

ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision Application No. S – 218 of 2010

Mr. Ghulamullah Memon, Advocate for the Applicant.

Mr. Maqbool Ahmed Awan, Advocate for Respondents No.2 and 7.

Mr. Agha Athar Hussain, Assistant Advocate General.

Date of hearing : 03.09.2012.

ORDER ON C.M.A. No. 752 / 2010

Nadeem Akhtar, J. : This application has been filed by the applicant under Order VI Rule 17 CPC praying that he may be allowed to amend the plaint of his Suit which he had filed against the respondents for specific performance of an agreement for sale of land, cancellation of registered sale deed and permanent injunction in respect of the said land. Applicant's said Suit was dismissed by the trial court, and the first appeal filed by him against such dismissal was also dismissed by the lower appellate court. In this Revision application, the applicant has impugned the judgments and decrees passed by both the courts below. Through the listed application, the applicant has prayed that he may be allowed to amend the plaint and the matter be remanded back to the trial court for deciding the same afresh.

2. Facts of this case are that Suit No.22/2009 (first Suit) was filed by the applicant on 21.05.2009 before the Senior Civil Judge, Moro, against respondents 1 to 5 and 7 to 12 herein for specific performance of contract and permanent injunction. The applicant had stated in his Suit that respondents 1 to 5 were the co-owners of agricultural land measuring 9-00 acres situated in Deh Old Gachero, Taluka Moro, District Naushero Feroz, (the land). It was the case of the applicant that respondents 1 to 3 agreed to sell the land to him in consideration of Rs.900,000.00 and he agreed to purchase the same for the said amount. According to the applicant, respondents 1 to 3 executed in his favour a sale agreement on 15.12.2008 when the applicant paid an "advance amount" of Rs.600,000.00 to respondents 1 to 3 in the presence of witnesses. As per the terms and conditions of the agreement, the balance sale consideration of Rs.300,000.00 was to be paid by the applicant on 20.05.2009 whereafter

respondents 1 to 3 were required to complete the sale in favour of the applicant by handing over possession of the land to him and by executing registered sale deed in his favour. It was alleged by the applicant that he made several attempts to pay the balance sale consideration to respondents 1 to 3, but on every occasion they demanded additional amount from him and avoided to perform their agreed part of the contract, and finally they refused to complete the sale in his favour as they were trying to sell the land to some third party.

3. On the basis of the above averments, the applicant prayed for a decree against respondents 1 to 3 for specific performance of the above agreement and permanent injunction. On 28.05.2009, the applicant withdrew the first Suit with permission to file a fresh Suit. Thereafter on the same day, that is on 28.05.2009, a fresh Suit was filed by the applicant before the same trial court which was numbered as Suit No. 26/2009 (second Suit). The second Suit was filed against twelve (12) defendants, by adding respondents 6 and 7 herein, who were cited as defendants 6 and 7 as the land was sold out to them by respondents 1 to 3 through a registered sale deed according to the applicant. All the facts, averments and allegations of the first Suit and the second Suit filed by the applicant were the same, except that in the second Suit it was alleged by the applicant that during the pendency of his first Suit, the respondent No.1 sold out some portions of the land to respondents 6 and 7. The prayers in the second Suit against respondents 1 to 3 for specific performance and injunction were the same with additional prayers of cancellation of the registered sale deed in favour of respondents 6 and 7 and for restraining the official defendants / respondents from mutating the land in their favour. On 30.09.2009, the applicant filed a statement in the second Suit for withdrawal of the second Suit against defendants / respondents 4 and 5 who were co-owners of the land, but had not entered into any agreement with the applicant. In view of the above statement, names of defendants / respondents 4 and 5 were struck off from the plaint by order dated 30.09.2009.

4. The defendant / respondent No.2 filed his written statement in the second Suit wherein he denied all the averments and allegations made by the applicant in his Suit. He specifically denied any agreement in respect of the land with the applicant, or receiving any amount as sale consideration in respect thereof from the applicant. He also denied that the land was sold out to defendants / respondents 6 and 7 during pendency of the Suit, and asserted that sale deed in favour of

respondents 6 and 7 was presented for registration on 19.05.2009 prior to 21.05.2009 when the first Suit was filed. The said defendant / respondent claimed that applicant's Suit was based on false and fictitious sale agreement and prayed for dismissal of the Suit.

5. Defendants / respondents 6 and 7 also filed their written statements in applicant's second Suit denying all the averments and allegations contained therein. They contended that the sale agreement filed and relied upon by the applicant was a fictitious document, and that sale deed in their favour had been executed and registered prior to the filing of the first Suit by the applicant. They further contended that the applicant had no right, title or interest in the land as the same was their property by virtue of the said registered sale deed. They also prayed for dismissal of the Suit.

6. Issues were framed in the Suit whereafter evidence was led by the parties. The applicant / plaintiff examined three witnesses including himself and the witnesses of the sale agreement and then closed his side. The respondents / defendants examined six witnesses including the co-owners of the land and the two buyers thereof and then closed their side. By the impugned judgment dated 22.05.2010, applicant's second Suit was dismissed by the trial court. Being aggrieved with the said judgment, the applicant filed First Civil Appeal No. 50/2010 which was also dismissed vide impugned judgment dated 12.11.2010 passed by the lower appellate court after hearing the parties.

7. As noted above, the applicant has challenged both the aforementioned impugned judgments in this Revision Application, and through the listed application, the applicant has prayed that he may be allowed to amend the plaint by making some additions in paragraph 4 and prayer (a) of the plaint, and thereafter the matter be remanded back to the trial court for deciding the same afresh. Following amendments in the plaint have been sought by the applicant through the listed application :

Paragraph 4 of the plaint is reproduced below :-

“ 4. That, as per terms and conditions of the sale agreement, the plaintiff had paid advance payment of Rs.600000/- to the defendants No. 1 to 3 in presence of the witnesses at the time of execution of sale agreement whereas remaining sale consideration of Rs.300000/- was to be paid by the plaintiff to the defendants No.1 to 3 on 20.05.2009, thereafter, the defendants No.1 to 3 had to hand over possession of the suit land to the plaintiff and execute

registered sale deed in favour of the plaintiff after getting sale certificate. ”

The applicant has prayed that he may be allowed to amend the plaint by adding the following sentence after the last word (certificate) mentioned in the above quoted paragraph 4 :-

“ in case of failure the vendors shall pay the double amount of the received amount of Rs.6,00,000/- to the vendee along with all expenses. ”

Prayer (a) of the plaint is reproduced below :-

“a. That, this Honorable Court may be pleased to direct the defendants No.1 to 3 to perform their part of contract as the plaintiff is ready to willing to perform his part of the contract, by executing registered sale deed in favour of the plaintiff coupled with delivery of possession of suit land to the plaintiff.”

It has been prayed by the applicant that he may be allowed to amend the plaint by adding the following sentence at the end of the above quoted prayer (a) :-

“ or the defendants No.1 to 3 pay Rs.12,00,000/- as double amount of advance money along with expenses accrued due to non performance of the first part of the contract by the defendants No.1 to 3 with the plaintiff. ”

8. Mr. Ghulamullah Memon, learned counsel for the applicant, submitted that the proposed amendments are necessary in order to decide the real controversy and all the questions involved in the Suit. He contended that the matter has been decided against the applicant by both the courts below because of such deficiency which can be cured now only by allowing the proposed amendments. According to him, in case the proposed amendments are allowed, the same will not change the cause of action or nature of the Suit. He submitted that amendments can be allowed at any stage of the proceedings and even at the appellate stage. The learned counsel conceded that a registered sale deed had already been executed in respect of the land in favour of respondents 6 and 7 prior to the filing of the first Suit by the applicant. No other submission was made on behalf of the applicant. Following cases were cited and relied upon by the learned counsel in support of his submissions :

1990 CLC 47 :

Hyderabad Municipal Corporation V/S Messers Columbia Enterprises.

In the above cited case, application for amendment of the plaint was filed before the lower appellate court which was dismissed in a summary manner on the ground that an earlier order had been passed in analogous proceedings. The application was allowed in Revision on the grounds that it should not have been dismissed in summary manner and should have been allowed by the lower appellate court, and that the matter had been reopened in Revision. It was held in this case that amendment can be allowed at any stage of the proceedings unless equities are otherwise or there is some good reason for summary rejection. In my humble opinion, this case is distinguishable from the instant case, firstly, as the application for amendment had not been filed before the High Court in Revisional jurisdiction, like in the instant case, secondly, as equities are otherwise in view of the reasons discussed in the following paragraphs, and lastly, as the listed application is being decided on merits and not in a summary manner.

2001 CLC 649 :

Abdul Hameed V/S Muhammad Aslam and 2 others.

This case deals only with the general principle that amendments in pleadings can be allowed at any stage. This is subject to the settled principles of law that no such amendment can be allowed which may change the cause of action, nature or complexion of the Suit, and that amendments are allowed only in such cases where the Suit can be decided on the same evidence and no additional, further or fresh evidence is required.

2007 CLC 165 :

Bashir Ahmad V/S Lahore Development Authority (LDA) through Director General and 2 others.

As discussed in the subsequent paragraphs this case referred to by the learned counsel for the applicant goes against him as it was held therein that the appellate court should have allowed the amendments because the same would not have entailed recording of any further evidence for trial in the matter.

PLJ 1996 Karachi 726 :

Commander (Retd.) M.A. Ansari V/S Pakistan Defence Housing Authority ETC.

In this case, Suit for declaration and permanent injunction was filed wherein amendment was sought for adding prayer for possession of the property in question. This case is clearly distinguishable as prayer for possession is merely a consequential relief in a Suit for declaration and permanent injunction.

With respect to the learned counsel for the applicant, the cases cited and relied upon by him are not relevant to the facts and circumstances of the instant case.

9. Mr. Maqbool Ahmed Awan, learned counsel for respondents 2 and 7, at the very outset raised a preliminary objection that this Revision Application is not maintainable as, by not filing the pleadings, documents and orders of the subordinate courts along with the Revision Application, the applicant has not complied with the mandatory requirements of the first Proviso contained in Sub-Section (1) of Section 115 CPC. With respect to the learned counsel, this objection is not relevant at this stage as the listed application, on which this Order is being passed, is only for amendment in the plaint. The question about maintainability of the Revision Application can be dealt with at the time of its hearing when the learned counsel will be at liberty to raise as many objections as he can. It may, however, be pointed out that all the relevant record and documents were subsequently filed by the applicant along with a statement, which are now part of the record.

10. In relation to the listed application, Mr. Awan submitted that the new plea raised by the applicant is not a legal plea, therefore, he cannot be allowed to raise such new plea for the first time at this stage. He also submitted that the nature and cause of action of the Suit will be completely altered if the proposed amendments are allowed. He specifically pointed out that, during their cross examination, respondents / defendants 1 to 3 were not confronted by the applicant about the alleged understanding / agreement that in case of their failure in completing the sale, they will be liable to pay double the amount to the applicant, as alleged by the applicant. Learned counsel then submitted that the applicant wants to reopen the matter at any cost, which he has lost before both the courts below, and that the only purpose of the applicant in filing the listed application is to pressurize the owners of the land. He prayed for dismissal of the application. Learned A.A.G. adopted the arguments of Mr. Awan.

11. In paragraph 7 of his first Suit, which was filed on 21.05.2009, the applicant had mentioned about his apprehension regarding sale of the land to some third party by respondents 1 to 3. Despite such apprehension, the applicant did not seek any relief in his first Suit against respondents 1 to 3 claiming double the amount in case of breach of the agreement. It is an admitted position that sale deed in respect of the land was executed and registered on 19.05.2009 in favour of respondents 6 and 7. Thus, respondents 6 and 7 had already become lawful co-owners of the land prior to the filing of the first Suit by the applicant. It was due to this reason that the first Suit was withdrawn by the applicant on 28.05.2009 and the second Suit was filed by him on the same day wherein the buyers of the land / respondents 6 and 7 were also cited as defendants. In this second Suit, the applicant once again failed to seek any relief against respondents 1 to 3 claiming double the amount in case of breach of the agreement although he was fully aware of sale of the land through registered sale deed in favour of respondents 6 and 7. After the aforementioned omissions, the applicant did not take any step in his First Appeal to seek any such relief by filing an application for amendment in the plaint. The applicant had three opportunities for seeking such relief, but he failed to avail all of them, especially the last two opportunities, namely, the second Suit and the appeal, when he could have retraced his steps.

12. An amendment can be allowed only where the relief has been left out inadvertently or by mistake, but if such omission is willful, deliberate, negligent or malafide, the same must be refused. In the instant case, the land was admittedly sold out to respondents 6 and 7 before filing of the first Suit, and the said respondents are enjoying possession and all their legal rights, title and interests in the land since 19.05.2009. The proposed amendments, if allowed, would tantamount to taking away such valuable vested rights of respondents 6 and 7. No doubt amendments in pleadings can be allowed at any stage and even at the appellate stage, but not at such a belated stage like in this case when despite a number of opportunities to claim double the amount from respondents 1 to 3 or to seek amendment in his plaint, the applicant failed to do so. The equities are also otherwise and against the applicant as held in the case of Hyderabad Municipal Corporation V/S Messers Columbia Enterprises (supra).

13. I have noticed that respondents / defendants 1 to 3 were cross examined in detail by applicant's counsel, but they were not confronted

about the alleged understanding / agreement that in case of their failure in completing the sale, they will be liable to pay double the amount to the applicant, as alleged by the applicant. Their cross examinations further reveal that even a suggestion to this effect was not made by the applicant. This shows that either there was no such understanding / agreement between the parties, or if there was any such understanding / agreement, then by not confronting respondents 1 to 3 with the same the applicant relinquished his right, if any, arising out therefrom.

14. It is a well settled principle of law that no such amendment can be allowed which may change the cause of action, nature or complexion of the Suit. It has also been held consistently that amendments are allowed only in such cases where the Suit can be decided on the same evidence and no additional, further or fresh evidence is required. In the instant case, the second Suit was filed for specific performance of agreement, cancellation of registered sale deed and permanent injunction, and no penalty or damages were claimed. Through the proposed amendments, the applicant has sought damages in the form of penalty. Since no issue was framed in respect of damages, a new issue shall have to be framed and further evidence in respect thereof shall have to be led by the parties. In my humble opinion, in case the proposed amendments are allowed the same shall not only change the nature and complexion of the Suit, but the parties shall have to adduce additional / further evidence in order to prove and rebut the claim of damages. Therefore, the proposed amendments cannot be allowed.

15. In the end, I would like to refer to the case of Mst. Barkat Bibi V/S Khushi Muhammad and others reported as **1994 SCMR 2240**, wherein the Hon'ble Supreme Court was pleased to hold that amendment is not allowed in cases where new cause of action is substituted for the original one or when a new claim based on new set of facts is introduced. In the instant case, the applicant wants to add a new claim of damages by introducing new facts in paragraph 4 of the plaint that there was agreement between the parties about respondents 1 to 3 / vendors paying double the amount to him in case of breach of agreement. In view of the above authority, such an amendment cannot be allowed.

Foregoing are the reasons of the short order announced by me on 03.09.2012 whereby the listed application was dismissed. It is hereby clarified that the observations made in this Order shall not affect the merits of the main case, which shall be decided on its own merits.

JUDGE