

(2003) 03 J&K CK 0017

In the Jammu And Kashmir High Court

Case No : Criminal Rev. No. 98 of 2001 and CMP No. 18 of 2003

Abdul Majid Mir and Others

APPELLANT

Vs

Mohd. Ashraf Mir and Others

RESPONDENT

Date of Decision : 31-03-2003

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 6 Rule 17

Citation : (2003) 2 JKJ 151

Hon'ble Judges : Y.P. Nargotra, J

Bench : Single Bench

Advocate : M.A. Qayoom, for the Appellant; A. Haqani, for the Respondent

Judgement

Y.P. Nargotra, J.—Through this revision the defendants/ petitioners are challenging the legality of the order dated 1.10.2001 passed by Ld.

City Judge, Srinagar, whereby the prayer of the defendants/ petitioners seeking amendment of their written statement has been turned down.

2. The facts need be stated briefly. The plaintiff instituted a Civil suit on 16-04-1981 against the defendants seeking a decree of mandatory

injunction directing the defendants to hand over the possession of suit property consisting of two shops and damages inter-alia on the plea that

plaintiff and his two brothers late Haji Gaffar Mir, father of the defendants and late Ghulam Mohammad Mir jointly owned various properties

including the suit shops. The plaintiff filed suit No. 22 of 1963 for partition of the properties and the same was compromised and accordingly a

decree dated 30.4.1969. The parties came to possess the property of their shares accordingly. That the suit shops fell into the share of the plaintiff.

The plaintiff handed over shop No. 1 to the father of the plaintiff for temporary use as a licensee where he carried on business with his sons, the

defendants till 1979 when he died. The defendants then removed the central wall and occupied the shop No. 2 also. The plaintiff revoked the licence and has filed the suit.

3. The defendants in their written statements have pleaded simpliciter denial to the averments made in the plaint. The Ld. trial court framed ten issues on 30-05-1985 for determination and the plaintiff is still leading his evidence in the first instance.

4. Ld. trial court has rejected the prayer of the defendants on the three counts:

(i) the application suffers from gross delay.

(ii) the defendants are not entitled to take inconsistent pleas.

(iii) the defendants seek to introduce new pleas which tend to displace the plaintiff's case.

5. Heard the Ld. counsel for the parties and perused the record of the case. Let us examine the validity of the aforesaid grounds on which the amendment has been refused by the trial court.

6. Well established principle of amendment of a party's own pleadings is that leave to amend will be granted so as to enable the real question in issue between the parties to be raised on pleadings unless such amendment causes such injury to other party which cannot be compensated for by costs. Such amendment can be allowed at any stage of the proceedings provided it is necessary for the purpose of determining the real question in controversy between the parties. Ordinarily the leave to amend should be readily granted if the said test is satisfied and there is no lack of bonafide on the part of the party seeking leave. In AIR 1967 it was held:-

5. The order passed by the High Court cannot be sustained. Rules of procedure are intended to be a handmaid to the administration of justice. A

party cannot be refused just relief merely because of some mistake negligence, inadvertence or even infraction of the rules of procedure. The court

always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide or that by his blunder, he had

caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or carelessness may have been the first

omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.

7. Delay per se is not sufficient to disentitle a party from the granting of leave to amend. In Mrs. Evelyn J. Disney Vs. Rajeshwar Nath Gupta and others, , it was held:

9. We agree with Ld. counsel for the appellant that mere delay in filing an application for amendment of the pleadings is per se no ground to dismiss it. It is a trite proposition of law, culled out from various pronouncements, that bona fide amendments vital for adjudication of the real question in controversy between the parties should be allowed, however negligent the first omission and however delayed the proposed amendment, if the opposite party can be compensated with costs or other terms to be imposed in the order.

8. In Dalip Kaur and another Vs. Major Singh and others, it was held:

3 The purpose and object of Order 6 Rule 17, CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as

may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice on the basis

of guidelines laid down by various High Courts and the Hon'ble Supreme Court of India. It was held in A.K. Gupta and Sons Vs. Damodar Valley

Corporation, . that the object of the rule was to decide the rights of the parties and not to punish them for their mistakes, by allowing the

amendment of the pleadings in the appropriate cases. The exercise of such far-reaching discretionary power is governed by judicial consideration

and wider the discretion, greater has to be the care and circumspection on the part of the court. On the basis of the different Judgments it is settled

that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings:-

(i) all amendments should be allowed which are necessary for determination of the real controversies in the suit;

(ii) the proposed amendment should not be altered and be a substitute of the cause of action on the basis of which the original lis was raised;

(iii) inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be

allowed to be incorporated by means of amendment;

(iv) proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;

- (v) amendment of a claim or relief barred by time should not be allowed;
- (vi) no amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- (vii) no party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
- (viii) the delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
- (ix) error or mistake which if not fraudulent should not be made on ground for rejecting the application for amendments of pleadings.

9. The observation of the trial court that defendants cannot raise inconsistent pleas in defence is not according to law. There is no such restriction imposed by law. A defendant may take as many defences as he likes and such defences may be inconsistent or alternative. But if such inconsistent defence has not been originally taken in the written statement and seeks to change the original cause of action of the plaintiff such amendment cannot be allowed.

10. Thus this is a settled principle of law that an amendment that involves a complete change of front in the defence and displaces the case of the plaintiff as originally set up by him in his plaint cannot be permitted. By amendment character of the suit must not be allowed to be changed.

11. In the present case according to the plaintiff he is the owner and was put in possession in pursuance of compromise decree in partition suit of the suit shops on which he handed over shop No. 1 to the defendants as a licensee. The defendants initially have denied the same meaning thereby that plaintiff is neither the owner nor was put in possession and nor he gave the shop on permissive possession to the defendants. By the amendment the defendants seek to put up the defence that the plaintiff was not put in possession of the suit shops by compromise decree and instead they have been in possession since 1964 and have become owner by possession. Such plea on the face of it therefore is explanatory by nature and does not in any manner displace the plaintiff in his case. It cannot be termed to mean that initial character of the case is being changed.

The plaintiff is still leading his evidence therefore no such prejudice can be caused to him which cannot be compensated by costs. Therefore court

below was not right in refusing the amendment.

12. For the reasons stated above the order impugned of the court below is set aside and application seeking amendment filed by the defendants is

allowed subject to payment of Rs. 1000/- as costs to the otherside. The defendants shall be allowed to file amended written statement subject to

the right of the plaintiff to file replica if he so chooses. The parties shall appear before the trial court on (sic).