

THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A No.19 of 2000

Abdul Baqi & others

Versus.

Abdul Salam & others

Applicants

:

Through Mr. Jhamat Jethanand,
Advocate.

Respondents No.1, 4 & 5

:

Through Mr. Kamaluddin, Advocate

Respondents No.2 & 3

:

Through Mr. Wali Muhammad Jamari,
Assistant Advocate General

Date of hearing

:

18.01.2019

Date of judgment

:

11.02.2019

J U D G M E N T

Zulfiqar Ahmad Khan, J: This Revision Application impugns the judgment and decree dated 17.11.1999 and 30.11.1999 respectively, passed by learned Illrd Additional District Judge, Hyderabad, dismissing the Civil Appeal No.144/1997 and maintaining the order dated 19.09.1997, passed by learned Ist Senior Civil Judge, Hyderabad, whereby plaint of 2nd Class Suit No.19/1996, filed by the applicants was rejected under Order VII Rule 11 C.P.C.

2. Facts necessary to understand the controversy are that the applicants / plaintiffs filed said Suit for Declaration against the respondents/defendants, alleging therein that the building on plot No. A/81, CS.No.1993 Ward-A, admeasuring 232 Sq. fts. Daulatabad, Government College Road, Hyderabad was owned by Dr. Abdul Wahab Shaikh who died on 13.01.1989 and left behind applicants / plaintiffs as his legal heirs. At the time of death of Dr. Abdul Wahab, applicants / plaintiffs No.1 & 3 were minors and applicant / plaintiff No.2 was illiterate widow belonging to Chitral tribel area. It was mentioned in the plaint as well as in the memo of appeal that applicants / plaintiffs maintained themselves through alms, charity fund and rent received from a shop built in the suit property. In 1994, the defendants above named met with

the applicant / plaintiff No.2 who agreed to sell out the suit property to defendants and as such, defendants/respondents prepared deed and obtained signature and thumb impression of applicants / plaintiffs No.2 & 3 without making any payment and thereafter the applicants / plaintiffs were forcibly ousted from the said property, thus the applicants / plaintiffs filed said suit with the following prayers:-

- “(a) That it may kindly be declared that the contract of sale of the property in question i.e House No.A/81, sheet No.11, C.S No.2993, Ward A, admeasuring about 232 Sq: feet located in Daulatabad Colony, Government College Road, Hyderabad is illegal void ab-initio and without lawful authority.
- (b) That it may kindly also be declared that the possession of the property in question has also been taken over, illegally, dishonestly, forcibly and fraudulently.
- (c) That it may kindly also be declared that mutation of property in question in the record of defendant No.3 on the basis of illegal and void document is also illegal.
- (d) That any other relief if is found in favour of the plaintiffs may kindly also be awarded to the plaintiffs in addition to the above prayed reliefs.
- (e) That it may kindly be also declared that the plaintiff No.1 has no concern with the impugned contract signed by the plaintiffs No.2 & 3. All the further benefits got by the contract to the extent of share of the plaintiff No.1 are also illegal, malafide, void and without lawful authority.

3. In response to that plaint, respondents/defendants filed their written statement, wherein denied all the allegations leveled against them by alleging that suit property was sold out in the consideration of Rs.2,40,000- (Rupees Two Lac & Forty Thousands) through sale deed and of Rs.50,000/- (Rupees Fifty Thousands) only was paid against it. The applicant / plaintiff No.2 being real mother of applicant / plaintiff No.1 executed deed as his guardian. The applicants / plaintiffs received sale consideration amount and thereby handed over the possession of the suit property.

4. Thereafter, the respondents / defendants moved an application under Order 7 Rule 11 CPC, which was opposed by the applicants / plaintiffs, however, learned trial Court after hearing the same rejected the plaint vide order dated 19.09.1997. Such order was challenged in Civil Appeal No.144 of 1997 by the applicants / plaintiffs. During pendency of such appeal, the

applicants / plaintiffs moved an application under Order 6 Rule 17 r/w Section 151 CPC for amendment in Para No.23-A of the plaint with following addition:-

1. “and the sale deed No.970 dated 01-03-1994 may be ordered to be delivered up and cancelled.
2. That, the para 23(b) the full-stop at the end be converted into Coma and following be added:-

“and the defendant No.1 be ordered to put the plaintiffs in vacant possession of the suit property”.

5. The respondents / defendants filed their objection to such application for amendment and objected to allow amendment as sought by the applicants / plaintiffs on the ground that if the proposed amendment was allowed then it will change the nature and character of the suit and such amendment was sought only to fill lacunas. Moreover, both parties led their respective arguments and after hearing parties’ counsels, learned appellate Court dismissed the appeal vide judgment dated 17.11.1999, against which the instant revision application has been preferred.

6. Counsel for the applicants / plaintiffs submitted that impugned judgments, passed by the learned Courts below are against the facts, law and equity; that the impugned judgments are based on no evidence and the same are liable to be reversed; that both the Courts below have erroneously ignored and not considered the oral as well as documentary evidence available on record; that the proposed amendment which was sought by the applicants before the appellate Court by moving an application under Order 6 Rule 17 r/w Section 151 CPC was very much essential and it will not change the nature and complexion of the suit; that proposed amendment was necessary for proper adjudication of the suit; that through trial Court framed issues even then, no chance for proceedings with the suit was given to the parties, thus the judgment of learned appellate Court as well as order of learned trial Court are liable to be set-aside and the matter may be remanded to the trial Court for deciding the same on merits. In support of his contentions, learned counsel for the applicant relied upon the cases of **Mst. Ghulam Bibi and others v. Sarsa Khan and others** (PLD 1985 Supreme Court 345), (2)**Mir Mazar v. Azim** (PLD 1993 Supreme Court 332), (3)**Janat Bibi v. Sikandar Ali and others**

(PLD 1990 Supreme Court 642), (4) **Mst. Hafiza Bibi v. Ali Hussain and others** (1994 SCMR 1194) and **Walayat v. Mst. Kaneez Fatima** (1994 MLD 1955).

7. Counsel for the private respondents as well as the learned AAG while supporting the impugned judgment/order submitted that the appellate Court has rendered the judgment in proper manner after considering all material aspects as well as examining the evidence available on record, therefore, no illegality or material illegality apparent on surface. They submitted that the impugned judgments be maintained and the instant revision may be dismissed. Learned counsel for the private respondents relied upon the cases of **Karachi Electric Supply Corporation v. Muhammad Shahnawaz and others** (PLD 2017 Sindh 23), (2) **Dr. Hasan Mahfuz Jalisi v. Khawaja Moinuddin and 2 others** (PLD 2006 Karachi 98), (3) **Mst. Maryam Begum and 5 others v. Riaz Muhammad** (2005 SCMR 1945), (4) **Messrs M.A. Majeed Khan v. Karachi Water and Sewerage Board and others** (PLD 2002 Karachi 315) and (5) **Mst. Imam Hussain v. Sher Ali Shah and others** (1994 SCMR 2293).

8. Heard counsel and reviewed the material available on record.

9. Admittedly, the applicants filed suit for Declaration in which written statement was filed by the defendants and in all 9 issues on law and facts were framed by the trial Court. Thereafter, defendants filed an application under Order VII Rule 11 C.P.C., which was objected by the applicants and after hearing the parties only on the said Order VII Rule 11 application, plaint was rejected by the trial Court vide impugned order dated 19.09.1997. According to said order, applicants had not prayed for possession nor cancellation of sale deed; thus only declaratory decree would not have set things right as connected relief was not prayed, hence the suit fall under the embargo of Order 2 Rule 2 C.P.C. Being aggrieved, applicants preferred Civil Appeal No.144/1997. During pendency of the same, applicants moved application under Order VI Rule 17 r/w section 151 C.P.C. for making

amendment in the plaint, which was not allowed and the appeal was dismissed vide the impugned appellate judgment.

10. Order VI rule 17 of C.P.C. provides that a Court may at any stage of proceedings could allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments are to be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Interpretation of this provision came up for detailed examination in view of the case-law on the subject, in particular in the case of **Mst. Ghulam Bibi and others** (Supra) by the Honourable Supreme Court.

11. The question which needs examination is whether in the facts and circumstances of the case the applicants' side should have been permitted by the appellate Court to amend the plaint so as to convert a suit for declaration as to ownership of the suit-land into a suit for declaration, cancellation of sale deed and possession involving the suit land.

12. The facts relevant for the determination of the aforementioned question as mentioned that the building on plot No. A/81, CS.No.1993 Ward-A, admeasuring 232 Sq. fts. Daulatabad, Government College Road, Hyderabad was owned by Dr. Abdul Wahab Shaikh who died on 13.01.1989 leaving behind the applicants inheriting the same. At the time of death of Dr. Abdul Wahab applicants No.1 & 3 were minors and applicant No.2 (his widow) was illiterate belonging to a tribal area. It was mentioned in the plaint as well as in the memo of appeal that applicants maintained themselves through alms, charity fund and rent from the shop existing in the suit building. In 1994, the respondents above named met the applicant No.2, who agreed (allegedly forcefully) to sell out the suit property to respondents and as such, the respondents prepared deed and obtained signature and thumb impression of applicants No.2 & 3 without making any payment and thereafter the applicants were forcibly ousted from the said property as it is alleged that they belonged to some powerful political party of those days. The plaint of the suit was contested as the respondents filed their written statements pleading that such

a suit for declaration was not maintainable in its present form; and trial Court framed issues and while the case was pending for evidence, respondents filed an application under order VII Rule 11 C.P.C. and after hearing the parties counsel on the said application, trial Court rejected the plaint of the applicants vide order dated 19.09.1997. The applicants went in appeal and during pendency of said appeal, they filed an application under Order VI Rule 17 r/w section 151 C.P.C. to amend the plaint, but the said application was dismissed by the appellate Court vide impugned judgment dated 17.11.1999 alongwith the main appeal with the following observation:-

“ Under the circumstances above I am of the view that if the amendment so proposed by appellants/plaintiffs is to be allowed then nature and character of suit will be totally changed. Appellants/plaintiffs in fact have consented and agreed impugned order hence have moved application U/O 6 R-17 but appellants/plaintiffs are not precluded to bring fresh suit. The facts and circumstances of the case law as produced by the counsel for appellants/plaintiffs are quite distinguishable to the facts and circumstances of present case. Accordingly, I agree with the arguments of learned counsel for respondents/defendants and in the light of case law as produced by him I hereby maintain order dated 19.9.1997 passed by the 1st. Sr. Civil Judge, Hyderabad at Ex.40 that order for rejection of plaint is legal one and needs not to be touched. Resultantly, I dismiss instant appeal with no order as to costs.”

13. After hearing both the learned counsel for some time I do not find myself in agreement with the observation made by the learned appellate Court that "if the amendment so proposed by appellants is to be allowed, then nature and character of suit will be totally changed".

14. No doubt an objection was raised from the respondents' side that the suit was not maintainable in the present form and an issue was framed in this behalf. But the same was ignored and the plaint was rejected under Order VII Rule 11 C.P.C. and the remaining issues were not decided by the learned trial Court. Therefore, the applicants could not be said to have acted in a mala fide manner by not seeking the amendment before the appellate Court. Be that as it may, the learned appellate Court itself observed (and rightly so) that the delay alone in applying for the amendment cannot be a determining factor for deciding an application under Order VI, rule 17, C. P. C. The use of the expression "at any stage of the proceeding" in rule 17 is not without significance. The word "proceedings" has been interpreted by the Honourable

Apex Court in a liberal manner so as to give a proper scope to the rule in accord with its purpose, as including the appellate stage and that too up to the Honourable Supreme Court.

15. The foregoing interpretation is also in accord with the mandatory language used in rule 17 to the effect that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy" Therefore, once the Court decides that the amendment is necessary for the said purpose of determining the real question, Court is required by law to not only to allow an application made by a party in that behalf, but it is also bound to direct the amendment for the said purposes. Strictly speaking the said rule can be divided into two parts. In the cases falling under the first part, the Court has the discretion to allow or not to allow the amendment, but under the second part once the Court comes to a conclusion that the amendment is necessary for the purpose of determining the real question, it becomes the duty of the Court to permit the amendment.

16. In view of above, however, subject to a very important condition as to the nature of the suit; in so far as the cause of action is concerned, if it does not change by the amendment, whether it falls under the first part of rule 17 or in the second part is irrelevant, because when the cause of action is changed the suit itself would become different from the stage of initially filed. In the case at hand this condition would not have been contravened if the amendment had been allowed by the appellate Court. The bundle of facts narrated in the plaint which constitute the cause of action, as the application for amendment shows, would not have suffered any material change if the request would have been allowed. Apart from the consequential technical changes, *mutatis mutandis* in the context of the grounds stated in the application for amendment, only two major amendments were sought to be made in the plaint. They would have been firstly, the change in the heading signifying the suit being for delivering up the sale deed and cancellation etc. instead of declaration etc. and secondly, there was to be a similar change in the prayer paragraph. These amendments would not have caused any embarrassment to the respondents /

defendants either in seeking and making similar amendments in their written statements. The inconvenience caused to the respondents as the provision itself visualizes is not only natural but would ordinarily be occasioned in almost every case. That is why the law visualizes the award of adequate compensation; in that, the amendment has to be allowed "in such manner and on such terms as may be just".

17. In the case of **Mst. Ghulam Bibi and others** (Supra), it was observed "that is why this Court has so far followed the liberal rule in interpreting Order VI, rule 17 so as, to permit amendment if otherwise necessary, notwithstanding the possibility that on account of some formal change, the question of limitation might have acquired pronounced importance, had it not been a case of amendment under Order VI, rule 17, other principles governing the question of amendment in pleadings have adequately been determined and examined in the precedent law and no more discussion is necessary in so far as the question of law and principle is concerned".

18. It has been ruled in recent years by the superior Courts of Pakistan that rules of procedure are meant to advance justice and to preserve rights of litigants and they are not meant to entrap them into blind corner so as to frustrate the purpose of law and justice as has been held in abovementioned reported case. In the instant case after the plaint was rejected by the trial Court, appeal was preferred before the appellate Court and in that appeal application under Order VI Rule 17 CPC was filed seeking amendment of plaint, notice of which was served on the other party and after hearing, the same was dismissed alongwith the said appeal. Ends of justice demanded that amendment should have been allowed as such request could have been treated at par with case of declaration under section 42 of Specific Relief Act, when consequential relief had not been sought, amendment sought in effect was formal in nature and by allowing it, nature of the suit would not have changed.

19. The case law cited by the learned counsel for the respondents is quite distinguishable from the facts and circumstances of the case at hand, thus is

not applicable. The case of **Mst. Maryam Begum** (Supra), where the Honourable Supreme Court observed that amendment sought in suit would not only change the nature and character of the suit but it would also nullify the judgments and decrees passed by the Courts below. With respect is not applicable in the circumstances of the present case, because in the present case the applicant only sought for amendment to the extent of possession of the suit property, which is a consequential relief to the main relief of declaration.

20. The case of **Karachi Electric Supply Corporation** (Supra) is on the point of amendment to be sought due to malafide on the part of plaintiff, whereas no malafide appears on the part of applicant in the case at hand. As they sought consequential relief arising from the same cause of action originally incorporated in the plaint. Thus the cited case is not attracted in the present circumstances. The case of **Dr. Hasan Mahfuz Jalisi** (Supra) is also on same point.

21. In the case of **Mst. Imam Hussain** (Supra) plaintiff sought amendment at belated stage i.e. after lapse of five years, where in the present case amendment was sought well within time. As regard the case of **Messrs M.A. Majeed Khan** (Supra), it pertains to Order XXX Rule 1 & 10 C.P.C, hence is not applicable in the case at hand.

22. In view of what has been discussed above, as well as, following the rule laid down in the case of **Mst. Ghulam Bibi** (Supra), I set aside the judgment dated 17.11.1999 passed by learned Illrd Additional District Judge, Hyderabad dismissing Civil Appeal No.144/1997 as well as the order dated 19.09.1997 passed by learned Ist Senior Civil Judge, Hyderabad rejecting the plaint in IInd Class Suit No.19/1996 and remand this case to the trial Court for decision of the same on merits afresh within four months holding that plaint stood amended as prayed in the Appellate Court through application made under Order VI, Rule 17 CPC. Resultantly the instant revision is allowed with no order as to costs.

JUDGE

S