

(1960) 05 P&H CK 0010
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 23-D of 1960

Har Sarup Guta

APPELLANT

Vs

S. Aggarwal Khushi Ram and Others

RESPONDENT

Date of Decision : 05-05-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 115

Citation : AIR 1960 P&H 653

Hon'ble Judges : A.N. Grover, J

Bench : Single Bench

Judgement

(1) This petitioner for revision is directed against an order of the trial Court refusing to allow amendment of the written statement in a suit for possession by pre-emption.

(2) The suit was filed in the year 1955. In the original written statement the vendee pleaded waiver by the plaintiff but the plea was based on the fact that the property in suit had been offered to the plaintiff by defendant Nos. 2 to 4 (the vendors) but the plaintiff declined to purchase the same, vide paragraph 4. The suit proceeded and after a lapse of nearly four years the vendee sought permission to amend his written statement to introduce the plea that the plaintiff gave his consent to the sale of the property in dispute by the vendors in favour of the plaintiff (vendee?) before the sale in question.

Amendment was also sought to introduce a plea that the right of pre-emption claimed by the plaintiff offends against the Constitution. The trial Court considered that so far as the amendment relating to the validity of the law was concerned, it was hardly necessary because the question could be raised at any time without having been expressly pleaded. It, however, disallowed the other prayer with regard to new facts being pleaded on the point of waiver on the ground that the omission to plead the so-called consent in the original written statement was deliberate. It has been mentioned in the order that no reason was given in the application seeking amendment except inadvertence and that the

real reason which prompted the application being filed was some letter which had been discovered by the defendant vendee and which is alleged to have been written by the plaintiff to Municipal Committee expressing his consent to the sale.

(2a) The learned counsel for the petitioner contends that the plea of waiver had already been raised in the written statement and all that was sought to be done was to introduce some new facts in support of that plea. It is submitted that under O. 6, R. 17 of the C.P.C., all amendments should be allowed which are necessary for determining the controversy between the parties and no injustice will result to the plaintiff which cannot be compensated by costs.

On the other hand, the learned counsel for the respondent No. 1 submits that the petitioner has been guilty of great laches and delay and that he was fully aware of the letter referred to before of which he had obtained a certified copy in October 1955 although he did not file the same till 20th November 1959 when the application for amendment was made. It is suggested that the aforesaid document has been tampered with and the petitioner was trying during all this period to create evidence to support the new plea which is sought to be raised. On behalf of the respondent No. 1 reliance has been placed on *Bhagavatula Gopalakrishnamurthi and Others Vs. Dhulipalla Sreedhara Rao and Another*, in which it was observed that if by reason of the subsequent events certain rights accrued to the plaintiff, he would be entitled to claim reliefs under those rights by amendment.

But where certain facts were alleged which facts were available to him and which he did not choose to mention, it was not open to the Court to permit such an amendment as that would permit a new cast to be made on the facts which were available but were not pleaded. This view was dissented from in *Pathikonda Gopala Rao Vs. Nagiri Pedda Kitamma*, where the learned Andhra Judge held that when the other party could be compensated by costs, or other proper terms, the amendment ought not to be refused on the sole ground of delay or negligence.

In *Dharmalinga Chetti v. Krishnaswami Chetty* AIR 1949 Mad 467, the petitioner had stated in the original written statement in a general way that the patta covering all the four properties had been transferred to him in 1944 and that he had been in enjoyment ever since. Later on, he sought amendment to include a plea that he had a right to items 1 and 2 out of those four properties by oral sale in 1923. *Panchapakesa Aiyar, J.*, held that the petitioner might have forgotten and overlooked the oral sale when he filed the written statement and that he had been no doubt, guilty of gross laches but amendment should not be refused on that ground and it would be enough to saddle him with costs.

In an earlier case in *Muthammal Vs. Gurusami Nayakkan*, a suit had been filed in 1932 on a promissory note executed in 1924. The ground on which exemption from limitation was claimed was that there was a payment on 18th August 1930. The object of the amendment was to rely on a further ground of exemption, namely, that there was an acknowledgement of liability. It was held that the

plaintiff could not be prevented from relying upon the fresh ground as the amendment proposed did not change the cause of action nor did it bring in a new relief.

In *National Fire Insurance Co. Ltd. v. Mool Singh Gurdev Singh* AIR 1951 Simla 227, Harnam Singh J., was of the opinion that the application for amendment deserved dismissal where the defendant applying for amendment of the written statement was in possession of the information on which the proposed amendment was sought, at the time when the written statement was filed. He also found that the defendant company in that case had been guilty of suppressio veri in making the application under O. 6, R. 17 and on that ground alone the application was liable to be dismissed.

(3) Lopes L. J., in *Weldon v. Neal* (1887) 19 QBD 394, laid down the law in very clear terms:

"However negligent or careless the first omission and however late the proposed amendment, the amendment shall be allowed, if it can be allowed without injustice to the other side".

The observation of Bachelor J., in *Kisandas v. Rachappa Vithoba* ILR 33 Bom 644, which were accepted as laying down the correct law by their Lordships of the Supreme Court in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, incorporate the same test, namely, 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. Thus the laches or negligence or delay had not been considered to be good ground for refusing amendment unless coupled with other circumstances it could be found that the application for amendment had been made mala fide. The plea of waiver had already been taken in the original written statement and certain additional facts are now sought to be adduced in support of that plea.

It seems to me that the view of the Andhra High Court is more in consonance with the correct position as it obtains now after the law has been laid down by the Supreme Court. No injustice is likely to be caused in the present case which cannot be compensated by costs. It is a fit case in which amendment ought to have been allowed.

(4) The next question is whether in a petition for revision it is open to this court to interfere with an order of the Court below declining to allow amendment. In *Keshardeo Chamria Vs. Radha Kissen Chamria and Others*, their Lordships had occasion to refer to various decisions mainly of the Privy Council, laying down the scope of revisional jurisdiction but in that very case reference was made to AIR 1949 239 (Privy Council)

According to that authority, if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a

jurisdiction so vested a case for revision arises under sub-section (a) or sub-sec (b) of S. 115, C P. C. Order 6, R. 17 enjoins that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. It cannot be denied in this case that the amendment which is sought is necessary for the purpose of determining the real question in controversy, i. e., that there has been waiver on the part of the plaintiff of his right to pre-empt. By applying wrong principles the Court below came to an erroneous decision which resulted in its failing to exercise a jurisdiction which vested in it. A case for revision consequently arises and I am of the opinion that I can justifiably interfere, in these circumstances in the same way as it has been done in several decided cases, e.g. AIR 1949 Mad 467 and Pathikonda Gopala Rao Vs. Nagiri Pedda Kitamma,

(5) For the reasons given above, I would allow this petition and set aside the order of the Court below and direct that amendment be allowed but only on the condition that the petitioner pays or deposits costs to the extent of Rs. 300/- on or before the date of next hearing in the Court below. If he fails to do so, the amendment shall be disallowed. The parties are directed to appear in the Court below on 14-6-1960. Costs will be costs in the cause.

(6) Petition allowed.