

(1997) 10 OHC CK 0005

In the Orissa High Court

Case No : Civil Revision No. 236 of 1995

Kannankara Kuria-Kosa Thomas

APPELLANT

Vs

Shriram Saw Mills and Others

RESPONDENT

Date of Decision : 24-10-1997

Acts Referred:

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

Citation : AIR 1998 Ori 68 : (1998) 1 CivCC 515 : (1998) 85 CLT 120 : (1997) 2 OLR 543

Hon'ble Judges : R.K. Dash, J

Bench : Single Bench

Advocate : R.K. Mohapatra, S. Swain, R.K. Dash, U.K. Samal, N.K. Sahu and D.P. Dash, for the Appellant; Y.S.N. Murty, P. Misra and S. Joseph and Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.K. Dash, J.—Defendant No. 1 in Title Suit No. 62 of 1990 on the file of the Civil Judge (Senior Division). Nayagarh, has preferred this revision under S. 115 of the CPC (for short, "CPC") challenging the order dated 18-8-1995 whereby the plaintiff's prayer for amendment of pleading under Order 6, Rule 17, CPC has been allowed.

M/s. Shriram Saw Mills (hereinafter referred to as "plaintiff") is a registered partnership firm of which Sila Rajeswar Rao is the Managing Partner. It has filed the aforesaid suit against the petitioner as well as Government of Orissa and its functionaries (hereinafter referred to as "defendant's") for a decree for specific performance of contract and other ancillary reliefs.

2. Plaintiffs case, in brief, is this :

Defendant No. 1 is the owner of the suit land measuring Ac. 20.53 dec., more specifically described in the schedule of the plaint over which there has been a forest growth. In order to have rubber plantations on the suit land he made an

application to the Divisional Forest Officer, Nayagarh, for according necessary permission to remove the timbers standing thereon. Since he is living in Baharain, a Gulf country, it could not be possible on his part to pursue the Forest and Revenue authorities in the matter. He, therefore, executed a power-of-attorney in favour of the Managing Partner of the plaintiff on 3-4-1984 to attend to the work of demarcation, enumeration, cutting and felling of trees and to obtain necessary transit permit. When the matter stood thus, he entered into an agreement with the plaintiff on 9-12-1988 for sale of the timbers for Rupees 3,20,000/-. The said agreement was signed by both parties and was registered at Baharain before the Indian Embassy. The plaintiff then got the joint verification made by the Revenue and Forest authorities whereafter necessary forms were submitted to the Divisional Forest Officer for transportation of the timbers. He also constructed motorable road and approach road to the suit land and engaged four persons, to keep watch over the trees. In the meantime, defendant No. 1 revoked the power-of-attorney and also the agreement for sale with a view to sell the trees to a third party. Hence the suit.

3. Defendant No. 1 traversed the plaint allegations and contended, inter alia, that time was the essence of contract, inasmuch as the plaintiff was required to obtain necessary clearance from the Revenue and Forest authorities by 31-3-1989, but it failed to do so within the stipulated time for which he cancelled the power-of-attorney as also the agreement for sale.

4. On the above pleadings the trial Court struck issues and proceeded with hearing. Both parties led evidence in support of their respective cases. After conclusion of the trial, when judgment was awaited, plaintiff filed a petition under Order 6, Rule 17, CPC for amendment of the pleadings. Plaintiffs case initially, as stated earlier, was that there was an agreement between it and defendant No. 1 for sale of the trees standing on the suit land and accordingly, prayed for specific performance of contract. By the proposed amendment, it, however, tried to introduce that under the terms of contract of sale the trees standing on the suit land have been sold and therefore, instead of decree for specific performance of contract, a decree for title to the properties, namely forest growth, be passed. This was objected to by defendant No. 1. It was contended that the amendments which have been asked for at a belated stage, if allowed, would change the nature and character of the suit. Moreover, if plaintiff's prayer for amendment is accepted, then hearing of the suit which has since been concluded will be reopened and parties will be asked to lead further evidence. In that view of the matter, he urged that amendment as sought for by the plaintiff should be rejected in limine.

5. Upon hearing, the learned trial court came to hold that since the plaintiffs case rests on interpretation of the document, Ext. 11, whether it is an agreement for sale or a contract of sale, and by the proposed amendment no new facts have been introduced, there is no legal impediment to grant leave to the plaintiff to amend the pleadings. Accordingly by the impugned order prayer for amendment

was allowed and it is against that order that defendant No. 1 has approached this Court by filing the present revision.

6. The sole contention of Shri R. K. Mohapatra, learned counsel for defendant No. 1, is that the amendment of relief of specific performance of contract to one for declaration of title is barred by limitation, inasmuch as to maintain a suit for declaration, the limitation prescribed u/s 58 of the Limitation Act being three years from the date of cause of action, plaintiffs prayer for a declaration of title was barred by the time it was sought to be incorporated by way of amendment and therefore, the learned trial Court committed grave error in permitting the plaintiff to amend the pleading.

7. In reply. Shri Y. S. N. Murty, learned counsel for the plaintiff, urged that the amendment will neither introduce a different or inconsistent case nor will it change the nature and character of the suit. The only change introduced is about the construction of the document, Ext. 11 on which the plaintiff bases his claim. Initially the document was read as an agreement for sale, but it has been sought to be read as a contract of sale. So ultimately it is for the Court to decide what its correct construction is. If at the end of the trial the Court does not accept the plaintiffs contention to read the document, Ext. 11 as a contract of sale, it will have no other alternative but to dismiss the suit. But at the stage of amendment, merits of the case cannot be gone into. So far as the question of limitation is concerned, Shri Murty would contend that there having been no change of cause of action, inasmuch as the relief claimed before and after amendment being based on the interpretation of the document, Ext. 11, the prayer for declaration of title which has been sought to be introduced by way of amendment cannot be said to be barred by limitation.

8. The first part of Order 6, Rule 17, CPC dealing with amendments vests the Court with discretion while the second part dealing with such amendments as are necessary for the purpose of determining the real question in controversy between the parties, imposes an obligation on the Court and not merely discretion to allow such amendments. All rules of Court are intended to secure proper administration of justice. Therefore, it is essential that they should be made to serve and to be subordinate to that purpose. In the matter of amendment of pleadings, the Court should be liberal and grant leave to the party applying for amendments, if it is of the opinion that they are necessary for determining the real question in controversy between the parties. But then, while doing so, it should keep itself alive whether such amendments would take away the legal right that has accrued in favour of the other side by lapse of time. Therefore, where the plaintiff seeks to amend his pleading by setting up a fresh claim in respect of the very same cause of action which by lapse of time has become time-barred the same must be refused.

9. In this context, it is apposite to refer to a recent decision of the Supreme Court in the case of Muni Lal Vs. The Oriental Fire and General Insurance Company Ltd. and another, where the Court observed that the relief which stood

barred by limitation on the date of amendment could not be granted as the same would defeat the valuable right of the defence of bar of limitation given to the defendant. In the said case, the plaintiff initially filed a suit seeking for declaration that he is entitled to the total loss of the truck from the insurance company. The trial Court dismissed the suit holding that the suit for mere declaration without consequential relief for payment of compensation for the loss of the truck or specified amount of compensation from the respondent was not maintainable. Aggrieved thereby the plaintiff preferred appeal to the District Judge. In the appeal, he filed an application under Order 6, Rule 17, CPC seeking the consequential relief. The District Judge refused to grant leave to amend the pleading since the relief sought to be introduced by way of amendment was barred by limitation and consequently dismissed the appeal. On further appeal, the High Court concurred with the view of the District Judge. The matter was then carried to Supreme Court. The sole question for consideration before the apex Court was whether the relief which could have been asked for by the plaintiff at the time the suit was filed, but was not claimed, could be sought by way of amendment when by efflux of time the same is barred by limitation. Their Lordships while dealing with the said question referred to earlier two decisions in the cases of *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, and *Vineet Kumar Vs. Mangal Sain Wadhwa*. In the former case the Court dealing with the basis of cause of action and character of the right held that it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suit or institutes the legal proceedings. In the later case, it was held that normally amendment is not allowed if it changes the cause of action. On a conspectus of the facts and circumstances of the case and the well settled principles of law, their Lordships agreeing with the views expressed by both the courts below held that when the alternative relief was available to the plaintiff at the time the suit was filed, but was not asked for, the same cannot be permitted to be brought in by way of amendment as it was barred by limitation.

10. Further reference may be made to another decision in the case of *Tarlok Singh v. Vijay Kumar Sabharwal* (1996) 3 SCALES 558, where the controversy with regard to limitation was considered. In that case, the Court observed thus :

"The question is : as to when the limitation began to run ? In view of the admitted position that the contract was to be performed within 15 days after the injunction was vacated, the limitation began to run on April 6, 1986. In view of the position that the suit for perpetual injunction was converted into one for specific performance by order dated August 25, 1989, the suit was clearly barred by limitation. We find force in the stand of the appellants. We think that parties had, by agreement, determined the date for performance of the contract. Thereby limitation began to run from April 6, 1986. Suit merely for injunction laid on December 23, 1987 would not be of any avail nor the limitation began to run from that date. Suit for perpetual injunction is different from suit for specific performance. The suit for specific performance in fact was claimed by way of amendment application filed under Order VI. Rule 17, CPC on September 12,

1979. It will operate only on the application being ordered. Since the amendment was ordered on August 25, 1989, the crucial date would be the date on which the amendment was ordered by which date admittedly, the suit is barred by limitation. The Court below, therefore, were not right in decreeing the suit.

11. Similar view has been expressed by the Andhra Pradesh High Court in the case of N. Raghotham Rao v. M.C.H., Hyderabad represented by its Special Officer and another 1997 (1) SCC 190 (AP). That was a case for perpetual injunction restraining the defendant-Municipal Corporation from interfering with the possession of the suit schedule land shown in the plaint. The plaintiffs claimed the same as being integral part of their building. It was contended on behalf of the defendant-Corporation that the vendors of the plaintiffs had no right to sell the suit schedule land describing it as a common passage meant for their exclusive use. It was asserted that the land in question was a part of the road set apart as such in the approved lay-out. During pendency of the suit the plaintiffs moved for amendment of the plaint seeking declaration with consequential relief. The said application was rejected by the trial Court on the ground that declaratory relief was barred by time. Against that order the plaintiffs preferred Civil Revision and the revisional Court while agreeing with the view expressed by the trial Court, observed that since the right to sue or the cause of action to sue for declaration clearly arose on the date of filing of the suit or at any rate on the date when the written statement was filed by the Corporation, the relief for declaration cannot be sought for on the date on which the petition for amendment was filed as the same was barred by limitation. The Court further observed that allowing the amendment will have the effect of enabling the plaintiff to sue for a time-barred relief.

12. The same view has been reiterated in the latest decision in the case of T. L. Muddukrishna v. Smt. Lalitha Ramachandra Rao 1997 (1) CCC 180 : AIR 1997 SCW 593 (SC). In that case both Parties had entered into an agreement for sale of a plot of land and the date of performance of the contract was fixed as May 28, 1989, The plaintiff issued notice calling upon the defendant to comply with the conditions mentioned in the agreement. But the defendant issued notice repudiating the contract, though the execution thereof was admitted. Plaintiff then filed the suit for mandatory injunction on April 21, 1992 directing the defendants to comply with the requirements as mentioned in the agreement. While the suit was pending the plaintiffs filed an application on November, 1992 under Order 6, Rule 17, CPC for amendment of the plaint seeking specific performance of contract. The said application was rejected by the trial Court and affirmed by the High Court. The matter then came to the Supreme Court. Agreeing with the findings of both the courts below the apex Court observed (at page 596 of AIR SCW) :

"x x x x x it must be held that for the purpose of limitation, what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit is required to be filed within three years

from the date fixed by the parties under the contract, Since the application for amendment of the plaint came to be filed after the expiry of three years, certainly it changed the cause of action as required to be specified in the plaint. The suit for mandatory injunction is filed and the specific performance was sought for by way of an amendment. The cause of action is required to be stated initially in the plaint but it was not pleaded. It was sought to be amended, along with an application for specific performance which, as stated earlier, was rejected. Under the circumstances, even by the date of filing of the application, namely, November 5, 1992, the suit was barred by limitation. High Court, therefore, was right in refusing to permit the amendment of the plaint."

13. Shri Murty, however, contended that Court's power is not circumscribed by law of limitation if in its opinion the amendment should otherwise be allowed. By referring to Ext. 11 he urged that initially it was construed to be an agreement for sale and accordingly the relief for specific performance of contract was sought for. But by the proposed amendment the said relief has been sought to be substituted by declaration of title on interpreting the said document as a contract of sale. So, as the amendment basically relates to the interpretation of the document, Ext. 11, the Court for doing justice to the parties can allow the same notwithstanding whether it is within time or not. In support of his such submission he relied upon the decisions reported in AIR 1921 PC 50 (Charan Das v. Amir Khan); N. Subramanian Namboodripad and Others Vs. K. Vasudevan Namboodiripad, ; L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., ; and Bisweswar Bajpai and Others Vs. Jajneswar Bajpai and Another, .

14. In Charan Das (supra) the plaintiffs, sued for declaration of their right of pre-emption over certain land without claiming for possession as a consequential relief. The defendants in their defence admitted the plaintiffs' right of preemption, but pointed out that mere claim to such right was not a claim to any right to property within the meaning of S. 42 of the Specific Relief Act, and that the right of pre-emption could not be enforced by a mere declaratory decree. The amendment was then sought for by the plaintiffs claiming possession. This prayer was refused by the trial Court, On appeal it was affirmed by the Divisional Judge. The Judicial Commissioner, however, allowed the amendment whereupon the matter came before the Privy council by way of appeal. While not interfering with the Judicial Commissioner's Order, the Court observed (at pages 51 -52):

"It may be noticed that in the claim the relief sought is so awkwardly set out that it would be quite open to the interpretation that they had in fact claimed pre-emption and not a declaration of the right, were it not for the fact that the plaintiffs themselves appear for foolish reasons stoutly to have maintained that was not their object. 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 its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases (see, for example, Mohummed Zahoor Ali Khan v. Mussumut Thakooranee Rutta Koer : (1867) 11 MIA 467 (PC) where

such considerations are outweighed by the special circumstances of the case, and their Lordships are not prepared to differ from the Judicial Commissioner in thinking that the present case is one".

A reading of the aforesaid decision would show that though the Privy Council did not interfere with the Judicial Commissioner's order, yet it agreed with the well settled principle of law that power to grant leave to amend pleadings should not be exercised where its effect would take away a legal right of the defendant accrued in his favour by lapse of time.

15. The next decision on which reliance was placed by Shri Murty is the case of N. Subramanian Namboordripad (*supra*). This decision has no application to the facts of the present case. In the said case the suit was based on a document. Initially it was read in a particular way and after the written statement was filed, application for amendment was made by the plaintiff to read the document in another way. In that view of the matter, the Court held that when the question relates to construction of the document, it cannot be said that by the proposed amendment a new and inconsistent cause of action was sought to be introduced. In the present case, the plaintiff by the amendment has sought to substitute the relief of declaration of title in place of specific performance of contract.

16. Further, reliance was placed on L. J. Leach and Co. Ltd. (*supra*), The plaintiffs in the said case instituted a suit for damage for conversion alleging that the goods in question were due to them and that the defendants who had ordered them on their behalf had themselves no title to them. It was also averred in the plaint that the defendants were acting as agents of the plaintiffs. This claim was repudiated by the defendants. The trial Court accepted the plaintiffs' case and decreed the suit and referred the matter to the Commissioner for ascertaining the damages. On appeal a Division Bench of Bombay High Court held that the title to the goods imported by the defendants vested in them and it would pass to the plaintiffs only when the defendants endorsed the shipping documents in their favour and that as that had not been done, the claim for damages on the basis of conversion was misconceived. Having held thus, the Court allowed the appeal and dismissed the suit. Aggrieved thereby the plaintiffs approached the Supreme Court. Their Lordships on scrutiny of the evidence available on record, agreed with the conclusion arrived at by the High Court and observed that the claim for damages by the plaintiffs on the footing of conversion must fail. During pendency of the appeal, the plaintiffs moved an application for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. This was resisted by the defendants. They contended that the amendment introduced a new cause of action, that the suit on that cause of action would be barred by limitation, that the plaintiffs had ample opportunity to amend their plaint but they failed to do so, and that owing to lapse of time the defendants would be seriously prejudiced if this new claim was allowed to be raised. This contention was, however, not accepted for the reason that initially the plaintiffs' suit was for damages and all the allegations

which were necessary for sustaining the claim for damages for breach of contract were already in the plaint. What was lacking was that the plaintiffs were alternatively entitled to the damages for breach of contract by defendants in not delivering the goods. In the above factual backdrop the Court allowed the plaintiffs' prayer for amendment. Shri Murty laid stress on paragraph 16 of the judgment where the Court observed that though as a rule the Court should 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, From the above what Shri Murty tried to impress upon me is that notwithstanding that the declaration of title, which the plaintiff sought to introduce by way of amendment, has become time barred, yet in the interest of justice the same should be allowed to be incorporated in the plaint by way of amendment. I am not inclined to accept this submission, the reason being that discretionary power of the Court to grant leave to amend the pleadings cannot be exercised *de hors* the limitation. In other words, if a fresh suit on the amended claim is barred by limitation, then in that case the Court should be loathe to exercise discretion and allow the amendment.

17. The decision of the Calcutta High Court in *Biswaswar Bajpui* (supra), on which reliance was placed by Shri Murty is based on the principle as decided by the apex Court in *L.J. Leach* (supra).

18. On a reading of the various judicial pronouncements referred to above and on scrutiny of the pleadings of the parties, I am of the considered opinion that plaintiff's prayer for amendment of the relief of specific performance of contract to one for declaration of title cannot be allowed since by the time the amendment was prayed for, a suit for declaration on the very same cause of action could not be maintained, being barred by law of limitation. To be more specific, to maintain a suit for declaration of title, period of limitation being three years from the date the right to sue first accrued as provided in Article 58 of the Limitation Act, plaintiffs prayer for such declaration on the basis of the very same cause of action was sufficiently barred by limitation at the time when amendment was sought for. In that view of the matter, the impugned order of the trial Court is unsustainable.

19. In the result, the revision is allowed and consequently the order of the trial Court is set aside. In the circumstances, there shall be no order as to costs.