
(1973) 01 OHC CK 0012
In the Orissa High Court
Case No : Civil Revision No. 75 of 1972

Dr. Mrs. Sarojini Pradhan

APPELLANT

Vs

Khirode Chandra Pradhan

RESPONDENT

Date of Decision : 23-01-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 6 Rule 17, 115
Partnership Act, 1932 — Section 69

Citation : AIR 1973 Ori 214 : (1973) 39 CLT 330

Hon'ble Judges : B.K. Ray, J

Bench : Single Bench

Advocate : R.N. Das and J. Swain, for the Appellant; S.C. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

B.K. Ray, J.—The opp. party as plaintiff has instituted the suit out of which this application arises for recovery of Rs. 64,000.00 and odd against the defendant petitioner on the allegation that the petitioner entered into an agreement with him for working of her mines: that she executed a power of attorney in his favour and that she having terminated the agreement, he sustained loss and damage.

2. The case of the petitioner in her written statement in the Court below is that she appointed the OPP. party as her agent to work her mines by executing a power of attorney in his favour: that she also entered into an agreement with the opp. party for working of the mines; that the termination of the agreement was valid and that the claim for damages is not tenable. The petitioner in the Court below by her petition dated 7-2-72 sought to amend her written statement by incorporating the following statement.

"That the plaintiffs suit is hit by Section 69 of the Indian Partnership Act. 1932, inasmuch as, by the agreement of 24-3-1965, a partnership was constituted which however has not been registered as a firm u/s 59 of the Indian Partnership

Act."

She also filed another application in the Court below under Order 11, Rule 12, C. P. C. for discovery of certain documents. The learned Subordinate Judge by his order dated 23-2-1972 rejected both the petitions of the petitioner, viz., one under Order 6. Rule 17, C. P. C. for amendment of the written statement, and the other for discovery of certain documents under Order 11, Rule 12. C. P. C., Being aggrieved by the aforesaid order, she has come UP with this civil revision.

3. At the time of hearing. Mr. S.C. Mohapatra, learned Counsel for opposite party raises a preliminary point that even though a common order dated 23-2-72 has been passed by the Court below, since by the said order the learned Subordinate Judge has disposed of two separate applications of the petitioner one for amendment of her written statement and the other for giving discovery to certain documents, the petitioner should have filed two civil revisions instead of one. He contends that unless the petitioner elects to confine the present civil revision to any one of the two orders passed by the Court below, this revision is liable to be dismissed. There is sufficient force in this contention. As a matter of fact the petitioner by two separate applications moved the court below for the two separate and distinct reliefs, one being for allowing her to amend the written statement and the other being to direct the opp. party to give discovery of certain documents. Confronted with this position, Mr. R. Das, learned counsel for petitioner confines the present revision to the impugned order relating to the petition for amendment of the written statement This revision is, therefore, confined to amendment matter.

4. According to Mr. Das, the proposed amendment simply flows from the agreement relied upon by the plaintiff in his plaint. By the proposed amendment no new facts are sought to be added. To allow the proposed amendment would amount to giving the petitioner an opportunity to avail of a new legal stand which is not there in the original written statement. It is urged by him that the amendment sought to be made does not in any way prejudice the plaintiff and the trial Court may at any stage of the proceedings allow either party to alter or amend the pleadings in such manner as may be just. According to Mr. Das, an amendment can be made as may be necessary for the purpose of determining the real questions in controversy between the parties. It is true that the petitioner by the proposed amendment , wants to take a new legal plea which is available to her on the very agreement relied upon by the opposite party in his plaint. It cannot be doubted that the amendment sought to be made in the present case is one which flows from the original written statement and the agreement referred to in the plaint. No new facts are sought to be introduced by the proposed amendment. Further, the proposed amendment does not amount to reviving a cause of action which has already become barred by time. On the other hand, I feel that not to permit the petitioner to amend her written statement as desired would deprive her of a valuable legal stand which may be available to her at the time of final hearing of the suit. u/s 115, C. P. C., this

Court is competent to entertain an application in revision against an order either refusing or allowing an amendment as the said order amounts to a case decided by a subordinate Court (see 1972 (2) Cut WR 1044, K. L. Subudhi Bros. v. D. Bhaskar Rao.)

5. Mr. S.C. Mohapatra, learned counsel for opposite party relying upon a decision reported in Gauri Shanker Vs. Hindustan Trust (Pvt.) Ltd. and Others, . contends that on account of unusual delay on the part of the petitioner to come forward with an application to amend her written statement, the said application is liable to be rejected and has been rightly dismissed by the Court below. The impugned order, however, discloses that the amendment petition has not been rejected on account of delay. The rule that a petition for amendment is liable to be rejected on the ground of unusual delay is not an inflexible one. Each case has to be judged in the background of its own facts. In the case relied upon by Mr. Mohapatra the delay complained of was for a period of long 8 years. The fact which weighed with their Lordships in the said Supreme Court decision was that had the petition for amendment been filed earlier, the plaintiff in view of the new plea sought to be introduced by the amendment could have withdrawn the suit with permission to file a fresh suit on the same cause of action and re-filed the suit after serving the notice for termination of the contractual tenancy. Their Lordships felt that the new plea sought to be introduced by the amendment was only meant to harass the plaintiff unnecessarily and that to allow such an amendment would result in not furthering the cause of justice. - In the case before me, in view of the plea sought to be taken by the petitioner, the question of withdrawing the suit with permission to bring a fresh suit on the same cause of action cannot arise, because the legal bar sought to be pleaded against the plaintiff being u/s 69 of the Indian Partnership Act, the said bar cannot be removed by the plaintiff by getting the alleged Partnership firm registered after the cause of action for the suit has arisen. That apart, the delay in the present case is not much. The order-sheet of the case reveals that the parties are fighting tooth and nail and on several occasions in the past they have come before this Court to agitate their respective grievances on certain controversial points. When on earlier occasions, the matter was pending before this Court, it is very likely that the attention of the parties would be focussed on the points raised by them before this Court and they would not be so very vigilant about their respective pleadings in the trial Court. Taking all these into consideration. I do not accept the contention of Mr. Mohapatra that the proposed amendment is liable to be rejected on account of unusual delay.

6. It is next contended by Mr. Mohapatra that an amendment of pleadings is a matter which lies entirely in the discretion of the Court. This discretion of the Court has to be exercised judicially. Therefore, when the Court below, after due exercise of its jurisdiction judicially, has rejected the amendment petition of the petitioner, it cannot be said that it has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in exercise of the jurisdiction illegally or with material irregularity. In this view of the matter,

Mr. Mohapatra urges that this Court cannot interfere with the impugned order rejecting the amendment in exercise of its powers u/s 115, C. P. C.. For this proposition, Mr. Mohapatra relies upon a decision reported in *The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway*, . The case dealt with in the aforesaid decision is one relating to an order of injunction. The trial Court in that case passed an order of injunction after hearing the parties. The first appellate Court modified the order of injunction passed by the trial Court. Against this decision of the first appellate Court, both parties went up in revision to the High Court of Andhra Pradesh. The High Court of Andhra Pradesh accepted the revision petition of the plaintiff and rejected that of the defendant. Against this order of the High Court of Andhra Pradesh, appeals were preferred by special leave before the Supreme Court. Their Lordships of the Supreme Court held that the order of the first appellate Court had been passed "in exercise of jurisdiction vested in it by law: that the final order passed by the first appellate Court may be right or wrong: that a Court while passing an order in exercise of its jurisdiction is competent to pass a right or wrong order; and that such an order passed by the first appellate Court is not open to revision by the High Court u/s 115, C. P. C., The position of law emphasised by their Lordships of the Supreme Court in the aforesaid decision would not be of any avail to Mr. Mohapatra in the present case. True, a trial Court while disposing of an application for amendment of pleadings exercises a judicial discretion vested in it by law. This Court in exercise of its power u/s 115, C. P. C., is to see whether the discretion vested in the trial Court has been exercised or not and whether it has exercised the jurisdiction illegally or with material irregularity. Instances are not rare where this Court has interfered with the order of a trial Court either allowing or refusing to allow an amendment. It is now well settled that the main consideration to be borne in mind in exercising a discretion in dealing with a matter of an amendment of pleadings are that the interest of substantial justice should be advanced. A party cannot be allowed by amendment to set UP a new cause of action, particularly when a suit on the new cause of action is barred.

Where the amendment does not constitute the addition of a new cause of action but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed. In view of the principles mentioned above, if a Court while dealing with an application for amendment of pleadings refuses an amendment in violation of the said principles, it has to be said that it has refused to exercise the jurisdiction vested in it by law or has exercised jurisdiction with illegality. That being the position, I am of opinion that the contention of Mr. Mohapatra that this Court cannot interfere with the impugned order passed by the trial Court refusing to amend the written statement is not sustainable.

7. In the result therefore. I would allow the application, set aside the impugned order disallowing the petitioner's application for amendment of the written statement and allow the petition for amendment, subject to the condition mentioned below. It has to be borne in mind that this is a suit for recovery of

more than rupees sixty four thousand. The petition for amendment has been filed by the petitioner two years after the filing of the written statement. I am also conscious of the fact that in pursuance to the amendment made in the written statement, the plaintiff has to amend his plaint. In these circumstances. I direct the petitioner to pay Rs. 200.00 as costs which, in my view, is sufficient to compensate the plaintiff for the further harassment that would be caused to him on account of the amendment of the written statement which is being allowed. This cost shall be paid by the petitioner to Mr. S.C. Mohapatra learned Counsel for opposite party within a period of one month from today, failing which, the revision petition shall stand dismissed with costs.