

(1997) 03 CAL CK 0026
In the Calcutta High Court
Case No : Civil Revisional Jurisdiction

Ashim Sarker

APPELLANT

Vs

M/s. Chitra Zahir and Others

RESPONDENT

Date of Decision : 10-03-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 1, Order 6 Rule 17, Order 7 Rule 11, Order 7 Rule 11, Order 9 Rule 1

Citation : (1998) 1 CALLT 127

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Advocate : Mr. Ajit Kr. Panja, Mr. R.N.Das and Mr. Durga Prosad Dutta, for the Appellant; Mr. Hitra, Mr. Sanjit Mukherjee and Mr. Ashoke Kr. Sengupta, for the Respondent

Judgement

B. M. Mitra, J.—The instant revisional application is directed against order No. 11 and order No. 12 respectively passed on 4.7.96 and 5.7.96 by the Third Bench of City Civil Court, Calcutta in Title Suit No.974 of 1996.

2. The matter is taken up for hearing on contest and detailed submissions have been made by the respective counsels appearing for both the sides. The first order is the order No. 11 dated 4.7.96 by which a petition under Order VI Rule 17 of the CPC stood allowed. It appears from the look of the impugned order that the same is a cryptic one which does not spell out any reasoning. In the backdrop of the same, this court has been invited to look into the matter in question namely, the petition for amendment and also the relevant paragraphs of the connected plaint in order to impress upon this court as to whether the order should be sustained. Though no grounds have been mentioned in the order, but this court has been addressed at length by both the sides for drawing inference to all the possible aspects of the matter so that the court may form its opinion about the legality and/or sustainability of the impugned order. This court has afforded opportunity for marathon hearing to the parties concerned.

3. Before going to the question of propriety of the order impugned this court is perplexed with the vexed question about the extent of defendant's right to oppose the application for amendment when the defendant has not entered into the suit pursuant to the notice of summons. It is well-known that amendment here relates to pleading which has been contemplated under Order VI Rule 1 of the CPC and the same includes both the plaint and the written statement. Therefore, the question of amendment relates to something either about the plaint or of the written statement. There is not scope for confusion with regard to the ambit of the controversy relating to pleadings as they are contemplated under Order VI of the CPC and Order XIX deals with question of affidavits. A reference may be made in this context to chapters of the CPC and it appears from the perusal of the relevant chapters of the CPC that from Order I to Order XX relate to different stages of suit including that of passing of the judgment and decree save and except Order XIX which relates to affidavits. It is salient to mention in this context that Order XXXVIII to Order XL deal with question of interlocutory proceedings during the pendency of the suit. Therefore, interlocutory proceedings and the rules applicable thereto cannot apply strictly in terms of the same relating guidance of the suit. In this context, a reference may be made to Order IX Rule 1 of the CPC where it has been laid down that on the date fixed in the summons for the defendant to appear and answer, the defendants' appearance will be taken note of and the defendants will be permitted to answer the pleadings contained in the plaint by way of filing of written statement. Save and except in a given situation where the defendants on being served with a copy of the plaint pursuant to service of summons can pray for rejection of the plaint under Order VII Rule 11 of the CPC provided the reasons for which they exist. It appears in the record of the proceedings that the defendant was not in the arena of dispute pursuant to the service of summons in the suit and as the defendant did not appear, there was no question for the defendant to answer. In the meantime, before the stage has appeared for the defendant to answer the plaintiff has come with an amended plaint, the copy of which has been served on the defendant/ opposite party who has chosen to combat the same instead of coming into the arena of suit. Therefore, so long as defendant has not entered into the field of the suit by making its appearance, the defendant is no longer in the scenario of the scene of the suit and the defendants' participation in any possible combat of pleading will be prospective and dependent on circumstances not known at the relevant point of time. The defendant has not come with its own pleadings in the form of written statement. It is salient to mention that interlocutory proceedings and the stages thereon are different from the stages in the suit. In absence of the written statement being filed the controversy about construction of pleadings have not assumed significance. In the backdrop of the same, the first question to be considered is that if amendment of the plaint is allowed before the entry of the defendant in the suit whether defendant is likely to suffer any injury of irreparable nature. If the plaintiff is prevented from filing its amended plaint whether it is likely to result in material failure of Justice. In that context, attention of this court has

been drawn to the proviso to section 115 of the amended provisions of the CPC and the court is made to ponder over the language of the proviso(b) superadded to section 115 of the CPC where the expression is "the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the parties against whom it was made". Here, this court is confronted with a situation where the court will be required to see as to whether the impugned order will result in material failure of justice or in the alternative, is likely to cause any irreparable injury to the party against whom it was made. Therefore, the concept of irreparable injury to the party is an epithet by way of alternative to failure of justice because of the particular coinage of the expression "or" which is supposed to have been adopted by the legislature keeping in view the etymological significance of the said preposition. This court while giving effect to the entire provisions of the section 115 together with its proviso, it must be satisfied that it has not resulted in material failure of justice nor it has caused any irreparable injury against whom it was passed. In this context, this court reiterates the provisions of Order IX Rule 1 of the CPC and if on the day fixed in the summons for the defendant to appear and answer, the defendant is not either served with the notice or has not entered appearance, there is no question of appearance of the defendant in the suit and the question of answering to the pleadings by way of written statement does not and cannot arise. Therefore, in the ordinary situation where defendant has entered appearance, the guiding principles governing Order VI Rule 17 will be radically different from the situation where the defendant has not appeared in terms of Order IX Rule 1 of the Code of Civil Procedure. A reference may be made to the language of Order VI Rule 17 of the CPC where the court is conferred with the power of jurisdiction of allowing either party to alter its pleadings in such manner and on such terms as it deems fit which is necessary for the determination of the real controversy between the parties. To appreciate the pith and substance of the real controversy the court is required to make in depth analysis of the pleadings and arrive at its own opinion. So far court has construed pleadings, they should speak for themselves and they are required to be interpreted by the court instead of being read in the light of the submission of the parties as to how they have been read by them. Duty is cast upon the court to read for itself and not to appreciate the pleading through the lens of somebody else's eyes, namely, the commentators as how they are being seen by the representatives of the respective parties. Therefore, this court feels that it is saddled with an obligation to arrive at its own opinion about the real question in controversy between the parties. The petitioner for amendment has been made available. The real dispute in controversy has been attempted to be projected in paragraph 23 of the amended plaint but the sum and substance of the claim has been put forward and is projected in paragraph 9 of the original plaint which has its hearing on the controversy in question. It has been submitted by the petitioner that the amendment introduced is by way of elucidation of the pith and substance and what has been there in the original plaint and the amended provisions are by way of adumbration to highlight the real controversy in question in terms of its dimension. It has been further

submitted that narration as contained in the proposed amendment is projection of the parties' version about the sequence of events in both the films, namely, the original one and the alleged pirated version of the film. In terms of the pleadings, the same will reveal the similarity in production of both the two films for which a detailed investigation is necessary.

4. In the backdrop of the same, this court can elucidate the guiding principles on which under the present law, amendment can be disallowed. The amendment can be disallowed where it is malafide in nature, (2) to introduce something as a result of which an accrued right on an embargo flowing from a self-contained statute is attempted to be disturbed where it is likely to result in sufferings of irreparable loss and prejudice which cannot be compensated In terms of cost (4) where they wanted to appear and defend the suit. But in the cited decisions, in their affidavit filed an opposition to the petition with regard to the case of the plaintiff as it then stood and disclosed their defence to a substantial extent. Here, from the records placed before this court, it does not appear that the defendants have disclosed their defence to a substantial extent and on the contrary, the defendants in spite of notice did not choose to appear and contest the same on the ground of alleged illness of their lawyer. This court makes it clear that the scenario would have been entirely different, had the defendant appeared in the suit and asked for time to file the written statement on being favoured with the supply of the copy of the plaint, the defendant can not be given premium for its act of non appearance in the suit and to shelve its defence in its sleeve and clamour for opposing the said amendment. As such, the case cited by Mr. Panja is distinguishable on the score of the same as the given facts of the said decision do not tally with the facts of the present case. Therefore, on the question that the defendants have got to be served with notice but, here, notice has been received for the purpose of the amendment but they do not choose to come in the arena of the suit to contest the pleadings as yet. Therefore, the proposed amendment should not constitute any mischief or harm not to speak of irreparable injury to the defendant when they are not in the some of the contest on the question of pleadings. Mr. Panja has also tried to contend that in absence of any reason being contained in the order, the same has become vulnerable to be assailed. In support of the said contention Mr. Panja has referred to the case of Mahendra Radio and Television, Meerut and Another Vs. State Bank of India, where the court has held in revision that trial court allowing part of the amendment but rejecting the other part without giving any reason and as such the revisional court sought to interfere with the same. Therefore, in the facts of that given case the double standard has been sought to be applied by the court concerned to accept one part of the pleadings and to reject another part without giving any reason as to why such double standard has been followed. But, here in this case, the application for amendment has been allowed and the question of part rejection does not arise and as such it has been submitted that the reasons should be scrutinised by the revisional court and it should arrive at its opinion by formulation of the reason as to why the order impugned should not be sustained.

The said contention has been sought to be supported by Mr. Mitter. the learned counsel of the Opposite Parry by placement of reliance on another decision of Allahabad High Court reported in Dr. Shakeel Ahmad Vs. Smt. Sabina Khatoon, where the court while dealing with the petition under Order IX Rule 9 of the CPC has arrived at an inference and comments that if any ground can be set forth in the impugned order for restoration of a matter, the revisional court should make itself satisfied about sufficiency of the reasons for cause of default. There, in the said decision it has been held that the court having powers coextensive with the power of the court below can satisfy itself about the sufficiency of the ground for the default in appearance. The court itself should consider the connected application and affidavit relating thereto in order to arrive at its opinion about sufficiency of reasons for default in making appearance, Here, Mr. Mitter has urged that revisional court having powers should make itself satisfied as to whether real question in controversy has been attempted to be expressed by way of elaboration in the proposed amendment and the court should arrive at its own opinion about the propriety of the same. This court has been persuaded to consider the plain scope of the controversy and its possible extent of dimension to ponder of the question as to whether proposed amendment will cause irreparable injury as provided by way of alternative to furtherance of substantial justice as incorporated under provision (2) to section 115 of the Code of Civil Procedure. This court feels on proper scrutiny and appraisal that the proposed amendment and the prayers sought to be incorporated are not likely to change the nature of the suit not they may invade into the domain of cause of action. This court feels that applying the principles as indicated earlier where the amendment should be disallowed, the proposed amendment should be incorporated in the body of the plaint. Bereft of unnecessary averment's by way of prolixity pleadings should be precise but keeping in view the inarticulate nature of drafting of the pleadings, this court can lean in favour of acceptance of the same but in a truncated manner with a view to do where prolixity is bordering on absurdity. From the preview of the amended plaint the pleadings proposed to be amended should be streamlined without making drastic alteration of the same so that the party may not feel that its desired move has been frustrated or has been nipped in the bud. Mr. Panja has also referred to the case of R.G. Anand Vs. Delux Films and Others, and particular reference was made to paragraph 46 thereof where catena of criteria have been laid down for determination of the controversy relating to a pending lis about the infringement of Copyright in a suit. The said criteria as prescribed by the apex court are relevant for the purpose of determination and/or resolution of controversy involved in a pending lis arising on the question of infringement of Copyright and the same may not be made applicable at the stage of amendment of pleadings under Order VI Rule 17 of the Code of Civil Procedure. In other words, from the enumeration made by the apex court it appears that it wanted to draw the pen picture that pleadings and evidence should be in some such colour so that it may be gone in for scrutiny as to whether there is a literal imitation of sequences in the films in question in order to determine the actionable claim of Copyright

infringement. According to the Supreme Court, one of the safest and surest test to determine as to whether or not there has been a violation of Copyright is to reveal before the reader, spectator or viewer so that an opinion can be formed that subsequent work appears to be a copy of the earlier one-Such surest test may be found if amendment is allowed to be incorporated, then the viewer or the spectator will get after comparison an idea as to whether it is a substantial reproduction of the impression flowing from the original on which the copy is allowed to have been made. Therefore, in order to arrive at an opinion based on pleadings, the same is required to be proved by clear and cogent evidence and for that the party concerned should not be precluded at the point of threshold to bring about pleadings so that it can lead evidence to substantiate the same. Therefore, the indicia as laid down in the cited decision may become more manifest if the amendment is allowed to be incorporated as indicated hereinbefore so that the test prescribed in the aforesaid decision may be found present in the pleadings.

5. There has been another reference to a decision in the case of Manick Chandra Nandy Vs. Debdas Nandy and Others, wherein in paragraph 5 thereof the pertinent observation has been made which is the reiteration of the age-old concept guiding governance of section 115 of the CPC where it is laid down that the exercise of revisional powers is confined only to the question of jurisdiction. Therefore, the revisional court being a court of records it can modify action and/or alter the original impugned order. It can do the same provided it is in tune with the procedures required for acceptance for the purpose of correction of jurisdictional error. Even an error on a point of fact or on a point of law must come within the domain of the ambit of section 115 of the CPC unless it results in material irregularity in exercise of jurisdiction. This court feels that by incorporation of amendment as suggested the controversy and the real question involved can be set on rest and on taking ground a party litigant should not be disallowed to offer its pleadings and in that eventuality it will not be able to lead evidence. The plaintiff may stand on its own case or it may fall and the defendant can succeed in making out a counter-case by traversing the material allegations contained in a composite manner in the original plaint as well as in the proposed amendment. In order to obviate the possibility of filing pleadings in instalment the defendant is given leave to file a composite pleadings by way of one written statement so that the entire gamut of pleadings contained In the plaint and the proposed amendment can be dealt with.

6. This court after having given its anxious consideration wants to sustain the order impugned as it will not cause irreparable injury if the amendment as proposed subject to modifications indicated herein before is made on the body of the plaint and the same may be served on the defendant. The trial court is hereby directed to give direction on the plaintiffs to incorporate the proposed amendment in terms of directions contained hereinbefore in a separate schedule so that it may form part of the pleading after deletion of unnecessary averments so that same may be shorn of dilation of details which are unnecessary.

Therefore, the portion as mentioned and indicated in the order as contained in the proposed amendment is required to be deleted and the party concerned will file a fresh schedule in the amendment petition within a period of fortnight from the date of obtaining delivery of the certified copy of the impugned order. if the certified copy is applied for, the same may be made available at an early point of time, preferably, within 3(three) weeks from the date of the application so that the plaintiff may make the endeavour within the period as mentioned and the same may be effected. After the plaint being amended in the light as indicated above, the defendant will file a composite written statement traversing the allegations contained in the composite plaint containing averment in the plaint as well as in the amended version of the plaint after deletion as indicated.

7. The revisional application thus stands disposed of and allowed partly subject to above observations.

8. In view of the disposal of the revisional application the parties can take steps in the trial court as they are advised.

9. Revisional application disposed of