
(1977) 08 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Second Appeal No. 72 of 1975

Aisha and Others

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 12-08-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : (1977) 08 J&K CK 0003

Hon'ble Judges : G.M. Mir, J

Bench : Single Bench

Advocate : J.L. Choudhary, for the Appellant; M.A. Jehvi, for the Respondent

Final Decision : Dismissed

Judgement

G.M. Mir, J.—On 6-12-1966 a suit for condition of accounts was instituted by the Plaintiff-Appellant in the court of C.J.M. Sub Judge)

Srinagar against the State of Jammu and Kashmir stating that the Plaintiff-Appellant in response to a Govt. Notification inviting tenders from

contractors for the instruction of a timber bridge at mile 9 (sic)opore-Chowkibal road offered his tender which was accepted by the Govt. and the

work in question was allotted to the Plaintiff-Appellant after the execution of the agreement. It was further averred in the plaint that be Plaintiff-

Appellant commenced the construction work immediately thereafter but in few of the provisions in the allotment order that the work undertaken by

the Plaintiff Appellant was to be executed to the extent of (sic)ads available during that financial year the Plaintiff-Appellant had to stop the work

on account of non-availability of funds as well departmental materials in time. It was fur(sic) alleged that the department without ice to the Plaintiffs-

Appellants got some actions of the work executed by some other contractor and

when in spite of repeated demands for accounts the department failed to take the final payment to the Plaintiff-Appellant, the necessity for filing the suit arose the trial court the State, inter alia, raised (sic) the written statement an objection with (sic)rd to the maintainability of the suit for accounts against the State. Many other objections also were raised by the State and a member of issues were framed by the trial Court, The first issue was as to whether the (sic) of the Plaintiff against the State for ren(sic)n of accounts was or was not maintainable By its order dated 28-7-1973 the trial court decided this issue in favour of the Plaintiffs and on the findings returned with regard to this issue and other issues it proceeded to pass a preliminary decree directing that the accounts be taken between the parties and also appointed a Commissioner for this purpose. Aggrieved by this order of the trial Court, the State took an appeal to the District Judge, Srinagar.

2. The main contention of the Defendant Respondent in the first appellate court was that the suit for rendition of accounts was not maintainable - as the Plaintiff-Appellant was in possession of accounts himself and all accounts being within his knowledge the suit for accounts was not maintainable. It was contended that if at all, the suit should have been for the recovery of a specific amount. The learned District Judge upheld the contention of the State and vide its order dated 9-12-1974 set aside the judgment and decree of the trial court and ordered that the suit was not maintainable and therefore dismissed the same. It was against this order that this second appeal has been filed by the Plaintiff-Appellant.

3. The main ground urged in this appeal was that the reliance placed on a judgment of this Court by the District Judge, Srinagar, in disposing of the first appeal was not in accordance with law and that the facts of the case relied upon by the first appellate court were entirely different from the facts appearing in the instant case. It was submitted that in view of the terms of the agreement between the parties an agency has been created and on the facts of the present case the agent was legally entitled to ask his principal for accounts. The appeal was instituted in this Court on 27-2-1975. During the pendency of the appeal it appears an application was submitted by the learned Counsel for the Appellant on 26-8-1976 with the submission that the matter under consideration in appeal was of far-reaching

importance inasmuch as important questions of law were involved and the decision of the Full Bench of this Court relied upon by the District Judge requires further consideration as the same appeared to be contrary to the judgment given by the Supreme Court in a case involving similar questions of law and facts. It was prayed that the matter be referred to a larger bench so that the matter is finally concluded. It appears that the application was not pressed and no orders of the court were obtained upon this application. Instead on 8-11-1976 by Anr. application submitted by the Plaintiffs-Appellants a prayer was made that they be permitted to amend the suit so as to claim a specific amount from the Defendant-Respondent. This application was objected to by the State on a number of grounds. It was submitted on behalf of the State that the Appellants had caused much delay in seeking an amendment of the plaint as the objection with respect to the non-maintainability of the suit had been taken in the written statement submitted by the State as early as in 1967, It was also submitted that the proposed amendment, if allowed, will change the nature of the suit and also will alter cause of action and such a conversion, if permitted, would start the suit afresh after a number of years spent in litigation. The third objection raised by the State was that the application for amendment has not been made in good faith as the suit for specific amount of money has already become time barred and if amendment was permitted great injustice will be caused to the Defendant-Respondent.

4. Under Rule 17, Order 6, CPC the court has power at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner as may be just and all such amendments are to be allowed as may be necessary for the purpose of determining the real question in controversy between the parties. There is a catena of decisions dealing with the amendments of pleadings and it may be said that the settled law now appears to be that ordinarily a party should be allowed to make such amendments as may be necessary for determining real question in controversy provided in asking for amendment there has been no undue delay; that no new cause of action is introduced, or that no vested interest or a legal right accrued to the other side is affected. It is also well settled that amendments to the pleadings may not be allowed if it is found that the application for this purpose is not made in good faith and also if this may not be

done without causing injustice to the opposite party. The general rule is to allow the amendment of the pleadings but it may be done only in cases where no injustice is caused to the other side. While considering the request for amendment of the pleadings, the most important aspect to be gone into is whether or not by permitting an amendment injustice would result to the other side. If an amendment if allowed takes away from a party a right accrued to him by lapse of time, it may well be said that it would undoubtedly result in injustice to that party. As a rule the Plaintiff may not be allowed to amend the plaint by introducing a new cause of action which has become time barred since the institution of the suit. In other words no such amendment should be allowed as will take away a valid defence under the law of Limitation (See AIR 1957 SC 595).

5. The instant suit as originally framed was for rendition of accounts. The amendment now being sought will be to the effect that a specific amount would be determined by the Plaintiff-Appellant himself and the prayer in the plaint for the recovery of the same shall be substituted in place of the present one. In short the suit as it stands is for rendition of accounts and the refusal to render accounts is the cause of action but by the amendment, if allowed, the cause enaction shall stand changed to non-payment of a specific amount. Obviously the amendment if allowed would result in altering the relief prayed for from rendition of accounts and a decree for the amount found due on such rendition of accounts into a new relief, for a decree for a specific amount claimed to be due. This change would amount to a fundamental change in the character of the suit and in the circumstances of the case the Plaintiff could not be permitted to make such an amendment. (See Ashwani Kumar and Others Vs. Smt. Moti Kumari and Others, .

6. To grant or refuse to grant permission for amendment of the pleadings is in the discretion of the court but the discretion is to be exercised judiciously. One of the conditions for the exercise of such discretion to favour of the permission to amend will necessarily rest on the fact as to whether or not the Appellant has acted in good faith. As a general rule application for amendment ma(sic) not be refused where the applicant has acted bona fide. But if it was found that the applicant has acted mala fide, the amendment on this ground alone may be refused. Court may infer

want of bona fides from great delay in applying for leave to amend. (See All 1956 All 439).

7. In the instant case the objection to the maintainability of the suit was raised as early as 1967. In AIR 1971 J and K 71 the (sic) for rendition of

accounts by a contractor against the State was held to be not maintainable on grounds and facts similar to the appearing in the instant case,

Obviously whatever the law or the practice might have been in vogue before 1971, the matter has been set at rest on account of a Divisional Bench

judgment of this Court holding that suit for accounts against the State as (sic) maintainable and this should have put the Plaintiff-Appellant on alert

and without finding delay he should have applied for the necessary amendment There was yet Anr. judgment of this Court reported in AIR 1973 J

and K which also affirmed that a suit for accounts by a contractor against the State was not maintainable as the contractor must be presumed to

know as to what specific amount was due to him from the State. This also seems not to have raised the Appellant from his slumber. Even during

the hearing before the District Judge the question of maintainability of the suit was raised. The Plaintiff-Appellant there also did not yield but insisted

that he had every right to file a suit for the rendition of accounts. His contention was overruled and the appeal of the State was allowed. In the

second appeal itself the main ground taken is that the suit in its present form is maintainable in law and that the first appellate court has erred in law

in dismissing the same. The half-heartedly raised submission in this Court for referring the matter to a larger bench to further go into the matter and

decide the issue was not pressed. It was only after more than 1½ years of the filing of the second appeal that for the first time an application for

permission to amend the plaint was made on 8-11-1976. These facts manifestly reveal that the Plaintiff-Appellant has been responsible for

deliberately causing much delay in applying for an amendment of the plaint The lack of bona fides on the part of the Appellant was quite apparent.

8. Further a valuable right has since accrued to the Respondent-Defendant inasmuch (sic) suit for the recovery of a specific amount of money

against it has become barred by the operation of the statute of limitation, The Defendant cannot justifiably be deprived of the right that has vested in

it. No circumstance has been shown to exist to deprive the Defendant-Respondent of this valuable right.

9. The amendment if allowed on the facts this case will cause an injury to the opposite party for which it cannot be compensated (sic) costs or

otherwise. The application for permission to amend the suit is therefore rejected.

10. On merits of the appeal, I find notice in the arguments advanced by the learned Counsel for the Appellant.

11. Relying on AIR 1971 J and K 71 the appeal merits dismissal as no suit for a ren(sic)ion of accounts relating to construction work of the bridge

would lie against the (sic)ate as the Plaintiff must be presumed to possess accounts and should have sued for a specific amount. The following

paragraph from the above referred to judgment may be usefully reproduced here:

Held that the suit was not maintainable. The Plaintiff's attempt in converting a suit for a definite sum which he could claim against the Defendants

into a suit for accounts was a device unknown to the law and could not be either upheld or encouraged. He was working the contract and he knew

what work he had done and therefore should have claimed the amount which according to him was due to him from the department. The mere fact

that he pretended not to know the exact amount due to him would not make any difference in his case or for that matter the statement of some

Executive Engineer that he was not in a position exactly to state what amount was due to whom amongst the contracting parties did not make any

difference.

12. The appeal is therefore dismissed, but in the circumstances of the case no order is made as to costs.