Writ Petition No.4583/2014.

(Atul Kumar Pandey vs. Ashish Kumar Pandey & others)

5.5.2014. Shri Pranay Verma, learned counsel for the petitioner.

Shri Naman Nagrath, learned Senior Counsel with Shri Sanjeev Mishra, learned counsel for the respondent no.1.

Shri Girish Kekre, learned counsel for respondent no.2.

With consent of learned counsel for the parities, the petition is finally heard.

Challenge vide this writ petition under Article 227 of the Constitution of India is to an order-dated 20.2.2014 passed in Civil Suit No.39-A/2012 by Second Additional District Judge, Katni, allowing the application under Order 6 Rule 17 of the Code of Civil Procedure, filed by the plaintiff (respondent no.1 herein).

Suit by the plaintiff is for declaration of title over property marked with letters 'ABCD' of House No.75 situated at Singhai Colony Katni and for permanent injunction restraining the defendants from interfering with his possession over the property marked by letters ABCD and ECDF in the plaint map contending *inter alia* that Rajkumar Pandey, father of plaintiff, defendant no.1 and 2 and Ramesh Kumar Pandey and Pankaj Pandey, had given all his properties to his sons vide Will dated 1.7.2005 and the respective persons are in possession of their respective shares (Paragraphs 2 of the Plaint : 2. यह कि स्च.राजकुमार पाण्डे को अपने जीवनकाल में अपने पुत्रों को जो कुछ भी देना था, उसके द्वारा वसीयत दिनांक 1.7.2005 (एक जुलाई सन् दो हजार पाँच) व उसके अलावा भी स्वतंत्र रूप से प्रदान किया गया है तथा सभी को उनके पृथक पृथक चल एवं अचल संपत्तियाँ प्रदान की जा चुकी है और संपत्ति के किस भाग का किस प्रकार से किस व्यक्ति के द्वारा उपयोग किया जावेगा, इसका भी विशिष्ट विवरण उनके द्वारा वसीयत में किया जा चुका है). It

is further pleaded that during their life time, plaintiff's father and mother had settled the respective shares as per Will (3. .. इस प्रकार से अन्य सुविधा अनुसार संपत्तियाँ स्च.राजकुमार पाण्डे एवं वादी व प्रतिवादीगण की माँ प्रेम कुमारी ने अपने जीवनकाल में वसीयत के द्वारा सुव्यवस्थित कर दी गई थी।). The plaintiff further pleaded that except Will dated 1.7.2005, Rajkumar Pandey who expired on 5.11.2006 did not execute any Will. It was further contended that the Will contains the detail description of the properties alloted to respective brothers. That, ground floor of House No.75 is given to Pankaj Pandey, the first floor and the roof of the ground floor to Atul Kumar Pandey (defendant no.1), the petitioner and the title over the roof of ground floor to Pankaj Pandey.

The defendant (present petitioner), while admitting the Will, however, denied the plaint allegation contending *inter alia* that the roof of first floor of House No.75 was not given to the plaintiff and that he has no right to use the same or go through the house that the plaintiff does not have entire right over the suit property.

The defendant no.2 pleaded ignorance about the Will (later on defendant no.2 has brought a separate civil suit seeking declaration that the Will dated 1.7.2005 is forged and therefore, null and void).

That, during pendency of the suit and on the plea that he has discovered certain facts about the Will after obtaining certain documents from the office of Municipal Corporation Katni. The plaintiff filed an application under Order 6 Rule 17 CPC for

amendment in the plaint that the Will dated 1.7.2005 executed by Rajkumar Pandey with respect to House No.75 was forged and fabricated and is not a Will in the eyes of law and the plaintiff is co-owner of suit property.

The application was opposed on the ground that the same if allowed will change the entire suit and will introduce a new case. That, it amounts to withdrawal of specific admission which shall cause irretrievable prejudice to the defendant no.1. The trial Court allowed the application holding that the defendant no.2 in a separate suit, has questioned the validity of Will vide Civil Suit No.95-A/2012 that parties in both suit are the same.

The order is being challenged on the ground that the amendment besides leading to withdrawal of admission, will change the entire suit and a new suit would take birth with the proposed amendment.

The documents on record reveals that earlier an amendment application preferred by the plaintiff was partly rejected by order-dated 1.4.2010 which has challenged vide Writ Petition No.4602/2010. The petition was disposed of on 19.7.2013 in the following terms -

> "Looking to the facts and circumstances of the case, this petition is disposed of by giving direction to the learned trial Court to re-decide that part of the application of amendment which has been refused after the certified copy of the plaint of another suit of defendant no.2 in which the genuineness of the Will has been challenged is filed before him.
>
> Learned trial Court is further directed to pay heed that in any case propounder of the Will has to

> prove the Will and, therefore, in any case, the Will is to be proved. Hence, in this situation, it cannot be said that plaintiff is withdrawing his admission. According to me, he is simply explaining the reasons why he is withdrawing his averments made in the plaint which is permissible under the law. In view of the decision of the Supreme Court in Panchdeo Narain Srivastava v. Jyoti Sahay AIR 1983 SC 462 since the genuineness of the Will is also in question, therefore, if there is no other order contrary not to consolidate the two suits, the learned trial Court is hereby directed to consolidate both the suits and record common evidence in both the suits."

Against this order, present petitioner had preferred Special Leave to Appeal (Civil) No.28185/2013 which though dismissed on 4.10.2013; however, with following observations :-

> "The High Court, by the impugned order, has remitted the matter to the trial Court to consider the amendment application filed by the first respondent. We are, therefore, not inclined to interfere with the impugned order.
>
> We, however, direct the trial Court to consider the application for amendment on merits uninfluenced by the observations made by the High Court that in its opinion the first respondent by the amendment application is simply explaining the reasons why he is withdrawing his averments made in the plaint which is permissible under the law."

The trial Court vide impugned order has allowed the application under Order 6 Rule 17 CPC filed by plaintiff in its entirety, holding -

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''दोनों ही व्यवहार वाद व्य.वा.क्र. 39ए/12 एवं 95ए/12 में स्व0 राजकुमार पांडे के द्वारा कथित निष्पादित दि0 1.7.05 विवादित है। व्य.वा.क्र. 39ए/12 के प्रति. क्र. 3 मनमीत सिंह हुन्जन उर्फ हनी को छोडकर दोनों ही प्रकरणों के पक्षकार एक ही परिवार से संबंधित है तथा स्व. राजकुमार पांडे द्वारा कथित वसीयत दिनांक 1.7.05 विवादित है। दोनों ही प्रकरणों में ऐसी कोई सारवान प्रगति नहीं हुई है। अतः सम्पूर्ण परिस्थितियों पर विचार करते हुए, पूर्व पीठासीन अधिकारी के द्वारा अपने पारित आदेश दि. 1.4.10 के माध्यम से वादी के जिस संशोधन को अस्वीकार किया गया है उसके संबंध में उसे वादपत्र में संशोधन किये जाने की अनुमति दिया जाना उचित प्रतीत होता है और इस तरह से वादी की तरफ से प्रस्तुत संशोधन आवेदन आदेश 6 नियम 17 सी.पी.सी. दिनांकित 16.12.09 स्वीकार किये जाने योग्य पाया जाता है। प्रति0गण चाहे तो अपने जवाबदावा में पारिणामिक संशोधन कर सकते हैं। जहॉ तक प्रतिवादी क्र.1 व 3 की तरफ से मान0 न्यायालय के जो न्याय दृष्टांत प्रस्तुत किया गया है। वह इस प्रकरण की परिस्थिति तथा इस तथ्य को देखते हुए कि इस न्यायालय व्य.वा.क्र. 95ए/12 लंबित है, जिसमें उसी वसीयत के संबंध में निराकरण किया जाना है, से भिन्न होने के कारण उक्त न्याय दृष्टांत का लाभ प्रति.क्र.1 व 3 को प्राप्त होना परिलक्षित नहीं होता।

वादीगण को निर्देशित किया जाता है कि वह अवशेष संशोधन जो कि दिनांक 1.4.10 के माध्यम से अस्वीकार कर दिया गया था। जिसे कि आज दिनांक को पारित आदेश के माध्यम से स्वीकार कर लिया गया है, के परिप्रेक्ष्य में वादपत्र में संशोधन समाविष्ट कर प्रमाणित करावें। तदोपरांत प्रति0गण यदि चाहें तो पारिणामिक संशोधन कर सकते हैं। उपरोक्तानुसार उक्त आवेदन को निराकृत किया जाता है तथा व्य.वा.क्र.95/12 एवं 39ए/12 को कंसालीडेट किया जाता है और व्य.वा.क्र. 95ए/12 को भी इस प्रकरण के साथ रखा जाये।''

It has been held in A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation AIR 1967 SC 96 -

> "9. The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in Cooke v. Gill, (1873) 8 CP 107 (116), in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corporation Ltd. 1962-2 All ER 24, and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case' have been understood to mean "new set of ideas": Dornan v. J. W. Ellis and Co. Ltd., 1962-1 All ER 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

In Shantibai vs. Ganpat Rao Gujar 2001(3) MPLJ 439, a Division Bench of this Court while relying on the decisions in Shanti Kumar R. Chanji v. House Insurance Co. of New York AIR 1974 SC 1719, Haji Mohammed Ishaq Wd. S. K. Mohammed v. Mohamed Iqbal and Mohamed Ali and Co. AIR 1978 SC 798 and Heeralal v. Kalyan Mal AIR 1998 SC 618 and applying the principle laid therein to the amendment in plaint (see paragraph 42 of the report), held -

> "32. We are of the considered opinion that the present one was not a case where the proposed amendment could not be held to have resulted in totally changing the nature, of the suit as well as the nature of the case of the plaintiff as set up initially.

Permitting of such pleas clearly amounted to de novo trial of the suit which could not be permitted in the manner done by the learned Single Judge by remitting issues which were not even framed by the learned Single Judge and were left to be framed by the trial Court.

33. Allowing the proposed amendments in the facts and circumstances of the case clearly amounted to permitting the plaintiff to resile from the clear cut admissions contained in the pleadings which were binding upon him. The course of action adopted by the learned Single Judge remitting the unframed issues with a blanket permission to bring in fresh evidence on the record filling up the lacunas in the case of the plaintiff virtually amounted to directing a de novo trial of the suit which cannot be held to be justified in law. The application for the amendment deserved to be rejected.

...

36. It may be noticed that their Lordships of the Privy Council in the decision in the case of Ma Shwe Mya v. Maung Mo Hnaung, reported in 48 Calcutta 832 at page 835 had observed while dealing with the case of an amendment that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless, no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suits."

37. We are further of the view that allowing a change in the nature of the case basing the suit on a totally new ground and giving an opportunity to the plaintiff to adduce false or perjured evidence cannot be permitted. Such an amendment, if allowed, would cause serious prejudice to the defendants for which there can be no justification."

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In the case at hand, if the amendment is allowed to hold the field, the defendants will have to face a totally new and contradictory plea. The trial Court thus committed gross error of law in allowing the amendment in plaint by impugned order dated 20.2.2014, which being not sustainable in the eyes of law is hereby set aside.

In the result, the petition is allowed to the extent above. No costs.

(SANJAY YADAV)
JUDGE

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