
(2011) 02 AHC CK 0296
In the Allahabad High Court
Case No : Rent Control No. 7 of 2011

Kishore and Others

APPELLANT

Vs

Additional District Judge, Court No. 8 and Others

RESPONDENT

Date of Decision : 25-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 6 Rule 17, 107, 151

Citation : (2011) 3 ADJ 288 : AIR 2011 All 297

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Mohd. Aslam Khan, for the Appellant; Manish Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—Heard Mohd Arif Khan learned Senior Counsel assisted by Mohd. Aslam Khan, learned Counsel for the Petitioners, Sri Nrapendra Misra holding brief of Sri Manish Kumar learned Counsel for opposite party No. 1, Sri N.K. Pandey and Sri Anand Kumar Mishra, Advocates for Respondents.

2. By means of the present writ petition , the Petitioners/ tenant has challenged the order dated 10.1.2011 (Annexure No. 8 to the writ petition) passed by opposite party No. 1/ Additional District Judge, Court No. 8, Lucknow by which Petitioners" application for amendment in the written statement at the appellate stage has been rejected.

3. Controversy relates to a shop situated at house No. 119, Mill Road, Mawaiya, Lucknow, initially let out by Sri Kungoo Mall, the father of the Petitioner at a monthly rent of Rs. 50/-.

4. On 02.08.1999, landlord/O.P. Nos. 2 to 7 moved an application for release of the shop in question u/s 21(1)(a) of U.P. Act 13 of 1972 registered as PA Case No. 100 of 1999, a written statement filed on 13.08.2001 by tenants/Petitioners, thereafter application and application u/s 34(c) of the Act has been moved by the

tenants on 08.01.2006 registered as paper No. 66 for issue commission.

5. On 29.01.2008, the landlrods, filed the objection to the above said application along with an affidavit, in paragraph No. 6 of the said affidavit it is inter alia mentioned as under:

That the contents of the para No. 4 is absolutely incorrect, baseless and wrong. No shop has been released in favour of the deponent, the story narrated therein concocted and false story. It is further submitted that the case, which was filed in the court of A.D.M. (Civil Supply) Lucknow, u/s 16(1)(b) of the Act 13 of 1972 was in fructuous due to the death of Aditya Narain Misha as well as due to the death of Ghunnu Mul hence there was no vacancy at all, the deponent moved an application for withdrawn of the case before A.D.M. (Civil Supply) Lucknow on 22.12.2007 that his case may be withdrawn as not pressed and which was allowed.

6. Further, a written argument has also been filed on 17.08.2010 on behalf of the Petitioners/tenants through their counsel Sri Raj Kumar Yadav, Advocate and in paragraph No. 14 it is stated as under:

That it is very relevant to consider that the present application is pending since 1999 continuously for release of the shop No. 2 which was in the tenancy of Late Kungoo Mal since 1960 they why the other release application which was pending before the additional District Magistrate (Civil Supply), Lucknow u/s 16(1)(b) of Act XII of 1972 has been compromised on 29.01.2008 and it is clearly mentioned in annexure No. 1 and annexure No. 2 which are attached, that the said case was pending since 1981 and after a lapse of 27 years applicants not pressed the said application and admitted sub tenant Sri Laxmi Chand as their tenant. If applicant had any need for any shop why they entered into a compromise with Sri Laxmi Chand and not pressed their release application in which final orders were going to pass. Any ruling is not applicable in the present case and present release application has no merit.

7. After considering the pleadings and material evidence on record, the prescribed authority by an order dated 31.08.2010 (Annexure 6) allowed the release application, challenged by the Petitioners/tenants by filing an appeal (RA No. 55 of 2010), pending before Additional District Judge, Court No. 8, Lucknow.

8. On 10.01.2011, Petitioners/tenants moved an application u/s 34(g) and Rule 22(d) of U.P. Act, 13 of 1972 read with Section 151 Code of CPC for amendment of the written statement prayed that after paragraph No. 29, para 29(A) be allowed to be incorporated, the same is reproduced herein below:

29A. That during pendency of the case u/s 21(1)(a) of U.P. Act No. XIII of 1972 Respondents entered into a compromise with the sub tenant Sri Laxmi Chand on 22.12.2007 and withdraw their case u/s 16(1)(b) of U.P. Act XIII of 1972 in which Respondents have taken declaration as provided u/s 12 of U.P. Act XIII of 1972 and the said case whose number is 125 of 1988 pending since 1981 and

other case which was pending in the court of Judge Small Causes Court, Lucknow since 1971 for recovery of damages and ejectment have been withdrawn after a long litigation between the Respondents and Sri Laxmi Chand. If Respondents had any bona fide need for the shop why they entered into a compromise with Sri Laxmi Chand and forgo the said shop in his favour which goes to show that Respondents have no need for any shop hence a petition u/s 21(1)(a) of U.P. Act No. XIII of 1972 have no merit and liable to be rejected.

9. By impugned order dated 10.01.2011 appellate authority/O.P. No. 1 rejected the Petitioner's application for amendment hence the present writ petition has been filed.

10. Sri Mohd. Arif Khan, learned Counsel for the Petitioner while challenging the impugned order submits that the same is totally in contravention to the law as propounded by the Apex Court as well as by this Court that the matter relating to amendment in written statement, stand in a different footing in comparison to the amendment in the plaint, as such appellate court erred in law in rejecting the application for amendment for amending the written statement.

11. He further submits that the amendment sought to be incorporated in written statement is based on a subsequent event which would affect the merit and demerits of the case. Moreover, particularly when the facts sought to be incorporated, in respect to the same, the landlord/opposite parties has led the evidence. However, the O.P. No. 1 taking too hyper technical view had rejected the application for amendment ignoring the fact that even time barred amendment which does not change in nature of the suit or the defence be allowed.

12. He further submits that the facts which the tenant/Petitioner wants to incorporate in their written statement has not pleaded previously and in absence of pleadings, no amount of evidence could be led by the tenant/Petitioner, the said establish proposition of law has been ignored by the O.P. No. 1 while rejecting the application for amendment and the said authority was swayed away with the consideration that the trial court at page No. 10 of the judgment considered the contention and at page No. 14 and 15 regarding a finding to the effect. So the order under challenge in the present writ petition is arbitrary in nature and liable to be set aside.

13. In support of his argument, Sri Mohd. Arif Khan, Senior Advocate for the Petitioners relies on the following judgments.

(i) (1994) 2 SCC 29 (SC)

(ii) B.K.N. Pillai v. P. Pillai and Anr. AIR 2000 SC

(iii) Andhra Bank Vs. ABN Amro Bank N.V. and Others,

(iv) Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (D) and Others,

14. Sri N.K. Pandey and Sri J.N. Pandey, appearing on behalf of the Respondents submits that the order passed by the O.P. No. 1 while rejecting the Petitioner application for amendment is perfectly valid as in the present case, the release application has been moved in the year 1999 and thereafter before the prescribed authority the plea in respect to which amendment sought at the appellate stage was brought by the landlord/Respondent by way of affidavit, so the same was well within the knowledge of the tenant/Petitioner established from the fact that the said plea has been taken by their counsel in the written argument. In spite of the said facts, they had not taken any care to move an application for amendment at that stage, as such, now after passing of the judgment by the prescribed authority taking into consideration the said facts, at the appellate stage, the amendment sought by the Petitioners/tenants want with intention to delay the proceedings, if allowed will be caused pre-judice to the landlords case which cannot be compensated adequately in terms of money, as such the present writ petition filed by the Petitioner is liable to be rejected.

15. In support of his argument, Sri N.K. Pandey, counsel for the Respondent relies on the following judgment.:

(i) Ajendraprasadji N. Pandey and Anr. v. Swami Keshavprakeshdasji N. and Ors. 2007 AIR SCW 513.

(ii) Chander Kanta Bansal v. Rajinder Singh Anand, 2008 AIR SCW 3225

(iii) Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others,

16. I have heard the counsel for the parties and gone through the record.

17. Before dealing with the question whether the amendment sought by the Petitioner/tenant in the written statement to be incorporated after paragraphs 29 as 29(A) has been rightly rejected by the O.P. No. 1 or not. I feel it appropriate to consider the principles in which the amendments or pleadings can be allowed or rejected.

18. The principle allowing or rejecting an amendment of the pleadings has emanated from Order 6 Rule 17 of the Code of Civil Procedure, which runs as under:

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial

19. From a bare perusal of Order 6 Rule 17 of the Code of Civil Procedure, it is clear that the court is conferred with power, at any stage of the proceedings, to

allow alteration and amendments of the pleadings if it is of the view that such amendments may be necessary for determining the real question in controversy between the parties.

20. The proviso to Order 6 Rule 17 of the Code, however, provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. However, proviso to Order 6 Rule 17 of the Code would not be applicable in the present case, as the trial of the suit has not yet commenced.

21. In the case of Ajendraprasadji N. Pandey and Anr. v. Swami Keshavprakeshdasji N. and Ors. 2007 AIR SCW 513, the Apex Court while dealing with the matter regarding amendment of written statement in paragraph No. 3 has held as under:

The Respondents/Plaintiffs filed application for amendment of the plaint of Special Civil Application No. 156 of 2002 and also produced further documents vide list Ex. 25. The trial Court granted amendment of the plaint and further dismissed the application of the Appellants objecting the jurisdiction of the Court. The Appellants preferred appeal to the High Court challenging the above order. The High Court admitted the appeal and finally dismissed the application for stay and directed the appeal to be placed for final hearing. On 31.01.2003, the new Acharya was appointed by the Committee constituted pursuant to the Resolution dated 15.05.2002. The Appellants preferred SLP No. 3351 of 2003 before this Court challenging the order of the High Court. This Court modified the order of the High Court and requested Chief Justice of the Gujarat High Court to ensure that hearing and disposal of the appeal takes place as expeditiously as possible as according to this Court an important question was required to be decided in the matter. The High Court dismissed the appeal from Order No. 421 of 2002. SLP No. 1538 (Civil Appeal No. 3380) was preferred by the Appellant No. 1 before this Court against the above referred judgment of the High Court. The said appeal was decided and the matter was remanded back to the High Court, inter alia, observed that:

the dispute centers around the question as to whether the removal of Ajendraprasad Narejdraprasad Pandey from the post of Acharya on the basis of a purported Resolution dated 11.5.2000 passed by a body calling itself as Satsang Mahasabha was valid. Intimately linked to this issue is the legality of the action taken to is tall Rakeshprasadji Mahendraprasadji"?.." it is to be noted that legality of the appointment of Rakeshprasadji as Acharya was questioned. So, as noted above, the basis revolves around the question of legality of the decision taken to remove Ajendraprasadji and legality of appointment of Rakeshprasadji"."it is needless to note that while deciding the issue of injunction, the Courts have to consider three cumulative factors, viz. prima facie case, balance of convenience and irreparable loss. Definite findings are to be given on these aspects, on a prima facie basis.

22. In the case of B.K.N. Narayana Pillai Vs. P. Pillai and Another, has held as under:

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The Defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the Plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original is was raised or defence taken, Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which can not be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

23. Hon"ble the Apex Court in the case of Andhra Bank Vs. ABN Amro Bank N.V. and Others, while dealing with the matters relating to the amendment in written statement has held that it is a well settled law that delay is no a ground for refusal of prayer of amendment in a written statement and further held that the amendment in a written statement should be considered liberally and the additional ground taken by a Defendant to be incorporated in a written statement shall be allowed.

24. In view of the abovesaid facts, no doubt the principle which emerged out that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

25. Such being the settled law, in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case [see B.K.N. Narayana Pillai Vs. P. Pillai and Another, and Baldev Singh and Others Etc.

Vs. Manohar Singh and Another Etc., Basavan Jaggu Dhobi v. Sukhnandan Ramdas Choudhary

26. In view the abovesaid settled proposition of law by the various decisions of the Apex Court as well as by this Court, the court should liberal while allowing amendment in the written statement but while doing so, it is also settled proposition that it should be kept in mind that no serious injustice or irreparable loss is cost to the other side on the ground that the prayer of amendment is not bona fide one.

27. Further, the Privy Council in the case of Ma Shwe Mya v. Maung Mo Hnaung AIR 1922 P.C. 249 has observed as under:

All rules of courts 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.

28. In the case of Ajendraprasadji N. Pandey and Anr. v. Swami Keshavprakeshdasji N. and Ors. 2007 AIR SCW 513, the Apex Court after reviewing and taking into consideration the law on subject has held that before allowing the amendment in a written statement, the Defendant who has sought amendment would have to satisfy that the matter sought to be introduced by amendment could not be raised earlier in respect to due diligence which is one of the foremost requirement of law while allowing an application for amendment in written statement as per the requirement of order VI Rule 17 CPC.

29. Word, "due diligence" in allowing an amendment in a pleading has been considered by the Apex Court in the case of Chander Kanta Bansal v. Rajinder Singh Anand, 2008 AIR SCW 3225 and it has held as under:

It was brought to our notice that both sides have closed their evidence and completed their argument, but only at this stage the Defendant filed the said application for amendment of her written statement. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the

attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

30. Further, in paragraph No. 12 in the case of Chander kant Bansal (supra), it was also held as under"-

As rightly referred to by the High Court in Union of India (UOI) Vs. Pramod Gupta (D) by L.Rs. and Others, this Court cautioned that delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings.

31. In the case of Ravajeetu Builders and Developers v. Narayanaswamy and sons and Ors. 2009 (10) SCC 84, Hon"ble Apex Court after reviewing the law on the subject and considering the varuous pronouncements as laid down , the factors which should be taking into consideration while dealing with the application for amendment in paragraphs 63, it has been held as under:

Para 63 -On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amend-ment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multi-ple litigation;

(5) Whether the proposed amendment con-stitutionally or fundamentally changes the nature and character of the case? and (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

32. In view of the aboesaid facts, argument advanced by the learned Counsel for the Petitioner to the effect that as there is no pleading on the part of the Petitioners/tenants in their written statement, so if the amendment is not allowed, they cannot lead the evidence in support of their case. In my opinion is not tenable because in the present case, the amendment which is sought by the Petitioners is at appellate stage and admittedly the plea which the Petitioner/tenant wants to brought by way of amendment was within their knowledge at the trial stage i.e. before the prescribed authority and on the basis of the said plea

was also taken on their behalf in the written statement.

33. Needless to mention herein that though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take evidence in the shape of additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 Code of CPC Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist. The circumstances under which additional evidence can be adduced are:

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, (clause (a) of sub rule (1)) or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, (clause aa, inserted by Act 104 of 1976) or

(iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. (clause (b) of sub rule (1)).

34. Accordingly, argument advanced by the learned Counsel for the Petitioner that if the plea as sought by them in written statement if not allowed to be incorporated they can not led any evidence is also misconceived as in the appellate stage evidence may be admitted by an appellate authority if it "requires" to enable it to pronounce judgment "or for any other substantial cause". The scope of the rule, in particular of Clause (b) was examined way back in 1931 by the Privy Council in Parsotim Thakur and Ors. v. Lal Mohar Thakur and Ors. AIR 1931 PC 143, while observing that the provisions of Section 107 as elucidated by Order 41 Rule 27 are clearly not intended to allow litigant, who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal, it was observed as follows:

Under Cl. (1) (b) it is only where the appellate Court "requires" it, (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands some inherent lacuna or defect becomes apparent.

35. In the case of K. Venkataramiah v. A. Seetharama Reddy and Ors. (1963) 2

SCR 35, a Constitution Bench of Hon"ble the Apex Court while reiterating observations in Parsotim"s case (supra), pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause.

36. So, keeping in view the abovesaid position of law, in nutshell it can be laid down that while granting or allowing the amendments under order 6 Rule 17 in plaint or written statement, two conditions must be satisfied i.e.:

(a) of not working injustice to the other side, and

(b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments 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.

37. Keeping in view the abovesaid principles in mind while dealing with the matter in question, the plea sought to be brought by way of amendment in written statement by the Petitioner/tenant at the appellate stage will cause serious pre-judice to the landlord/opposite parties, if allowed because they cannot be placed in the same position as the pleadings have been originally stood as well as the finding given by appellate court while rejecting the application for amendment moved by the Petitioners/tenants that the facts which they want to brought by way of amendment has already taken into consideration by the prescribed authority while passing order dated 31.08.2010 thereby allowing release application, I do not find any illegality or infirmity in the order under challenge.

38. For the foregoing reasons, the present writ petition lacks merit and is dismissed. No order as to costs.