

(1996) 05 KAR CK 0008
In the Karnataka High Court
Case No : Misc. Second Appeal No. 48 of 1995

Government of Karnataka and Others	APPELLANT
Vs	
M.B. Patil and Another	RESPONDENT

Date of Decision : 31-05-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23A, Order 43 Rule 1, Order 43 Rule 1U, 80

Citation : (1997) 1 CivCC 102

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : R.K. Hatti, for the Appellant; T. Sathyanarayana, for T.S. Achar and Associates, for the Respondent

Final Decision : Dismissed

Judgement

Hari Nath Tilhari, J.—This appeal which is titled as Miscellaneous Second Appeal and is virtually an appeal under Order 43, Rule (1) of the CPC against an Order of remand and may be termed First appeal from order itself has arisen from the judgment and Order dated 1 -12-1993 given by the Additional Civil Judge and Assistant Sessions Judge, Tumkur (Sri H.R. Deshpande) in Regular Appeal No. 188 of 1990 arising out of judgment and decree dated 2-11-1990 delivered by the Principal Munsiff, Tumkur in Original Suit No. 412 of 1989.

2. The Plaintiff-Respondent filed the suit for relief of permanent injunction directing the Defendants to restore the schedule property to its original condition by filling up the pits and by removing the earth. The Plaintiff claimed himself to be the owner in possession of the land marked in the plaint sketch by letters "ABCDEFGH". The Plaintiff based his claim on the basis of certain Registered sale deed wherein the property have been alleged to have been purchased from Smt. Lakshminarasamma. The Defendants contested the suit and filed the written statement and on the basis of the pleadings of the parties, the Trial Court framed the following issues:

(1) Does the Plaintiff prove that he is in lawful possession and enjoyment of the suit schedule properties marked as ABCDEFG in the plaint sketch ?

(2) Does he further prove the alleged interference as set out in para 11 of the plaint?

(3) Does the Defendants prove that the suit is bad for want of notice u/s 80, CPC ?

(4) What reliefs ?

3. The Trial Court that is the learned Munsiff answered issue Nos. 1 to 3 in negative and finally dismissed the Plaintiffs suit. Having felt aggrieved from the judgment and Decree of the Trial Court, the Plaintiff filed the Regular Appeal No. 188 of 1990. The lower Appellate Court considered the matter and on one hand it rejected the application for appointment of Commissioner by way of additional evidence, on the other hand the lower Appellate Court considered the application for amendment of the plaint moved by the Plaintiff who was Appellant before the learned Civil Judge and allowed the amendment application on payment of costs of Rs. 250/- to the Respondents. After having allowed the amendment application, the lower Appellate Court considered it just and proper that the case be remanded for Trial afresh in the light of the amendment application after giving the Defendants opportunity to file the additional written statement as well as of the trial of the case after framing of proper issues and after recording the necessary evidence.

4. The Defendants felt aggrieved from the judgment and order of remand preferred this appeal under Order 43, Rule (1)(u) of the CPC Order 43 provides for first appeal? from order.

5. I have heard the learned Government Counsel, Sri R.K. Hatti, as well as Sri T. Sathyanarayana, learned Counsel for the Plaintiff-Respondent.

6. Challenging the order of remand, the learned Government Pleader urged that the learned lower Appellate Court erred in law in allowing the amendment application and acted contrary to the principles of law in passing the order and allowing the amendment. The learned Government Pleader submitted that the amendment in question amounts to making out a new case and therefore amendment should not have been allowed. He submitted that the property in dispute is being changed from the one in the suit and the relief for declaration had not been originally claimed in the plaint and it was sought to be added subsequently by way of amendment and this had the effect of changing the nature of the suit, The learned Government Pleader further urged that the Plaintiff had not claimed any relief in alternative for possession in the plaint originally filed. Relief for possession was not originally claimed, but by way of amendment Plaintiff tried to introduce this new relief being claimed for possession. This new relief amounts to making of a new case. The learned Government Pleader urged that the amendment application has been illegally

allowed and the lower Appellate Court, the learned Government Pleader urged, illegally passed the order of remand.

7. The contentions made by the learned Government Counsel has been hotly contested on behalf of the Plaintiff-Respondents by Sri T. Sathyanarayana. Sri T. Sathyanarayana submitted that firstly, the claim that had been made in the plaint has been with respect to the land demarcated in the sketch map of the plaint was only sought to be reduced and nothing was added. He submitted that originally relief was claimed with respect to the land demarcated by letters "ABCDEF & G", but by way of amendment the area was sought to be reduced to area covered by demarcation by letters "DGE & F" and that the claim with respect to the land "ABCDG" was sought to be given up as it came to the share of Plaintiffs brother and Plaintiff had no concern. The learned Counsel submitted that reducing the claim from larger to the smaller area cannot be said to make a change of cause of action, it is Only the reduction of quantum of the property that is being claimed and as such the amendment cannot be said to have got a tendency of causing any injury or loss to the Defendants-Appellants. Sri Satyanarayana further submitted that the consequential amendment was sought in the description of the property not by area, but by letters with reference to the sketch map and the property ABCDG with respect to that item claim was sought to be deleted. Sri Sathyanarayana further submitted that the Plaintiff had claimed title to the property in the suit and Defendants had denied that, so the only dispute was with respect to the title therein, though no doubt no specific relief for declaration was sought for. But the issue as to declaration and possession as to the title was no doubt very much involved in the case, so making a claim specific in the form of relief also cannot be said to amount to making of a new cause of action or case. The learned Counsel for the Respondents further urged that the allowing the amendment is not going to cause any irreparable injury or loss. In this view of the matter, the learned Counsel for the Respondents further urged that the learned lower Appellate Court did not commit any error of law or jurisdiction in allowing the amendment or in remanding the case to the Court below as amendment has been allowed on payment of costs. The learned Counsel for the Respondents further urged that as such remand order does not call for interference and appeal deserves to be dismissed.

8. I have applied my mind to the contentions respectively made by the learned Counsel for the parties, I have also gone through the record and copy of the plaint has been placed before me by the learned Government Counsel. The law relating to amendment is very well-settled. Before I proceed further, it appears to be profitable to quote certain observations of their Lordships of the Supreme Court with reference to the law of amendment; In the case of Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, their Lordships of the Supreme Court have been pleased to observe as under:

We think that the correct principles were enunciated by Batchelor J, in his

judgment in the same case, viz., as Bom. 644 at p. 655 (c), when he said at pp. 649-650:

All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties...but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a Plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the Defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remain"; the same; can the amendment be allowed without injustice to the other side, or can it not?

From the above decision of their Lordships of the Supreme Court that an amendment can be allowed if the said amendment is necessary for the purpose of determining the real question in controversy between the parties and that it is not working injustice to other side. The amendment can be refused if it is likely to cause an injury which cannot be compensated in terms of money or which may amount to making out a new case. Particularly when the claim is barred by limitation, that may be a consideration before the Court in deciding whether to exercise the discretion in the matter of allowing amendment or not.

9. In the case of L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., , Hon. Venkatarama Ayyar, J., delivering the judgment on behalf of the Court, observed as under:

It is no doubt true that Court would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to Order it, if that is required in the interests of justice. In Charan Das and Ors. v. Amir Khan and Ors. 47 Ind. App. 255 : AIR 1921 PC 50, the Privy Council observed:

That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a Defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case.

It emerges from these observations that ordinarily the amendment which has the effect of taking away the legal rights of a Defendant which has accrued by lapse

of time has to be rejected, but there may be circumstances even where amendment may be allowed irrespective of the fact that limitation had expired. But those may be cases on special circumstances.

10. Keeping this in view, when I examine the amendment application in the context of the plain particularly the allegations made in the plaint, I do not find that any new case was sought to be made nor I could find that the amendment were of a nature which may said to have the effect of depriving the Defendants-Appellants of any legal right nor those amendment can be said to have a tendency of causing any loss or injury to the Defendants-Appellants. In the original plaint, relief was claimed with respect to land demarcated in the sketch map by letters "ABCDEFGH". The Plaintiff, by amendment sought to relinquish his claim with respect to land other than the one covered by expression "DEGH", as according to the Plaintiff the land " ABCDH" fell to the share of his brother and Plaintiff had no concern. Therefore, Plaintiff was reducing his claim and the scope of disputed property simpliciter then what was originally described. That the property covered by expression "DGEH" has already been there in the original plaint, so that could not be said to be introducing a new case. The amendment in the schedule was required, consequently with reference to the description of the property by reference to the sketch map and that amendment was sought. In my opinion that also did not have a tendency to affect the interest of Defendants adversely.

11. As regards the claim for declaration of title that Plaintiff be declared to have a title over that land, which can only be said to be a clarification of the pleading and. nothing more as in the plaint of the suit for either possession or injunction, Plaintiff has first to assert his title or right or interest in the property with respect to which he claims the relief for possession or injunction. If and when the Plaintiff has asserted the right in the plaint though in the suit for injunction or possession he has not specifically claimed a relief for declaration in specific form, the claim of declaration was definitely involved in the case as a result of claim made in the body of the plaint. In my opinion, in a suit for injunction, if there is an omission to claim the declaratory decree, the suit for injunction can not be said to be not maintainable, but if Plaintiff as a matter of precaution wants to add to that relief particularly when he asserted the title in the body of the plaint, the seeking of declaratory decree is a matter of precaution cannot be said to be something as introducing a new claim as that claim has already been made in the plaint. It is not the Defendants case that Plaintiff has not asserted any title. Decree for possession alternatively has also been claimed. The learned Counsel urged that relief for possession as a claim was not there and it can be said to be changing the nature of suit for injunction to the suit for possession. In my opinion, there is no substance in the contention. In the case of A.K. Gupta and Sons Vs. Damodar Valley Corporation, their Lordships of the Supreme Court have been pleased to lay down as under in paras 7 and 8 of the report:

It is not in dispute that at the date of the application for amendment, a suit for a

money claim under the contract was barred. 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 of 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. See *Charan Das v. Amir Khan* and *L.J. Leach and Company Limited's cases*, *supra*.

(8) The principal reasons that have led to the rule last mentioned are first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (*Cropper v. Smith* (1884) 26 Ch.D.700 and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading....

In paragraph 9 again their Lordships of the Supreme Court with reference to this case or cause of action in the context of the law of amendment observed as under:

The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the Plaintiff to succeed" as was said in *Cooke v. Gill* (1873) 8 CP 107 in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add on immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts.

If we consider, new case here means a new claim i.e., made by a person provided it is based on new basis constituted by new facts alleged in and by amendment application, then it may be said to be a new case. But if a relief is claimed on the basis of the facts alleged in the plaint as an alternative relief, then it may simpliciter be said to be a different approach or additional approach to the same facts of the case. In a suit for injunction the Plaintiff asserts title and possession but in alternative he can claim that if he is not found to be in possession, decree may also be granted to him for possession. This will only amount to be an additional approach to those facts. It cannot be said to be introducing a new claim. The amendment in the case which have been allowed as such cannot be said to cause any injury or injury which cannot be compensated in terms of money as has been observed by the lower Appellate Court.

12. In this view of the matter, I am of the opinion that the lower Appellate Court did not commit any error of law or jurisdiction in allowing the amendment application. The lower Appellate Court has also referred to certain decisions of this Court in which the view has been taken that in a suit for injunction, the relief can be allowed to be added by way of amendment. Further this Court has taken

the view that amendment reducing the claim does not amount to alter the cause of action nor does it make out a new case. In my opinion, the Court below cannot be said to be mistaken or wrong in their approach and if the amendment had been allowed, no doubt the proper course for the Court has been either to allow the Defendants to file the additional statement or to remand the case to the Trial Court with a direction to the Trial Court to allow the Defendants to file the additional written statement and to direct the framing or additional issues. The lower Appellate Court while remanding has given all these directions and amendment has been allowed after imposing costs. In my opinion, therefore the order allowing the amendment at the Appellate stage cannot be said to be suffering from any jurisdictional error or error of law nor the order remanding the case to the Trial Court can be said to be suffering from any jurisdictional error or error of law.

13. The learned Government Counsel made a reference to the decision of this Court in the case of H.K. Thammaiah v. Management of B.H.E.L. and Anr. 1991 (1) Kar.L.J. 277. In my opinion that case is not applicable to the facts of the present case. There can be no dispute that new case cannot be permitted to be made but, but here it is not a case of a new case. Therefore, this case is not applicable. Another case which has been relied by the learned Government Counsel is the case of Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others, That case is not applicable to the facts of the present case. The Court in that case had taken the, view that the amendment application was rightly rejected by the Tribunal taking the view that a person cannot be allowed subsequently to wriggle out of the situation and withdraw the admission. Here it is not a case of withdrawing the admission. There are other cases of the Supreme Court also in which the three Judge Division Bench has taken the view that admission can be withdrawn i.e., in the case of Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another, . It has been observed that an admission made by a party may be withdrawn or may be explained away. The learned Trial Judge, while granting the application for amendment was satisfied that in order to effectively adjudicate upon the dispute between the parties, amendment of the pleading was necessary. Thereafter, their Lordships observed that the High Court in that case was not justified in setting aside the order allowing the amendment. That, here I may observe, it is not a case of withdrawal of any admission by way of amendment as such the cases relied on by the learned Government Counsel are not relevant and have no application to the facts of the present case.

Thus considered, in my opinion, the lower Appellate Court did not commit any error of law or jurisdiction by allowing the amendment application and in remanding the case for trial afresh under Order 41, Rule 23-A, CPC Thus considered, this appeal under Order 43(1)(u), Code of Civil Procedure, has got no merits and it deserves to be dismissed and is being dismissed herewith costs.