
(2006) 12 GAU CK 0066
In the Gauhati High Court

Hindustan Paper Corpn. Ltd. and Another	APPELLANT
Vs	
L.M. Marketing and Others	RESPONDENT

Date of Decision : 06-12-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 227

Citation : (2007) 2 GLT 499

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Judgement

H.N. Sarma, J.—The subject matter of challenge in this batch of revision petitions filed under Article 227 of the Constitution of India is the impugned order dated 23.6.2004 passed by the learned Civil Judge (Senior Division) Morigaon, deciding the 2 petitions namely the petition No. 298/2004 and petition No. 256/2004 filed under Order 6, Rule 17, CPC. The first one was filed by the defendants and the second one by the plaintiffs in Money Suit No. 11/2003.

2. CRP No. 426/06 has been filed by the plaintiff whereas the other there have been filed by the defendants.

Since the matter pertains to the common impugned order requiring to decide the legality and validity of the same, all the petitions are heard analogously as agreed to by the learned Counsel for the parties.

3. I have heard Mr. J. Roy, learned Counsel for the petitioners in CRP 426/2006 and Mr. S.S. Dey, learned Counsel appearing on behalf of the respondents in the other petitions.

4. The petitioners in CRP 426/2006 instituted the Money Suit being MS No. 11/03 in the Court of the learned Civil Judge, (Senior Division), Morigaon, praying for realization of a sum of Rs. 23,53,425.00 along with interest at the rate of 18% per annum impleading the respondents as defendants.

After receipt of the summon, the defendants appearing in the suit raised a

preliminary issue regarding maintainability of the suit for want of cause of action as well as territorial jurisdiction of the Court by filing an application under Order 7, Rule 11, CPC. The plaintiffs' side also filed the application for amendment of the plaint to the effect that at the time of filing of the suit that the place of cause of action was wrongly typed as "Guwahati" instead of "Jagiroad" and, as such, it becomes necessary to amend the Para-13 of the plaint by putting the word "Jagiroad" in place of Guwahati, which was wrongly typed. The defendants filed the written objections against the prayer for amendment raising objection to the effect that the petition was not properly filed as it is stated that the said petition has not been filed by the parties to the suit but it was by the learned Counsel appearing for the plaintiffs and also the verification of the affidavits were not made by the plaintiffs themselves but by their counsels. No written objection was, however, filed against the application praying for rejection of the plaint under Order 7, Rule 11, CPC. The learned trial Court, after hearing the parties, rejected both the petitions. The prayer of the plaintiffs to amend the plaint was rejected on the ground that although the verification of the application was made by the engaged counsel of the plaintiff, the particular paragraph is not verified and in terms of Order 6, Rule 15, CPC, such an application is to be verified by the party or by one of the parties or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The learned trial Court, found that the learned Counsel appearing for the plaintiffs to be a person not acquainted with the facts of the case. The next finding of the learned trial Court, while rejecting the prayer for the proposed amendment is that such amendment would change the nature and character of the suit when the place of cause of action is allowed to be changed.

5. Since the survival of the major part of the argument in respect of the other three petitions would be consequentially depend upon the decision on the point regarding the amendment as raised in this petition, let me take up the said issue regarding amendment first and this fact was not disputed by the learned Counsel for the parties.

6. There is no dispute to the fact that Mr. M.A. Rahman, Advocate, is the engaged counsel of the plaintiffs in the suit. It is also undisputed fact that the said counsel in support of the application for amendment made the verification on the application as well as submitted the affidavit along with the same. The plaint or the application can be signed or verified either by the parties themselves or by the learned Counsels engaged for the parties. Order 3, Rule 1, CPC provides the role of the engaged Advocate of the respondents in the suit. Under the said provisions an Advocate is authorized to act on behalf of the parties of the suit in the proceedings. Accordingly, it cannot be said that Mr. M.A. Rahman, learned Counsel appearing for the plaintiffs who sworn the affidavit and made the verification, was not authorized by law to do so. The learned trial Court failed to consider this aspect of the matter which has resulted in passing of an illegal order to that effect.

7. Coming to the second contention that by way of changing of the place of cause of action would change the nature and character of the suit, no whisper is made that nature and character of the suit would be changed as a result of change of the place of cause of action. In fact, the learned trial Court appeared to have confused himself in appreciating the facts of the suit to arrive at a decision on the point. The learned trial Court was equally not oblivious with the purport of the Court on the application for amendment which has been judicially determined so long; to refer to the latest decision of the Apex Court on this point in the case of Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., , is quoted herein below:

It is well settled by various decisions of this Court as well as the High Courts in India that Courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference, can be made to a decision of the Privy Council in *Ma Shwe Mya v. Maung Mo Hnaung* in which the Privy Council observed:

All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.

8. The reference made by Mr. Roy to the another decision of the Apex Court regarding the duty of the Court in non-compliance of the procedural requirements as reported in the case of *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another*, , has also not emphasized one as quoted below:

Non-compliance with any procedural requirement relating, to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate to justice, "by any oppressive or punitive use. The well-recognised exceptions to this principle are:

- (i) Where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;
- (ii) Where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;
- (iii) Where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(iv) In case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.

9. Mr. Dey, learned Counsel for the respondents has strenuously submitted that since it is seen under the provisions of Order 6, Rule 15, CPC, it is provided that the plaintiff shall along with the plaint also require to file an affidavit, on the failure of compliance of the said provision, necessary consequence would follow. Although at this stage it is submitted by Mr. Dey that the original plaint do not contain any such affidavit, Mr. Roy placed a certified copy showing submission of affidavit along with the plaint which belies the aforesaid contention. Where for failure to submit affidavit along with the plaint would cause a dismissal of the suit or not, is not an issue in the present case, insasmuch as, we are concerned herein about the legality and validity of the order on the touch stone of prayer made by the plaintiffs/petitioners who seeks to amend the plaint. Thus we are concerned about the application for amendment in which it is also a principle of law that if there is a defect of verification or of affidavit, an application cannot be thrown away on such defect without giving opportunity to the concerned parties by the Court to rectify the defect.

10. But in the instant case, it is seen that the finding of the learned trial Court is that the appointed counsel was not authorized to swear the affidavit cannot be supported under the law.

11. It is also not disclosed as to how and in what manner in the event of allowing the amendment that would change the nature and character of the suit. The suit in question was filed for realization of money and after amendment of the suit and that will remain as Money Suit and it would be based on the averments made in the plaint, vis-a-vis, the defence disclosed in the written statements. The issues have not been framed; the defendants are yet to file their written statements. It also cannot be said that the proposed amendment is sought for at a much belated stage justifying its refusal.

12. In this connection, Mr. Roy refers to a recent decision of this Court in Adir Nilofar Khalil v. Z. Rahman as reported in 2006 (1) GUT 208 and submits that once an application for amendment is pending the learned trial Court is duty bound to dispose of the same first and then decide the petition under Order 7, Rule 11, CPC.

13. In view of the aforesaid discussions, the rejection of prayer of the plaintiffs to amend the plaint stands set aside and quashed and the said prayer of the plaintiffs stands allowed. Necessary consequential action would be taken up by the learned trial Court in this regard.

14. So far as relating to rejection of the prayer of the defence made in the petition No. 256/2004 by which the three Revision Petitions have been filed, the learned trial Court rejected the same on the ground that on an earlier occasion also such a prayer was rejected vide order dated 4.3.2004. Although, Mr. Dey

has raised the issue that even the plaint is not supported by an affidavit and for/ that reason the suit is dismissed, the said sub-M mission is not supported by any document. In fact, a certified copy of the plaint has been submitted by the learned Counsel for the plaintiff which discloses that an affidavit was filed along with the plaint which was served upon opposite parties on the date of filing of the suit itself. Situated thus, the submission of Mr. Dey is not based on facts.

15. Considering the other submissions of Mr. Dey that the plaint does not disclose the cause of action so far it relates to defendant No. 4, suffice it to observe that in Paragraphs-5, 6, 8, 9 & 10 of the plaint some cause of action has been stated against the defendant No. 4 also. Whether those facts pleaded disclose sufficient cause of action which is sufficient enough to pass decree against defendant No. 4 or not, that would be a matter to be decided at the time of the trial of the suit and not at this stage as urged by the learned Counsel for the petitioners.

16. I have also perused the plaint and upon considering the submissions made by the learned Counsel for the parties, I do not find that the submissions made by the learned Counsel is well-founded. Consequently, I am not inclined to interfere with the findings of the learned trial Court on the prayer made vide petition No. 298/2004 by the defendants and according the same stands dismissed.

17. In view of the aforesaid observations and discussions, the CRP No. 426/2006 stands allowed and CRP No. 425/2006, CRP No. 422/2006 and CRP No. 421/2006 stands dismissed.

18. The earlier interim order stands vacated.