

***Before Sanjay Kumar, J.***

**PARVAS KAUL—Petitioner**

*versus*

**PARUL KAUL—Respondent**

**CR No.1330 of 2017**

November 02, 2019

***Code of Civil Procedure, 1908—Proviso to O.6 R.17—Suit for possession by way of partition—Plaintiff/wife seeking half share in suit property/house – Application to amend written statement by defendant/husband, claiming proportionate share of suit property after adjustment of money paid by him—Plea of change of counsel—Application declined – Held, the ground of change of counsel falls woefully short of the requirement of proviso to O.6 R.17 – Does not show exercise of due diligence— The aspects of amendment sought were to the defendant’s knowledge—And were, in fact, adverted to in the written statement—Additionally, the amendment considered superfluous as the trial court itself was bound to determine the parties’ shares in suit property by looking into all concomitant factors—The trial court’s observations to the contrary held unwarranted and not binding for final adjudication.***

*Held that*, perusal of the amendment application demonstrates that the only ground cited by the defendant for seeking amendment of the written statement at that stage was the change of his counsel. However, the *proviso* to Order 6 Rule 17 CPC mandates that the Court ought not to allow amendment of pleadings by either party to the suit after commencement of the trial unless such party establishes to the satisfaction of the Court that it was not in a position to raise such issue despite exercise of due diligence before such commencement. In the case on hand, the ground cited in the amendment application falls woefully short of the required standard. Change of counsel is not reason enough to surmise that a party had exercised due diligence.

(Para 9)

*Further held that*, the aspects now sought to be introduced by the defendant, *vide* the additional paragraph proposed to be added in the written statement, were well within his knowledge even by the date he filed his written statement. In fact, he specifically adverted to the very same aspects in Preliminary Objection-6 thereof. It is only by way

of an alternative relief that he now seeks to rephrase what was set out therein.

(Para 10)

*Further held that*, viewed thus, this Court is of the opinion that no interference is warranted with the order under revision. Firstly, the amendment application did not meet the legal requirement posited by the *proviso* to Order 6 Rule 17 CPC and secondly, because the proposed amendment was superfluous. As rightly contended by Mr. Amit Jain, learned counsel, the trial Court is bound to declare the rights of the parties by determining their shares. When the Court itself is duty bound to undertake such an exercise, a prayer in that regard is not essential or even necessary. The trial Court necessarily has to look into all the concomitant factors while determining and declaring the shares of the parties. As the defendant already raised this issue in his written statement, the trial Court is bound to deal with the same on its own merits and in accordance with law. The observations to the contrary made by the trial Court in the order under revision were therefore unwarranted and would not be binding at the stage of final adjudication of the suit.

(Para 12)

Amit Jain, Advocate  
*for the petitioner.*

Sachin Mittal, Advocate  
*for the respondent.*

### **SANJAY KUMAR, J.**

(1) The petitioner in this civil revision, filed under Article 227 of the Constitution, is the husband and the respondent herein is his wife.

(2) The respondent-wife filed Civil Suit No.31037 of 2014 on the file of the learned Civil Judge (Junior Division), Gurugram (hereinafter, 'the trial Court'), praying for a preliminary decree for possession by way of partition, declaring her share to be half and the share of the petitioner- husband, the defendant therein, to be the remaining half in respect of the house property detailed in para-1 of the plaint. The petitioner-husband filed his written statement contesting the suit claim in April, 2015. Thereafter, he filed an application under Order 6 Rule 17 CPC on 17.12.2015, seeking to amend his written statement by adding a paragraph in Preliminary Objection-6 thereof. By

order dated 06.02.2017, the trial Court dismissed the application. Aggrieved thereby, he is before this Court.

(3) By order dated 22.02.2017 passed in this revision, this Court directed the trial Court to adjourn the case beyond the date fixed for the hearing of this revision viz. 22.03.2017. Thereafter, the said interim order was continued and is operative as on date. In effect, the suit proceedings stood stayed.

(4) Parties shall hereinafter be referred to as arrayed in the suit.

(5) As already noticed *supra*, the plaintiff claimed that she owned a half share in the suit property and the defendant was stated to be the owner of the remaining half. In his written statement, the defendant specifically stated that the parties had gotten married in 2001 and purchased the suit house property in the year 2003, after availing a bank loan. According to him, the said loan was transferred to another bank and thereafter, a fresh loan was also availed for furnishing of the house. He claimed that the parties had mutually agreed that the loan repayment installments would be borne by them equally, but after the fall out in the marital relations, the plaintiff stopped paying her share, leading to initiation of proceedings by the bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. He further claimed that owing to this development, he had no other option but to pay the loan installments on his own. He also relied upon a private compromise arrived at by and between the parties, which is of no relevance to this adjudication. He claimed that he had paid a total sum of Rs.39,65,175/- towards loan repayments, of which the share of the plaintiff would come to Rs.19,82,588/-. In consequence, he asserted that she was not entitled to seek partition of the property.

(6) By way of his proposed amendment, the defendant wanted to add a paragraph, wherein the averments were to the effect that if the trial Court came to the conclusion that the plaintiff was entitled to the relief of partition, he should be held entitled to a proportionate share in the suit property after adjustment of the total monies paid by him towards loan repayments, inclusive of the share payable by the plaintiff.

(7) However, the trial Court, *vide* the order under revision, opined that the proposed amendment had no relevance, as the factum of the shares of the parties had nothing to do with non-payment of loan installments by either of them and in case of default in repayment of the loan, the creditor would have its own right to proceed with the

recovery. According to the trial Court, disproportionate payment of installments by one or the other party would not affect the share of either of them and the aggrieved party could file a suit for recovery/compensation, as was permissible in law. Referring to the fact that the defendant had already mentioned the details of the bank loan and the alleged non-payment of installments by the plaintiff, the trial Court opined that the amendment was not necessary to decide the real controversy. It is on this basis that the trial Court disallowed the proposed amendment.

(8) Mr. Amit Jain, learned counsel for the petitioner/defendant, would assert that in terms of Order 20 Rule 18(2) CPC, the trial Court was bound to declare the rights of the parties by determining their respective shares and therefore, the dismissal of the amendment application was not justified. According to him, the additional expenditure incurred by the defendant necessarily had to be taken into consideration while determining his share in the suit property. He would submit that the question of the defendant raising a counter-claim did not arise in the case on hand, as the suit was a partition suit, wherein the plaintiff admitted that the defendant had a share in the suit property. Therefore, *per* the learned counsel, the defendant's claim with regard to the extent of his share would not constitute a counter-claim as per Order 6 Rule 6-A CPC. He, however, does not dispute the fact that by the time, the amendment application was filed, the trial Court had already settled the issues for trial.

(9) Significantly, the plaintiff raised this aspect in her objections filed in response to the amendment application. Therein, she stated that after the framing of the issues, the Court had no jurisdiction to allow the amendment relating to a plea which was within the knowledge of the defendant but was not raised prior to commencement of the trial, in terms of the *proviso* to Order 6 Rule 17 CPC. Perusal of the amendment application demonstrates that the only ground cited by the defendant for seeking amendment of the written statement at that stage was the change of his counsel. However, the *proviso* to Order 6 Rule 17 CPC mandates that the Court ought not to allow amendment of pleadings by either party to the suit after commencement of the trial unless such party establishes to the satisfaction of the Court that it was not in a position to raise such issue despite exercise of due diligence before such commencement. In the case on hand, the ground cited in the amendment application falls woefully short of the required standard. Change of counsel is not reason enough to surmise that a party had

exercised due diligence.

(10) Further, the aspects now sought to be introduced by the defendant, *vide* the additional paragraph proposed to be added in the written statement, were well within his knowledge even by the date he filed his written statement. In fact, he specifically adverted to the very same aspects in Preliminary Objection-6 thereof. It is only by way of an alternative relief that he now seeks to rephrase what was set out therein.

(11) Reliance placed by Mr. Amit Jain, learned counsel, on *Usha Balashaheb Swami and others* versus *Kiran Appaso Swami and others*<sup>1</sup> is of no relevance as that was a case dealing with an amendment of the pleadings prior to commencement of the trial. The *proviso* to Order 6 Rule 17 CPC therefore did not fall for consideration.

(12) Viewed thus, this Court is of the opinion that no interference is warranted with the order under revision. Firstly, the amendment application did not meet the legal requirement posited by the *proviso* to Order 6 Rule 17 CPC and secondly, because the proposed amendment was superfluous. As rightly contended by Mr. Amit Jain, learned counsel, the trial Court is bound to declare the rights of the parties by determining their shares. When the Court itself is duty bound to undertake such an exercise, a prayer in that regard is not essential or even necessary. The trial Court necessarily has to look into all the concomitant factors while determining and declaring the shares of the parties. As the defendant already raised this issue in his written statement, the trial Court is bound to deal with the same on its own merits and in accordance with law. The observations to the contrary made by the trial Court in the order under revision were therefore unwarranted and would not be binding at the stage of final adjudication of the suit.

(13) Making this position clear, the Civil Revision is disposed of but Civil Revision No. 1330 of 2017 in the circumstances, without any order as to costs.

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*Tribhuvan Dahiya*

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<sup>1</sup> 2007) 5 SCC 602