

(2008) 10 J&K CK 0013
In the Jammu And Kashmir High Court

Jai Krishan Basotra

APPELLANT

Vs

Santosh Gupta

RESPONDENT

Date of Decision : 29-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2(1)

Citation : (2008) 3 JKJ 306 : (2009) 5 RCR(Civil) 398

Hon'ble Judges : J.P. Singh, J

Bench : Single Bench

Judgement

J.P. Singh, J.—Petitioner is respondents tenant in respect of a shop located in the ground floor of a house situated opposite Peer Baba

Apsra Road, Gandhi Nagar, Jammu. He has been contesting respondents suit seeking his ejectment from the shop in question inter alia on the

ground that the suit shop was reasonably required by her for the use and occupation of her son Akhil Kumar Gupta who wanted to set up his own

business in the shop.

2. It was after the closure of evidence by the parties that the petitioner had filed an application seeking amendment of the written statement

introducing two more paragraphs in it. These paragraphs read thus:

6-A That Apsra Road where the suit shop and the house of the plaintiff/her husband is situated has been declared as commercial and shops and

commercial complexes have come up on both sides of the Apsra Road during the pendency of the suit.

6-B That the plaintiff/her husband along with their sons constitute joint family and they have put their house to commercial use during the pendency

of the suit where sons of the plaintiff have opened Cyber Cafe under the name

and style of M/s Friends Internet Cafe after obtaining the telephone

number in the name of the husband of the plaintiff as 2459820 and need of the sons of the plaintiff, if any, has ceased to exist because of the

subsequent event.

3. Petitioners application has been dismissed by the trial Court on the grounds that the facts sought to be introduced by amendment are Facta Pro-

bantia introduction whereof was impermissible in view of the provisions of Order 6 Rule 2(1) of the CPC Awarding of costs, while allowing the

amendment would not, according to the trial court, mitigate the prejudice which would be caused to the respondent in case amendment of the

written statement had been allowed.

4. Calling in question the trial Courts order of rejecting his application, petitioner has invoked the revisional jurisdiction of this Court seeking setting

aside of the impugned order and allowing his application for amendment of the written statement.

5. Appearing in support of the revision petition, Mr. Sharma submitted that the subsequent event of respondents sons opening a Cyber Cafe in his

house in an area where commercial activity had been permitted during the pendency of the suit, affects the very sustainability of the suit insofar as it

pertained to respondent personal necessity for use and occupation of the suit shop by her son, in that, respondents need would cease to exist with

her sons starting his business of running a Cyber Cafe the proposed amendment of the written statement was thus necessary for determining the

real question of respondents personal necessity for the occupation of the shop for her son in controversy between the parties.

6. Learned Counsel submitted that respondents objection that the petitioner had moved the application with malafide intention to delay the disposal

of the suit was misplaced because in the event of Courts allowing the petitioners application, he would not take more than two month & time to

produce all his evidence on his own to substantiate the pleas which he proposes to raise by amendment. Learned Counsel submitted that delay in

filing application for amendment, if any, would not deprive the petitioner of his right to bring on records the subsequent events which were not in his

knowledge at the time he had filed his written statement and which, when brought on records, would help the Court in arriving at the just decision

of the case in coming to the conclusion as to whether or not respondents projected requirement for use and occupation of the suit shop by her son

was reasonable. Learned Counsel referred to Andhra Bank Vs. ABN Amro Bank N.V. and Others, to support his submissions Per Contra, Mr.

C.S.Gupta submitted that the respondent had filed the suit in the year 2001 to seek petitioners eviction from the suit shop because she needed it to

adjust her unemployed son Akhil Kumar Gupta in the shop for doing his business. The petitioner had been delaying the final conclusion of the

proceedings in the suit on one or the other pretext and application seeking permission to amend the written statement was one of such maneuvers

of the petitioner to protract the litigation which would have by now concluded because the application had been moved by the petitioner when the

case had been fixed for final hearing Learned Counsel submitted that amendment in the written statement proposed by the petitioner was not

necessary for deciding the controversy between the parties.

7. Learned Counsel submitted that petitioner had attempted to introduce the story that the respondents son had started Cyber Cafe in the house

through his witnesses and having failed to succeed therein, he had invented yet another method of protracting the litigation by seeking amendment

of the written statement thereby delaying the already protracted litigation. Relying on Chander Kanta Bansal Vs. Rajinder Singh Anand, , he

submitted that the trial Court had rightly rejected petitioners application which was otherwise malafide and untenable as there was nothing on

records to indicate that the petitioner had not been able to raise the questions sought to be introduced by amendment inspite of his due diligence.

8. I have considered the submissions of learned Counsel for the parties and gone through the records. Petitioners plea that the respondents son

Akhil Kumar Gupta, for whose benefit, use and occupation the suit had been filed, is gainfully employed as he had opened a Cyber Cafe in the

house where the shop in dispute is located, is certainly a plea which, if proved, would be relevant in determining as to whether or not the

respondent personal requirement for the use and occupation of the shop by her son was reasonable.

9. Respondent has not said anything in the objections she had filed to petitioners application controverting the facts stated by the petitioner in his

application that the respondents son had opened a Cyber Cafe in the house where the suit shop is located. Few paragraphs of petitioners

application need to be noticed at this stage. These read thus:

4. That the plaintiff and her husband along with their sons constitute joint family and the son of the plaintiff Sh. Akhil Kumar Gupta and his other

son previously had opened a tutorial in the house and now they have opened Cyber Cafe in the house under the name and style of M/s Friends

Internet Cafe and has put the house to a commercial use. It is also submitted that the husband of the plaintiff is a government employee and a

gazetted officer and he cannot run business on his own name but using his telephone number sons of the plaintiff are running the business in the

house and their need if any has ceased to exist.

5. That the house of the plaintiff her husband in which suit shop situates is at Apsra Road, Gandhi Nagar, Jammu where all type of commercial

activities and shops have come up and commercial activities are going on and the plaintiffs sons have also converted the house for a commercial

use.

6. That the plaintiff has converted the house into a commercial use and started a business of Cyber Cafe in the house and the plaintiff became

greedy and wants to evict the defendant on the so-called need of his sons who are gainfully employed in the business in their house which is a

subsequent event.

7. That Apsra Road where the house of the plaintiff/her husband situate has been declared as commercial area during the pendency of the suit and

plaintiffs sons have opened a Cyber Cafe recently as such this plea could not be taken in the written statement.

10. Respondent has not furnished parawise reply to the petitioners application. She relies on what has been stated by her in the preliminary

objections and paragraph ns. 1 & 2 of her objections on facts filed in answer to the petitioners application seeking permission to amend the written

statement.

11. Facts pleaded by the petitioner in four paragraphs of his application have thus remained uncontroverted.

12. In these circumstances, when the facts stated by the petitioner in his application seeking amendment of the written statement are supported by

an affidavit and there is no denial thereto by the respondent, the plea raised by the petitioner that respondents son had opened a Cyber Cafe in the house, cannot be blinked at and thrown out at the threshold, in the absence of any material placed on records by the respondent to demonstrate that the petitioners plea sought to be introduced by amendment to the written statement was not based on facts.

13. It is no doubt true that petitioner had sought to introduce the facts projected in the application seeking amendment of the written statement after about a year of his coming to know that the petitioners son had opened a Cyber Cafe in the house and that too without any sufficient explanation therefor, yet delay in filing the application would not, by itself create any impediment in allowing the amendment, in case the other side is suitably compensated for the delay which had been caused because of petitioners delayed approach in seeking amendment of the written statement provided, however, that the amendment sought for was necessary for deciding the controversy in dispute between the parties in view of the reiteration of law on the subject by Hon'ble Supreme Court of India in Andhra Banks case (supra) where their lordships had observed as follows:-

5. We have heard Mr. Rohit Kapadia, learned senior counsel appearing for the appellant and Mr. S. Ganesh, learned senior counsel for the respondent. We have perused the original written statement as well as the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement, we are of the view that the amendment sought to be introduced by the appellant must be allowed. From a perusal of the impugned order of the Special Court we find basically that two grounds have been taken by the Special Court for rejecting the prayer for amendment of the written statement. The first ground is that considerable delay has been caused by the appellant in filing the application for amendment of the written statement. It is well settled that delay is no ground for refusal of prayer for amendment. Mr. Ganesh, appearing for ABN Amro Bank submits before us that by filing of such an application for amendment of the written statement which has been filed with long delay, the appellant sought to stall the hearing of the suit which has been fixed on 13th July, 2007. In response to this Mr. Kapadia, learned Counsel for the appellant, submits that in the event the prayer for amendment is allowed by us his client

undertakes to file the amended written statement by day after tomorrow, i.e., 12th July, 2007 before the Special Court. Since, we are of the view

that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr. Kapada,

we do not think that delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment

of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the

pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the

pleading would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. From a

perusal of the amendment application we find that the appellant in their prayer for amendment has only taken an additional defence that in view of

Section 230 of the India Contract Act, the suit itself is not maintainable. It is well settled, as noted herein earlier, that at the time of considering the

prayer for amendment of the written statement, it would not be open to the Court to go into the fact whether in fact the suit in view of Section 230

of the India Contract Act was or is not maintainable.

14. The judgment cited by learned Counsel for the respondent may not be applicable to the facts of the present case because Chander Kanta

Bansals case on which the respondents counsel has placed reliance was based on the interpretation which Hon'ble Supreme Court had placed on

the proviso which stands introduced by amendment to the Central CPC which is not applicable to the State of Jammu and Kashmir and the cases

of amendment of pleadings in the State of Jammu and Kashmir are required to be considered on the basis of the law as it exists in the State of

Jammu and Kashmir.

15. I do not find any justification in the trial courts view that the facts sought to be introduced by the petitioner by amendment of written statement

are Facta Probanda because the facts which are sought to be introduced by amendment are Facta Probanda and not Facta Probandia as

erroneously construed by the trial court. The facts which are stated to have come to the notice of the petitioner subsequent to the filing of the written

statement were required to be introduced by way of amendment so that the

opposite party was not taken by surprise in view of the provisions of Order 8 Rule 2 CPC. Learned trial Court has misconstrued the provisions of Order 6 Rule 2(1) of the CPC in rejecting the petitioners application because I do not find any such thing in the provisions of Order 6 which may come in the way of courts allowing the amendment sought to be introduced in the written statement. Respondents plea that the petitioner had sought amendment of written statement with a view to protract the litigation has been appropriately met with by the petitioners counsel stating at the Bar that the petitioner would not take more than two months to conclude the evidence which he may have to lead additionally, when allowed to amend the written statement.

16. In view of the statement made by Mr. Sharma that the petitioner-defendant would not take more than two months to conclude all his evidence which he may additionally lead in the case, I am of the view that petitioned application deserves to be allowed in the facts and circumstances of the case as the amendment sought to be introduced by the petitioner in his written statement is necessary for the purpose of determining the real question in controversy between the parties insofar as it pertains to the determination of the issue as to whether or not the respondents requirement for her use and occupation of the suit shop for her son is reasonable. For petitioners delayed approach in seeking amendment of the written statement, the respondent, in my opinion, can be suitably compensated by costs.

17. Accordingly, setting aside 2nd Additional Munsiff, Jammus Order dated 17.03.2007, petitioners application for amendment of written statement is allowed subject to payment of Rs. 5000/- as costs. Petitioner shall file the amended written statement and pay the costs to the other side by 3rd of November, 2008 when the parties shall appear before the trial Court.

18. The trial Court shall take up the case every week to conclude petitioners evidence which he is permitted to produce on his own and for that purpose the trial Court shall not permit him more than three opportunities to produce his oral evidence and certified copies of the public documents which petitioners learned Counsel had during the course of hearing of this petition sought to produce along with petitioners oral evidence.

Petitioners counsels statement that petitioner would produce all his evidence on

his own and shall not seek assistance of the Court in summoning his evidence, is recorded.

The trial Court shall take requisite steps to ensure expeditious final disposal of the suit within a period of four months.