

(1999) 02 PAT CK 0050
In the Patna High Court
Case No : Civil Revision No. 1789 of 1997

Kailash Prasad Sah and Others

APPELLANT

Vs

Govind Das Shastri and Others

RESPONDENT

Date of Decision : 16-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1963 — Section 16

Citation : AIR 1999 Patna 149 : (1999) 4 CivCC 282 : (1999) 3 PLJR 33

Hon'ble Judges : Prasun Kumar Deb, J

Bench : Single Bench

Advocate : Parmeshwar Prasad and Manoj Kumar Sinha, for the Appellant;
Devendra Pd. Sharma, Krishna Murari Kumar and Subodh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Prasun Kumar Deb, J.—This revision petition has arisen out of the order dated 24-9-1997 passed by the Sub-Judge VII, Bhagalpur, in T.S. No. 177/91, whereby and wherein the prayer of amendment made by the opposite party plaintiff has been allowed under Order VI, Rule 17 of the Code of Civil Procedure.

2. The plaintiff filed the above mentioned suit for grant of a decree of specific performance on the basis of the contract/agreement of sale of the suit plots situated in mohalla Mundichak Gangadhar Banerjee Road, in the town of Bhagalpur. According to the plaintiff, defendant No. 1 being karta of the joint family executed a deed of Jarbeyananama on 21-3-1984 for sale of the suitland for a consideration of Rs. 31,000/- on condition that the document for sale shall be executed on or before 13-9-1991 and an advance payment of Rs. 21,000/- was received by him. Further case of the plaintiff is that on further demand made by the defendant No. 1, the plaintiff made a further payment of Rs. 2,000/- against the consideration amount on 3-8-1991. But. when the plaintiff made requests several times for executing the sale deed the defendant No. 1 did not pay head

to it, even after lawyers notice being issued to defendant No. 1, then the above mentioned suit was filed, but during the pendency of suit defendant No. 1 transferred the suit land in favour of defendant No. 2 on 7-10-1991 by different sale deeds.

3. Written statement was filed by the defendants and all allegations made in the plaint were denied with the plea that the suit was not maintainable in its present form. It was further contended that the alleged Jarbeyananama was a forged and fabricated deed. Defendant No. 2 also filed his written statement stating that there was no such agreement between the plaintiff and defendant No. 1 and he is a bona fide purchaser without notice, and, as such, the suit is hit by Section 34 of the Specific Relief Act.

4. Both parties adduced evidence in support of their plea and after the conclusion of evidence when argument was going on a point was raised that there was no averment in the plaint regarding readiness and willingness of the plaintiff to perform the part of the contract and, as such the suit itself was hit by Section 16-C of the Specific Relief Act. Then and then only a petition was filed under Order VI, Rule 17, C.P.C. for amendment of the plaint by way of incorporating the readiness and willingness of the plaintiff regarding performance of his part of the contract. A rejoinder was filed against such prayer raising plea that at this stage the opposite party plaintiff was debarred from taking such amendment which would go to fill up the lacuna when already right has been accrued to the contesting defendant for dismissal of the suit for non-mentioning of statutory provisions as contemplated u/s 16-C of the Specific Relief Act. The copy of the amendment petition and its rejoinder have been annexed as Annexures 1 and 2 to the revision petition. The learned court below after considering the contention of both the parties and relying on a decision of the Supreme Court as reported in *Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar*, allowed the prayer of amendment and, hence, this revision petition.

5. Learned counsel appearing for and on behalf of the defendants-petitioners has vehemently challenged the impugned order stating that the amendment allowed by the learned court below is against all the principles laid down by this Court and the apex Court regarding amendment at belated stage under Order VI, Rule 17, C.P.C. His contention is that the suit was filed long back in the year 1991 on the basis of the alleged contract date 21-3-1984 and as per the terms of the contract the expiry date of the contract was 13-9-1991, but such amendment has been prayed only in the year 1997 when the lapse of time as contemplated under Article 54 of the Limitation Act, the defendants had already accrued a right in their favour not to execute even if there is any contract between the two. In support of his contention he has relied on a Division Bench judgement of this Court as reported in *Ramswaroop Singh and Others Vs. Bijoy Kumar Singh*, wherein it was held that after the closure of the evidence of the defendants amendment to incorporate readiness and willingness as contemplated u/s 16-C of the Specific Relief Act cannot be allowed. In course of discussion the Division

Bench held that when it was the bounden duty of the plaintiff to incorporate statutory provisions regarding his readiness and willingness in the plaint, the same cannot be allowed at a belated stage after the evidence is closed. It has further been held that if no such averment is there in the plaint then no amount of evidence can help the plaintiff in getting a decree in his favour. Earlier to that a single Bench of this Court has also held in the same line as reported in *Ram Singhasan Choubey and Others Vs. Sudama Prasad Sah*, , that even if there is evidence regarding readiness and willingness to perform the part of the contract that cannot justify an amendment at a belated stage at the time of argument to include the averment of readiness and willingness as per Section 16-C of the Specific Relief Act. In this context observation of the apex Court as reported in *Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another*, . has also been referred to for and on behalf of the petitioners. That was a case for declaration that certain document is void and inoperative having been obtained by undue influence, but during the pendency of the suit a prayer was made to include alternative relief for specific performance on the basis of the same document itself. In paragraph 5 of that judgment the apex Court held that such prayer of the plaintiff cannot be granted as those two prayers become not only inconsistent but also contrary to the original relief and then specific performance is required to be implemented, and there must have been an averment to the effect that of readiness and willingness and such averment cannot be there when the contract itself was originally claimed to be void and inoperative. This judgment of the Court does not help the petitioners in the present case. The main point that has urged before this Court relying on the aforesaid decisions to the effect that a suit for specific performance arises on a contract/agreement and the limitation of such suit has been incorporated under Article 54 of the Limitation Act, which requires that such suit can be filed on expiry of the period or within three years from the date of refusal of part performance by the adverse party. According to the petitioners such refusal was there in the year 1991 itself before the suit was filed and when the amendment had been prayed for the limitation had already been expired, and, as such, the amendment prayed for being totally barred by limitation can in no case be allowed. On the other hand, by relying on the decisions of the apex Court as reported in AIR 1981 SC 15 and on *Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar*, , it has been contended from the side of the opp. parties that the amendment prayed for is in no way affect the limitation matter. The averments made in the plaint very well disclosed the readiness and willingness of the opp. party plaintiff for performance of his part. The cause of action included a lawyer's notice served on defendant No. 1 on 21-8-1991 which categorically revealed the readiness and willingness of the plaintiff opp. party to perform his part of the contract regarding offering of the balance amount for execution of the sale deed.

6. The learned counsel appearing for the opp. parties has also referred to the evidence adduced by the plaintiff's side regarding his readiness and willingness and the same has not been denied in specific words except the fact that the

defendants had coloured the agreement to be a forged and fabricated one. According to the learned counsel for the opp. parties although all contents were there not only in the plaint but also in the evidence adduced by the plaintiff but specific averment as required u/s 16-C was inadvertently not being included in the plaint nor the maintainability of the suit had been challenged specifically on that ground in the written statement of the defendants. Only at the stage of argument such plea had been taken and, as such, the plaintiff had no other alternative but to include that averment in the plaint only to satisfy the specific provisions of the statute. The same position arose when the apex Court passed the order in 1991 SCC 166 (supra). In that case the defendant took the specific plea in the written statement regarding non-maintainability of the suit for non-inclusion of such averment as required u/s 16-C of the Specific Relief Act in the plaint and then a prayer was made for deciding the maintainability issue as a preliminary issue and at that stage the amendment petition was filed under Order VI, Rule 17, C.P.C. It was held while allowing the amendment petition by the apex Court that such inclusion of averment in the plaint no fresh cause of action was sought to be introduced rather the cause of action which was there in the original plaint remained so, but due to oversight or mistake such averment was not made and it was also observed that such mistake might have been caused by the lawyer while drafting the plaint and, as such, error can be rectified by amendment. The cardinal principle of amendment of pleading as contemplated under Order VI, Rule 17, C.P.C. as laid down by the apex Court, as reported in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, has been reiterated in the above mentioned judgment. It was held that the amendments can only be refused when the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him injury or injustice which cannot be compensated by cost. In the present case also the position remains the same. The cause of action for specific performance had not been altered by the amendment sought. All averments in the plaint revealed the readiness and willingness of the plaintiff for part performance of the contract, but only the averment required under the statute had not been incorporated. For such non-incorporation formal defect in the plaint cannot be said to be incurable as such the statement would not cause injustice to the adverse party, as from the averments of the plaint he was knowing on the same cause of action as to what the plaintiff wanted to do. Although courts are silent on allowing the amendment if a fresh suit on the amended claim would be barred by limitation on the date of application. But that is only a matter of discussion. As has been observed by the apex Court in the above judgment, the present amendment does not cause the defendants to have a right being accrued in his favour of back of the averment in the plaint, rather it was a formality to make specific statement to that effect in the pleadings, although the other averments in the plaint were showing the readiness and willingness of the plaintiff for performing his part of contract. In that view of the matter, I do not find that the learned Court below has committed any error of law or jurisdictional error in allowing the amendment at a belated stage, because such amendment

do not want further evidence to be adduced and even if required, the same can be allowed on imposing cost on the opp. party and that cost has already been imposed by the impugned order on the plaintiff opp. party.

7. Thus, I do not find any force in this revision petition and, hence, the same is rejected, but no order as to cost in the circumstances. The stay order passed earlier on 10-11-1997 is hereby withdrawn.