, it cannot be allowed.

(8) It was in somewhat similar context that amendment of w/s was refused in *Clark v. Wary* (1886) 31 Ch D.68. In that case defendant had agreed to grant a lease of a brick-field to the plaintiff. No lease was executed but the plaintiff entered into possession under the agreement and the plaintiff thereafter sued the defendant for specific performance of the agreement alleging that defendant, though frequently asked to do so neglected and refused to grant the lease. Defendant denied that he was asked to grant the lease and expressed his readiness to execute the lease and also made a counter claim by way of rent. After the suit was set down for trial, defendant applied for leave to amend the defense and counter-claim and to join (herewith a claim for possession of the land. It was held that it is in the highest degree unreasonable, having regard not only to the issues between the parties,

but also to the length of time that has elapsed, that this application should be granted. Defendant cannot present a totally distinct, new and inconsistent case.

(9) Let us consider the matter from another angle, by this amendment the defendant wants to claim the relief of possession of suit property which partakes by nature as a counter-claim and that too without paying the court fee which cannot be permitted in the light of facts and circumstances of this case. A counter-claim can be pleaded only in accordance with Order 8 Rule 6 A, Civil Procedure Code and not otherwise. Order 8 Rule 6 A Civil Procedure Code reads:(.....) Similarly counter-claim must comply with of Order 8 Rule 6B and 6C of the Civil Procedure Code which read(.....)

(10) COUNTER-CLAIM is substantially a cross-action rather than a defense pure and simple. Counter-claim is really a weapon of offence and enables a defendant to enforce a claim against the plaintiff as effectually as in an independent suit and it not only requires to be properly stamped but further also an opportunity had to be given to the plaintiff to meet it. It has to be disposed of as if it is a separate suit by itself. It must be pleaded at the first opportunity and specifically. Amendment application does not show that the defendant wanted to take up the plea of counter-claim in the w/s. Defendant has not come forward with a specific plea of counter-claim. The facts which could entitle the defendant to possession of suit property have nowhere been pleaded in the body of the w/s as it stands or in the proposed amended w/s. The claim of possession sought to be introduced might even be time barred. No court fee has been paid on the counter-claim. If the proposed amendment is not allowed, it would not adversely affect the right of the defendant to file an independent suit for recovery of possession of the suit property if he is otherwise entitled to file one. No injury or injustice is likely to occasion to defendant if he is driven to file a separate suit to establish his claim. Evidence of the plaintiff has already been recorded and even one witness of the defendant has been examined. Suit is pending since 1971. Plaintiff cannot be compensated with costs. Considering all these facts, it would be difficult to say that the lower court was justified in allowing the amendment. It should not have been allowed.

