
(2010) 02 AHC CK 0087
In the Allahabad High Court

Dharam Chand Pandey

APPELLANT

Vs

District Judge and Others

RESPONDENT

Date of Decision : 16-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107, 96

Citation : (2010) 4 AWC 4043

Hon'ble Judges : Devi Prasad Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Devi Prasad Singh, J.—Heard Sri R.S. Pandey, learned Counsel for the defendant petitioner and Sri S.K. Mehrotra, learned Counsel for the plaintiff respondent and the learned standing counsel.

2. Present writ petition has been preferred against the impugned order by which the Appellate Court has allowed the amendment application moved by the plaintiff respondent.

3. The plaintiff respondent had filed a suit for permanent injunction claiming easementary right of fresh air etc., against the defendant petitioner. The Regular Suit No. 557 of 1996 was dismissed by the Trial Court, vide judgment dated 26.2.2003. Feeling aggrieved, the plaintiff respondent preferred an appeal u/s 96 of the CPC pending before the District Judge, Faizabad. During the pendency of appeal, the plaintiff respondent moved two amendment application, which were allowed by the impugned order dated 17.7.2004 and 14.11.2005. Feeling aggrieved, the present writ petition has been preferred by the defendant petitioner.

4. Sri R.S. Pandey learned Counsel for the defendant petitioner submits that moving amendment applications by the plaintiff respondent, is an abuse of process of law. It has been stated that during the pendency of suit before the Trial Court, twice the amendment applications were moved which were allowed

by the Trial Court. Thereafter, suit was dismissed. Now again, during the pendency of appeal, the amendment application has been allowed, which seems to be mala fide and suffers from substantial illegality being abuse of process of law.

5. It has been further stated by Sri R.S. Pandey learned Counsel for the defendant petitioner that u/s 96 of CPC ordinarily, amendments should not have been allowed more so, when the suit has been finally decided by the trial court.

6. Learned Counsel for the defendant petitioner relied upon the recent judgment reported in Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, On the other hand, learned Counsel for the plaintiff respondent Sri S.K. Mehrotra submits that the amendment application was allowed by the Appellate Court on the ground that the defendant petitioner was raising a wall over the land in dispute which shall stop the flow of fresh air affecting the plaintiff's easementary right. Submission is that since the defendant petitioner raised wall after disposal of suit in question, there was no option with the plaintiff respondent except to amend the plaint at the first appellate stage. It has also been stated by the plaintiff respondent's counsel that clarificatory amendment may be allowed by the Court keeping in view the fact and circumstances of the case.

7. Learned Counsel for the plaintiff respondent relied upon the judgment reported on 2009 (27) LCD 1096 Sushil Kumar Jain v. Manoj Kumar and Anr..

8. Order VI Rule 17 of CPC as amended by the Act No. 22 of 2002, is reproduced as under:

17. Amendment of pleadings.--The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

9. A plain and literal meaning to provisions of Order VI Rule 17 of CPC, shows that it enables the parties to amend a plaint or written statement in case application for amendment could not be moved in spite of due diligence. Meaning thereby, provisions of Order VI Rule 17 of CPC does not prohibit to amend a plaint or written statement during pendency of trial or appeal.

10. In the case of Reevajeetu Builders (Supra), their lordships of Hon''ble Supreme Court, has observed that power conferred by Order VI Rule 17 of CPC should not be invoked liberally fastens the abuse of the process of law. Parties should be cautious of their right to make appropriate pleading in the plaint or

written statement at the time of filing of appeal and it should be used exceptionally and should not be permitted to misuse. Hon''ble Supreme Court has observed as under:

31. In our considered view, Order VI Rule 17 is one of the important provisions of the CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.

32. It may be pertinent to mention that with a view to avoid delay and to ensure expeditious disposal of suits, Rule 17 was deleted on the recommendation of Justice Malimath Committee by the CPC (Amendment) Act, 1999 but because of public uproar, it was revived. Justice C.K. Thakker, an eminent former Judge of this Court in his book on CPC (2005 Edition) incorporated this information while dealing with the object of amendment.

33. In a recently published unique, unusual and extremely informative book "Justice, Courts and Delays", the author Arun Mohan, a Senior Advocate of the High Court of Delhi and of this Court, from his vast experience as a Civil Lawyer observed that 80% applications under Rule VI Order 17 are filed with the sole objective of delaying the proceedings, whereas 15% application are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. His experience further revealed that out of these 100 applications, 95 applications are allowed and only 5 (even may be less) are rejected. According to him, a need for amendment of pleading should arise in a few cases, and if proper rules with regard to pleadings are put into place, it would be only in rare cases. Therefore, for allowing amendment, it is not just costs, but the delays cause thereby, benefit of such delays, the additional costs which had to be incurred by the victim of the amendment. The Court must scientifically evaluate the reasons, purpose and effect of the amendment and all these factors must be taken into consideration while awarding the costs.

34. To curtail delay in disposal of cases, in 1999 the Legislation altogether deleted Rule 17 which meant that amendment of pleading would no longer have been permissible. But immediately after the deletion there was widespread uproar and in 2002 Rule 17 was restored, but added a proviso. That proviso applies only after the trial has commenced. Prior to that stage, the situation remains as it was. According to the view of the learned author Arun Mohan as observed in his book, although the proviso has improved the position, the fact remains that amendments should be permissible, but only if a sufficient ground therefore is made out, and further, only on stringent terms. To that end, the rule needs to be further tightened.

11. Their lordships of Hon''ble Supreme Court (supra) held that while considering the application for amendment, Courts have to see whether amendment is necessary to decide the real controversy and no prejudice and injustice is caused to other parties. While summarising various points and factors which should be taken into consideration while dealing with amendment application Hon''ble Supreme Court held as under:

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

12. Hon''ble Supreme Court also observed that in case amendment application is allowed ordinarily cost should be imposed and the purpose is to discourage mala fide exercise of power and also to compensate other party for delay caused. Relevant portion of para 62 of the Revajeetu Builders (supra) is reproduced as under:

62. The purpose of imposing costs is to:

- a) Discourage mala fide amendments designed to delay the legal proceedings;
- b) Compensate the other party for the delay and the inconvenience caused;
- c) Compensate the other party for avoid able expenses on the litigation which had to be incurred by opposite party for opposing the amendment; and
- d) To send a clear message that the parties have to be careful while drafting the original pleadings.

13. While considering the present controversy in the light of the judgment of Hon''ble Supreme Court in the case of Revajeetu (supra), I find that amendments

were allowed by the Court on account of construction of wall over the land in dispute. A perusal of the impugned order dated 17.7.2004 shows that the defendant petitioner himself has pleaded before the appellate court that he is raising the boundary wall since the suit was dismissed by the trial court. Since the appeal is the continuation of suit and, any construction raised, may affect the easementary right of respondent and being subsequent event, the first appellate court was very well within the power to allow the amendment application. Since the defendant petitioner has admitted that he was raising boundary wall after dismissal of suit, the Appellate Court does not seem to have committed any illegality or impropriety while allowing the amendment application, vide order dated 17.7.2004.

14. In the case relied upon by the petitioner, Hon''ble Supreme Court held that for the effective adjudication of the dispute Court may allow the amendment application. Accordingly, there appears to be no illegality on the part of the Appellate Court to allow the amendment application. So far as the argument of defendant petitioner''s counsel with regard to mala fide is concerned, it does not seem to be sustainable for the reason that the amendment application allowed by the Appellate Court, is based on subsequent events. In case the plaintiff respondent has abused the process of law while moving two amendment applications before the Trial Court, then that act should have been impugned at appropriate time. The amendment application moved by the plaintiff or defendant, should be looked into independently keeping in view the provisions contained in Order VI Rule 17 CPC. Ordinarily, previous conduct has bearing. Of course, mala fide may be a ground to reject the amendment application but that too, should be looked into on the basis of material evidence on record.

15. In the present case, admittedly, since the construction of boundary wall was done after dismissal of suit, the application for amendment may not be linked with the earlier application allowed by the Trial Court during pendency of suit in question. The order passed by the Appellate Court allowing the amendment application, seems to be a clarificatory in nature based on subsequent events.

16. In the case of Sushil Kumar Jain (supra), Hon''ble Supreme Court has observed that clarificatory or explanatory application may be moved for amendment of written statement keeping in view the facts and circumstances of the case. Of course, such application may be considered within four corners of Order VI Rule 17 and on the pleading on record and it should not change the nature of suit. The relevant portion of the judgment in the case of Sushil Kumar Jain (supra), are reproduced as under:

10. At this stage, we may remind ourselves that law is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering, substituting a new cause of action (See Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.,

11. Similar view has also been expressed in *Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others*, It is equally well settled that in the case of an amendment of a written statement, the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed.

12. Keeping these principles in mind, let us now take up the question raised before us by the learned Counsel for the parties. As stated herein earlier, the admission made by a defendant in his written statement can be explained by filing the application for amendment of the same. This principle has been settled by this Court in *Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another*, while considering this issue, held that the admission made by a party may be withdrawn or may be explained. It was observed in paragraph 3 of the said decision as follows:

An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amendment, an admission of fact cannot be withdrawn....

In view of our discussions made hereinabove and applying the principles laid down by this Court in the aforesaid decisions, we are therefore of the view that the High Court as well as the learned Rent Controller had acted illegally and with material irregularity in the exercise of its jurisdiction in not allowing the application for amendment of the written statement of the appellant.

17. Sub-section (2) of Section 107 of CPC provides that appellate court shall have same power and shall perform as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. For convenience, Section 107 of CPC is reproduced as under:

107. Powers of Appellate Court. -(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

18. In response to power conferred u/s 107 CPC, the First Appellate Court has got jurisdiction to exercise all such powers which is vested in the Courts of original jurisdiction. Virtually, the appeal is in continuation of suit and keeping in

view the mandate of Section 107 CPC, the First Appellate Court possesses the jurisdiction to allow the amendment application for the ends of justice keeping in view the facts and circumstances of a particular case.

19. In view of the above, I do not find any illegality or impropriety in the impugned order passed in appeal. However, the costs awarded by the learned Appellate Court while allowing the amendment applications, seems to be too meagre. Their lordships of Hon''ble Supreme Court in the case of Revajeetu Builders (supra) observed that in case amendment application is allowed, then other party should be compensated for the delay and inconvenience and also to meet out the expenses of litigation incurred by other side opposing the amendment.

20. Accordingly, the cost imposed by the Appellate Court is enhanced for allowing both the applications, which is quantified to Rs. 15,000/-. The costs so enhanced, shall be paid to the defendant petitioner, within two months from today.

21. Subject to aforesaid directions, with regard to costs, the writ petition is dismissed. The Appellate Court is directed to decide the appeal on merit in accordance with law expeditiously and preferably, within two months from the date of receipt of a certified copy of this order.