

(1977) 07 CAL CK 0021
In the Calcutta High Court
Case No : Suit No. 247 of 1971

Ghulam Mohiuddin and Others

APPELLANT

Vs

The Official Assignee, Calcutta and Others

RESPONDENT

Date of Decision : 18-07-1977

Acts Referred:

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

Citation : AIR 1977 Cal 406

Hon'ble Judges : Monjula Bose, J

Bench : Single Bench

Advocate : T.P. Das and B.K. Chatterjee, for the Appellant; Jayanta Mitra and S. Sinha, (for No. 4) and Pushpa Chowcharia, (for No. 3), for the Respondent

Judgement

Monjula Bose, J.—This is an application for amendment of the plaint which has been instituted on May 28, 1971 inter alia for a declaration that the purported lease dated June 23, 1964 referred to in paragraph 20 (a) of the plaint, the purported agreement of tenancy dated May 1, 1964, referred to in paragraph 20 (b) of the plaint, and the purported tenancy referred to in paragraph 20 (c) of the plaint are null and void, inoperative and not binding on the plaintiffs. Alternatively, a declaration that the sale of the premises No. 2, Chingrihatta Lane, Calcutta by the defendant 1 to the plaintiffs Nos. 1 and 2 and one Golam Rasul since deceased is null and void and for other reliefs The petitioner's case in the plaint in short is that they are absolute owners of premises No. 2, Chingrihatta Lane, Calcutta, which premises was the subject-matter of various proceedings and purchased by the plaintiffs Nos. 1 and 2 and one Golam Rasul (since deceased) in execution proceedings at an auction sale held by the defendant No. 1.

2. The petitioners' further case is that after purchase of the said property the plaintiffs Nos. 1 and 2 and the said Golam Rasul came to know of certain proceedings filed by the defendant No. 2 Jamela Begum, against her husband Shamsuddin the previous owner of the said premises claiming Rs. 50,000 as

dower, and that Shamsuddin had allowed an ex parte decree to be suffered against him. It is alleged that in execution of the decree passed in that suit No. 1172 of 1958. premises No. 2, Chingrihatta Lane, Calcutta was attached and sold in execution proceedings and purchased by the decree-holder wife. On 10th May, 1963, the plaintiffs Nos. 1 & 2 and the said Golam Rasul (since deceased) filed a suit being Suit No. 833 of 1963 in this Court against the defendants Nos. 1 and 2 inter alia for a declaration that the decree passed in the said suit No. 1172 of 1958 was null and void and for a declaration that the sale of the said premises in purported execution of the decree was also null and void, and for other reliefs. On September 1, 1967 the defendant No. 2 consented to a decree being passed setting aside the sale in her favour. Subsequently. the plaintiffs came to know that although the defendant No. 2 had no right, title and interest in the said premises, she had purported to create a lease in favour of the defendant No. 3 J. B. Norton & Sons Ltd., a purported tenancy in favour of the defendant No. 4 A. K. Products, and had also a purported tenancy in favour of the defendant No. 5 Bengal Rubber Manufacturing Co. and it is these agreements and/or leases executed by the defendant No. 2 which are sought to be challenged in this suit. The defendants Nos. 3 and 4 have alone entered appearance and filed their written statements in this suit and the defendants Nos. 1, 2 and 5 have not entered appearance nor filed any written statement herein. The matter came up for hearing before me on June 24, 1977 and was part heard. On June 27, 1977 the next date of hearing the plaintiff's counsel prayed for an adjournment of the suit, and he submitted that it was necessary to amend the plaint for the purpose of determining the real controversy between the parties. Thereafter, this application for amendment was moved and Mr. T. P. Das, appearing with Mr. B. K. Chatterjee counsel for the petitioners conceded fairly and squarely that there had been blundering mistakes in the plaint which had to be deleted and also certain facts were necessary to be incorporated. In para 10 of the petition it was stated that the said amendments by deleting certain paragraphs and also the alternative relief prayed for. and the incorporation of certain facts were necessary for the ends of justice and for proper determination of the issues between the parties, and that no injustice will be caused thereby.

3. Counsel appearing on behalf of petitioners contended that the alternative relief for declaration that the sale of the said premises to the plaintiffs and the said Golam Rasul be declared null and void was an obvious mistake, as the plaintiffs had instituted this suit as owners of the said premises and there could be no question of challenging their own title. Counsel for the petitioners on the same grounds submitted that paragraphs 25 and 26 of the plaint wherein it is inter alia stated that the defendant Official Assignee should have known about the serious defects of title to the said property and that the Indenture of Conveyance dated March 29, 1963 executed by the Official Assignee in their favour was a sale of a mere right to litigate should be deleted from the plaint as the same had been stated by negligence and/or inadvertence and/or mistake on the part of the learned draftsman.

4. Counsel for the petitioners further contended that for determination of the real issues in the suit it is necessary to plead that the claim of the defendants 3, 4 and 5 as tenants under the defendant No. 2 amounts to an infringement of the plaintiff's rights and the same is a continuous cause of action arising from day-to-day and inasmuch as the last of such attacks was in January 1971, no part of the plaintiff's claim is barred by limitation.

5. Counsel for the petitioners submitted that the deletion and incorporation sought were curable by amendments and relied upon the decision in *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*, , in support of the proposition that a party cannot be refused just relief merely because of some mistake, negligence, inadvertence, or even infraction of the rules of procedure. In that case the plaintiff who was the Manager of a joint family and was carrying on business under a business name, brought a suit in that business name and when objection was taken by the defendant that the firm being an unregistered firm was incompetent to sue, applied for an amendment stating that he himself had intended to file and had in fact filed the action on behalf of the family in the business name.

6. Counsel for the petitioners contended that however defective the pleadings, the object of the plaintiffs in filing this suit was to assert their title as owners of the premises 2 Chingrihatta Lane, Calcutta and a perusal of the plaint would make it quite clear that the plaintiffs had alleged that the defendant No. 2 had no right, title and interest in the property, and they challenged the deeds executed by the defendant No. 2 in favour of the defendants Nos. 3, 4 and 5 on the ground that the said deeds were null and void and not binding on the plaintiffs, The amendments sought therefore did not change the cause of action and in fact no legal right had accrued to the defendants which would entitle them to resist the amendments. Counsel for the petitioners relied upon the Privy Council decision in AIR 1921 50 (Privy Council) in support of the authority that although the power of the Court should not as a rule be exercised to take away a legal right which had accrued to the defendant by lapse of time, yet there are cases in which that consideration is over-weighed by special circumstances. In that case the respondents sued for a declaration of their right of pre-emption over certain land, a form of suit which would not lie having regard to the proviso to Section 42 of the Specific Relief Act (1 of 1877). The trial Judge and the first appellate Court refused to allow the plaint to be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce the right. Upon a second appeal the Court allowed the amendment to be made, there being no ground for suspecting that the plaintiffs had not acted in good faith, and the proposed amendment not altering the nature of the reliefs sought. Counsel for the petitioners also relied upon the decision in *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, and submitted that the power of the court to order amendment if required in the interest of justice is not affected even if the claim is time barred on the date of the application for amendment.

7. Mr. Jayanta Mitra appearing with Mr. S. Sinha counsel for the defendant No. 4 and Mrs. Pushpa Chowcharia, Advocate for the defendant No. 3 opposed the application mainly on the grounds that the proposed amendments would have the effect of converting the suit into an entirely different suit which had no foundation in the pleadings. They further contended that by reason of the averments challenging their own title, the plaintiffs had non-suited themselves. In support of their contentions, the respondents relied on the decision in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, and submitted that the Court cannot grant relief to the plaintiffs on a case for which there was no foundation in the pleadings. This case is not of much help to the respondents as the petitioners herein had pleaded in the original plaint that they are the absolute owners of the property having purchased the same at a Court sale and they had further alleged that the defendant No. 2 had no authority to execute leases and/or to enter into tenancy agreements with the defendants Nos. 3, 4 and 5, and the said tenancies and/or leases were challenged as being null and void and not binding on the plaintiffs.

8. The respondents secondly contended that the amendments should not be allowed at this late stage of the proceedings and relied upon the decision in Gauri Shanker Vs. Hindustan Trust (Pvt.) Ltd. and Others, where the plea of absence of a valid notice terminating the contractual tenancy was not taken in the original written statement and an amendment to include a new plea after 8 years was not allowed on account of gross delay and laches. The Court in that case considered that the technical plea of the nature sought to be raised had it been raised at an earlier stage, the petition for eviction could have been withdrawn with liberty to file another petition after serving the requisite notice and in that view of the matter, the amendment was disallowed. The respondents also relied upon the decision in A.K. Gupta and Sons Vs. Damodar Valley Corporation, in support of the proposition that amendment of pleadings, introducing a new case cannot be allowed if a suit on such a case is barred. In that case the Court following the Privy Council and the Supreme Court decisions cited by the petitioners held that "the general rule, no doubt is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon v. Neale (1887) 19 QBD 394. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation". The three cases cited in my opinion are of no assistance to the respondents inasmuch as no new case or cause of action is being introduced by the proposed amendment and the incorporations sought amount merely to an additional approach to the same facts and no prejudice and/or injury will be caused to the respondents, if allowed.

9. The respondents in support of their contentions that the plaintiffs have nonsuited themselves by challenging their own title and in any event are bound

by the admissions in the plaint rely upon the decision in *Karanpura Development Co. Ltd. v. The State of Behar* reported in 68 CWN 965. In that case, the Court whilst considering whether the allegation in the written statement verified as submissions amounts to an admission, held that the pleadings regulate the cause and conduct of a suit and any attempt to rob the pleadings of this effect and character of admission at the stage of argument by suggesting the introduction of a new case would amount to placing the additional written statement on an entirely different footing. The question which arose for consideration in that suit was whether touzi No. 28 vested in the State of Bihar, and if so, on what date, and in view of the admission made by the contesting defendants in their additional written statements that the said touzi No. 28 vested in the State of Bihar by notifications dated 7th June, 1952 and September 11, 1952 the Court held the defendants could not retract therefrom. In that case, counsel for the defendants had contended that their written statements containing the said paragraphs were verified as submission and did not amount to admission and what the defendants meant was "purported" notification and the written statement should accordingly be amended by introducing the word "purported" before the word notification. I do not think that the ruling cited supports the proposition in the broad form as contended by the respondents. In that case, the cause of action pleaded in the plaint was examined and dealt with in the written statement and certain admissions were made regarding material facts constituting the cause of action namely that Touzi 28, had vested in the State of Bihar by several notifications. The Court held that the defendant having admitted the said facts should not be allowed by amendment to repudiate those admissions in relation to a material fact, which constitute the cause of action. The decision in my view cannot be held to apply to a case of a mistake and/or negligence where plaintiffs have filed a suit on the basis of their own title and have throughout challenged the authority of the defendant No. 2 to deal with the said property and are not seeking to introduce any new case by way of amendment. In my view the entire plaint has to be looked into to ascertain the cause of action in the suit and admissions have to be taken as a whole. In my opinion before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. A perusal of the entire plaint would disclose that the plaintiffs throughout assert their rights as owner and seek reliefs on the basis of that right. Moreover, the pleadings sought to be deleted in paragraphs 25 and 26 of the original plaint herein, on a plain reading thereof cannot be said to be statements of fact but are submissions. There is nothing in law to prevent the plaintiff from withdrawing and/or deleting the same and/or giving up an alternative relief, which was not intended to be claimed. Moreover whether the plaintiffs purchased a mere right to litigate or not is to be determined by construing the deed of conveyance and there can be no admissions with regard thereto.

10. In my view the ultimate test is, can the amendment be allowed without

injustice and whether the delay and/or negligence evidenced in this case is not sufficient to justify refusal in so far as it may be compensated in costs? To my mind the deletions and incorporations sought, will not in any manner alter the character and/or change the foundation in the original pleadings and the same continues to be a suit by the owners for a declaration that deeds executed or tenancies created by the defendant No. 2 are null and void and not binding upon them and the defendants can be compensated by costs and will not suffer any injury if amendment is allowed, in this view of; the matter, I accept the submission and contentions of the petitioners and I allow the amendments as prayed for. The said amendments are to be effected within 7 days on a signed copy of the minutes. Additional written statement if any. to be filed within a week thereafter. Cross order for discovery within 3 days thereafter, inspection forthwith, and the suit to appear in the peremptory list 3 weeks hence. Petitioners to pay the costs of this application assessed at 40 G. Ms. for each of the other appearing parties including the costs of the filing of additional written statement if any. The said costs to be paid as a condition precedent within 5 days. In default, this application shall stand dismissed with costs.