Before Rattan Singh, J.

JARNAIL SINGH—*Petitioner*

versus

KULWINDER SINGH AND ANOTHER—*Respondents*

CR No. 8088 of 2016

February 24, 2020

Constitution of India, 1950—Art. 227—Code of Civil Procedure, 1908—O.6 Rl.17—Application for amendment of plaint—To add relief—Whether permissible—After closing plaintiff's evidence—Plaintiff filed application for amendment after closing evidence in suit for declaration that agreement to sell is null and void—Relief of refund of earnest money sought to be added—Proviso added w.e.f. 01.07.2002 makes such amendment impermissible at belated stage.

Held that, the proviso to the said provision makes it clear that no amendment shall be allowed after a trial has commenced, unless the court came to the conclusion that in spite of due diligence, the amendment could not have been made prior to the date that it was sought.

(Para 16)

Further held that, in view of the above, I do not see how the application of the respondent-plaintiffs could have been allowed at the stage that it has been, with the relief now sought to be added by them obviously available to them at the time when the suit itself was instituted or well within time before the evidence had begun to be led after the issues had been framed.

(Para 17)

Further held that, the observation of the trial court that it was an inadvertent error, does not appeal to reason at all, because thought of a course cancellation of the agreement of sale itself may amount to the terms therefore not being binding on the parties, a specific prayer for refund of the earnest money, in the opinion of this court, could not be allowed at that stage, because if eventually the trial court comes to a conclusion that the agreement is binding, then the respondent-plaintiffs would actually have added prayer at a belated stage, seeking refund of earnest money, which they never initially sought.

(Para18)

Bhavyadeep Walia, Advocate
for the petitioner.

Naveen Bawa, Advocate
for respondent no.1.

AMOL RATTAN SINGH, J. (oral)

(1) By this petition, the petitioner challenges the order of the learned trial court (Civil Judge (Jr. Divn.), Patiala), dated 05.10.2016, by which an application filed by the respondent-plaintiffs under the provisions of Order 6 Rule 17 of the Civil Procedure Code has been allowed, at a stage after the evidence of the plaintiff had already been closed.

(2) The suit filed by the respondent-plaintiffs is one seeking a declaration to the effect that the agreement entered into between the parties on 16.08.2012, by which the petitioner (defendant no.1) agreed to sell the suit land to respondent no.1 -plaintiff, be declared to be an agreement that is illegal, null and void and not binding on the legal rights of the plaintiffs, the subject matter of the agreement being a house owned by the petitioner-defendant no.1.

(3) Strangely, while seeking that the said agreement be held not to be binding on the respondent-plaintiff, i.e. he not be held bound to purchase the suit property, he has thereafter still sought a decree of permanent injunction seeking that the respondent-petitioner (owner of the land) be restrained from alienating it in any manner.

(4) The learned trial court, while allowing the application vide the impugned order, has observed that a perusal of the written statement filed by the defendant showed that the petitioner (defendant no.1) admitted to having entered into an agreement of sale and therefore also admitted to handing over earnest money to the respondent-plaintiffs and "so may be the plaintiff inadvertently could not mention the relief of recovery of earnest money paid by the plaintiff but since this fact has been admitted by the defendant, declining to allow the plaintiff to amend his plaint qua present relief sought for, would amount to defeat the ends of justice". That court also observed that counsel for the plaintiff had suffered a statement that in case the application was allowed, he would not lead fresh evidence.

(5) Hence, it has been held that no prejudice was likely to be caused to the defendants, if the application was allowed.

(6) Learned counsel for the petitioner however submits before this court, that as a matter of fact the suit itself has been filed by the respondent-plaintiffs only to wriggle out of their liability under the agreement, to the effect that if they could not purchase the suit property by the fixed date, they were to forfeit the earnest money paid by them to the petitioner, and since they could not actually fulfill that agreement, they sought cancellation thereof, at which time they did not seek refund on the earnest money, which is something they are now seeking by way of an amendment at a stage when evidence had already been led and consequently, even in terms of the bare provision of Order 6 Rule 17 of the CPC, the amendment could not have been allowed.

(7) Learned counsel for the respondent-plaintiffs, on the other hand, simply wishes to rely upon two judgments of the Supreme Court, to submit that even at that stage the amendment could have been allowed, especially as the respondent-plaintiffs are not seeking to lead any evidence qua such amendment.

(8) The first judgment relied upon is in ***Raghu Thilak D. John*** versus ***S. Rayappan***[1] the second being one ***in L.J. Leach and Co. Ltd. and another*** versus ***Messrs. Jairdine Skinner and Co.,*** [2]**.**

(9) He also seeks to rely upon a judgment of the Bombay High Court in ***Dattaram*** versus ***Dharwadkar and another*** versus ***Ghanashyam G. Bhende and another***[3]**.**

(10) Having considered the matter, it is firstly to be observed that learned counsel for the petitioner has pointed to the fact that prior to the date of execution fixed in the agreement of sale, i.e. prior to 19.12.2012, the respondent-plaintiffs had got issued a legal notice to the petitioner on 29.11.2012 (copy Annexure P-5), stating therein that because of non-production of all kinds of documents pertaining to the suit property, including non-clearance of the loan taken by the petitioner-defendant from a bank, the agreement could not be executed, especially since no approved site plan had been shown by the petitioner-defendant to the respondents and as a matter of fact the respondents had come to know that there was no sanctioned site plan qua the suit property.

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[1] 2001(1) RCR (Civil) 726
[2] AIR (1957) SC 357
[3] 2003(3) RCR (Civil) 428

(11) That notice was got replied to by the petitioner-defendant through his counsel on 06.12.2012, i.e. before the date fixed for execution of the sale deed, stating therein that as regards the loan taken by him, it already stood cleared as per a certificate issued by the bank concerned on 31.08.2012, and as regards the suit property not being constructed as per a sanctioned site plan, the petitioner in fact was the third buyer thereof, with mutations duly entered in the municipal record to that effect qua all the buyers, and no notice had ever been issued to the petitioner to the effect that the construction made by his predecessors-in-interest was illegal in any manner.

(12) Hence, he reiterated that he was ready and willing to execute the sale deed on receiving the balance consideration, which should be done by the respondent-plaintiff on the date fixed, i.e. 19.12.2012, before the office of the Sub-Registrar, Patiala.

(13) Learned counsel for the petitioner therefore reiterates that it was only to wriggle out of their commitment that cancellation of the sale deed was sought, and consequently, with refund of the earnest money having been sought at a belated stage after evidence of the respondent-plaintiffs had already been closed, the trial court wholly erred in passing the impugned order.

(14) Having considered the matter, in my opinion, the petition deserves to succeed, firstly for the reason that the amendment has been allowed at a stage when it could not have been allowed even in terms of the bare provisions contained in Order 6 Rule 17, which provisions read as follows:-

> **"Order VI Rule 17 Code of Civil Procedure :**
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> 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."

(15) It is necessary to state here that the aforesaid provision was substituted for the original provision in the Code of Civil Procedure, by Act No.22 of 2002, w.e.f. 01.07.2002.

(16) Very obviously, the proviso to the said provision makes it clear that no amendment shall be allowed after a trial has commenced, unless the court came to the conclusion that in spite of due diligence, the amendment could not have been made prior to the date that it was sought.

(17) In view of the above, I do not see how the application of the respondent-plaintiffs could have been allowed at the stage that it has been, with the relief now sought to be added by them obviously available to them at the time when the suit itself was instituted or well within time before the evidence had begun to be led after the issues had been framed.

(18) Further, the observation of the trial court that it was an inadvertent error, does not appeal to reason at all, because though of course cancellation of the agreement of sale itself may amount to the terms therefore not being binding on the parties, a specific prayer for refund of the earnest money, in the opinion of this court, could not be allowed at that stage, because if eventaully the trial court comes to a conclusion that the agreement is binding, then the respondent-plaintiffs would actually have added a prayer at a belated stage, seeking refund of earnest money, which they never initially sought.

(19) As regards the case law cited by the learned counsel in, Raghu Thilaks' case (supra), the suit was one by which a decree of permanent injunction had been sought by the plaintiff against the defendant, with him subsequently having stated in his application under Order 6 Rule 17 of the CPC that the suit property had been taken possession of during the pendency of the suit, by the defendant, and consequently an appropriate amendment to that effect was needed to be made in the prayer.

(20) In such circumstances, the Supreme Court has held that the amendment could not have been declined.

(21) As regards the judgment of the Apex Court in L.J Leachs' case, as also the one by the Bombay High Court in Dattarams' case (both supra), they both pertain to a time when the aforesaid amendment in the CPC had not come about, adding the proviso to the above effect.

(22) Otherwise also, it is seen that the Supreme Court had held that the question of an amendment being allowed after the period of limitation had expired (as contended by the defendant in that case), would have been a matter to be seen when a fresh suit was filed. Therefore, in fact, that *lis* was one seeking a wholly different relief, which is not seen to be *pari materia* in any manner to the suit in hand in the present case.

(23) In any case, as already observed, that was a judgment of the year 1957, well before the amendment to the CPC took effect in July 2002.

(24) The unamended provision reads as follows:-

> **"Order VI Rule 17 Code of Civil Procedure :**
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> **Amendment of pleadings** – (1) 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.
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> (2)Every application for amendment shall be in writing and shall state the specific amendments which are sought to be made indicating the words or paragraphs to be added, omitted or substituted in the original pleading."

(25) Consequently, it is also necessary to observe that it is well settled law to the effect that a trial in a civil suit begins immediately after evidence has commenced upon issues being struck, with the application in the instant case obviously having been moved by the respondent-plaintiffs well after their evidence had been closed (to repeat yet again).

(26) In that context, a judgment of the Supreme Court ***Ajendraprasadji N. Pande and another*** versus ***Swami Keshavprakeshdasji N. and others***[4] can be usefully cited.

(27) In view of the above, the petition is allowed, with the impugned order set aside. The trial court would now proceed with the matter on the basis of the unamended plaint.

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[4] **,** 2007(1) RCR (Civil) 481

(28) It is, however, made absolutely clear that no observations made herein above shall be taken by the trial court to be one in the context of the merits of the case of the parties, which naturally would be considered by that court wholly on the basis of the evidence led before that court.

Shubreet Kaur