
(2008) 06 RAJ CK 0004
In the Rajasthan High Court

Mahendra Singh Gehlot

APPELLANT

Vs

Gopal Arora and Others

RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 151
Constitution of India, 1950 — Article 227

Citation : (2008) 4 RLW 3681

Hon'ble Judges : Dinesh Maheshwari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dinesh Maheshwari, J.—By way of this writ petition, the plaintiff-petitioner seeks to question the order dated 08.12.2007 (Annex.12) as passed by the learned Trial Court allowing an application for amendment of the written statement as moved by the defendants-respondents. The plaintiff-petitioner essentially contends that the amendment operates to his prejudice in taking away an accrued right; and that the amendment could not have been allowed after the trial had commenced.

2. The background facts and relevant aspects of the matter are that the plaintiff-petitioner has filed the suit [C.O. No. 20/2003 in the Court of Additional Civil Judge (Senior Division) No. 3, Jodhpur] for eviction and recovery of arrears of rent against the defendants-respondents in relation to a shop situated outside Sojati Gate, Jodhpur with the averments in the plaint (Annex.13), inter alia, that the shop in question is of his ownership and had earlier been of the ownership of his aunt Dr. Parvati Gehlot; that the suit shop was let to Swaroopji, the father of the defendants, by Dr. Parvati Gehlot in the childhood of the plaintiff; that the tenant Swaroopji started his business in the suit shop in the name of Shyam Provision Store; that until the father of the defendants was alive and until the then owner Dr. Parvati Gehlot was alive, they continued to pay and receive the rent as settled between them; that afterwards, the defendants continued to carry

on business in the name of Shyam Provision Store and entered into an oral agreement with the plaintiff to make payment of rent at Rs.700/- per month and made such payment until 30.09.1999 but not thereafter; that upon the plaintiff demanding the due rent, the defendants stated slump in their business and sought time to make payment; that appreciating their request, earlier the plaintiff did not press hard for payment of rent but despite later demands, the defendants have not made any payment and are liable to pay Rs.25,200/- towards due rent for last three years. The plaintiff has averred that the defendants are defaulters in payment of rent and has also averred about his reasonable and bonafide requirement of the suit shop for establishing an office for sale and purchase of immovable property with the submission that he is in dire need of money for higher education of his son and daughter-in-law who are to pursue their specialized medical studies. The plaintiff has, thus, sought the decree for the said amount towards arrears of rent and for eviction on the grounds of default and reasonable and bona fide requirement.

3. In their written statement (Annex.1), the defendants have, in the first place, taken the preliminary objections with the averments that the suit shop was taken on rent by their grand father late Shri Jethmal from the plaintiff's father late Dr. Govind Singh in the year 1956 at Rs.30/- per month; that after grand father, their father late Shri Swaroop Chand continued as tenant of Dr. Govind Singh and continued to make payment of rent at Rs.30/- per month. According to the defendants, for the rent having not been accepted from the month of April 1974, their father filed an application for depositing the same in the Court; however, during the pendency of such proceedings, the landlord Dr. Govind Singh expired on 07.07.1975 and notices were sent to his heirs including the plaintiff Mahendra Singh, his mother Smt. Sumitra, his brother Rajendra Singh, and his sisters but none appeared in the Court despite notice; and the Court ordered payment of the deposited amount of rent to the heirs of Dr. Govind Singh.

4. The defendants have further stated that for Dr. Govind Singh and his heirs having not accepted the rent of the suit shop, their father got served a notice through lawyer to the plaintiff, his brother, and his mother to disclose the particulars of the bank account wherein the amount of rent from 01.02.1975 to 31.12.1976 could be deposited but such notice was not replied either. According to the defendants, until the year 1987, their father Swaroop Chand continued as tenant in the suit shop and they were carrying on business with him; and after demise of their father Swaroop Chand, the relationship of landlord and tenant got established between the heirs of Dr. Govind Singh and the defendants. The defendants have suggested that the suit is liable to be dismissed for the plaintiff having concealed all the material facts and having not impleaded Smt. Sumitra and Rajendra, the heirs of Dr. Govind Singh, as parties. The defendants have also averred that the plaintiff has not obtained any Succession Certificate as being the sole owner of the suit property nor sent any information about his ownership to them. The defendants have further averred that the plaintiff has wrongly filed this suit with false averments about her aunt Dr. Parvati being the erstwhile

owner and about himself being the owner at present.

5. After such preliminary submissions, the defendants have proceeded to state their paragraph-wise reply but with a prefatory note that the plaintiff has stated ownership of the suit shop in her aunt Dr. Parvati and has claimed himself to be the present owner but has not filed any document in relation to the ownership of Dr. Parvati and hence, until filing of such documents by the plaintiff regarding ownership of Dr. Parvati and regarding his ownership through her, they are filing the present reply but keeping their rights reserved to file detailed written statement in relation to the ownership of Dr. Parvati, and of the plaintiff through her. Thereafter, the defendants have proceeded to elaborate on the averments already taken in their preliminary submissions, have denied the averments of the plaintiff regarding his ownership of the suit shop, have denied existence of relationship of landlord and tenant between Dr. Parvati Gehlot and their father, have reiterated the assertion that their grand father, and thereafter their father, were the tenants of Dr. Govind Singh and that they have inherited the tenancy in the suit shop after working with their father till his life time, have asserted that they are continuing as tenants of the heirs of Dr. Govind Singh, and have denied having entered into any agreement with the plaintiff as alleged. The defendants have denied the allegation of default in payment of rent and so also the averments regarding reasonable and bona fide requirement of the plaintiff.

6. It appears that in this suit, an application (Annex.3) was moved by the defendants under Order VII Rule 11 of the CPC (CPC) with the submissions that the plaintiff has failed to produce any document relating to the ownership of late Dr. Parvati Gehlot or regarding relationship of landlord and tenant between herself and the defendants and that the documents produced by the plaintiff do not show if he has become owner of the suit shop and is entitled to recover rent whereas the documents produced by the defendants make out that relationship of landlord and tenant had been between the father of the plaintiff and the father of the defendants. The defendants, thus, contended that the plaintiff having failed to disclose any cause of action for filing the suit for eviction and recovery of arrears of rent, the plaint was liable to be rejected. By its order dated 02.08.2005 (Annex.4), the learned Trial Court rejected the application so moved by the defendants with the observations that the question about the plaintiff's ownership of the suit shop could only be decided after trial.

7. It appears further that in this suit, the learned Trial Court proceeded to make provisional determination of rent by the order dated 06.10.2006 (Annex.5) while noticing the assertion of the plaintiff-petitioner about the suit property having been bequeathed to him by Parvati Gehlot and the admission of the defendants of themselves being the tenants of the heirs of Dr. Govind Singh. The learned Trial Court observed that if not as successor of Parvati Gehlot, the plaintiff nevertheless remains the landlord as an heir of Dr. Govind Singh; and even if there were other co-owners of the property, the law remains settled that any one of the co-owners could maintain the suit for eviction. The said order and other

aspects being not directly related to the prayer for amendment of the written statement need not be dilated upon any further in this order; but have been referred to indicate the nature of dispute, and the respective position of the parties.

8. The learned Trial Court framed relevant issues for determination of the questions involved in the case on 06.10.2006; and issue No. 1 has been framed on the fundamental question as to whether the plaintiff is the landlord and the defendants are the tenants and there exists the relationship of landlord and tenant between the parties?

9. After framing of issues, on the date fixed for evidence, i.e., 24.11.2006, the plaintiff-petitioner moved an application (Annex.7) under Order XII Rule 6 CPC with a request to the Trial Court to decide the suit immediately on the basis of the so-called admissions of the defendants on denial of title of the plaintiff-landlord and submitted that the defendants have emphatically denied his title and reiterated such denial even at the time of provisional determination of rent. The defendants filed a reply (Annex.8) to the said application with the submissions, inter alia, that the plaintiff has filed the suit stating himself to be the owner on the basis of a Will of late Dr. Parvati and they have only denied the ownership claim of the plaintiff on the basis of the alleged Will; that specific expression in that regard has not appeared in paragraphs 1 to 4 of the written statement for typographical error but they have filed an application for amendment of the written statement.

10. The defendants maintained that they had only denied the claim of the plaintiff on the basis of the Will of late Dr. Parvati Gehlot and that alone had been their intention. The defendants did move an application for amendment of the written statement under Order VI Rule 17 read with Section 151 CPC on 13.04.2007 (Annex.9) with the submissions that in paragraphs 1,2,3 and 4 of their written statement, wherever they have taken the averments regarding the question of ownership of the plaintiff, a line has not appeared to state that they do not admit the ownership claim of the plaintiff ?on the basis of the alleged Will from late Dr. Parvati?; and prayed that by way of amendment they be permitted to insert such an expression at the relevant places in the aforesaid paragraphs. The application for amendment so moved by the defendants was put to contest by the plaintiff with the reply dated 10.05.2007 (Annex.10) on the submissions that the amendment prayed for was not necessary for determination of the questions involved in the case; that application for amendment has been moved after framing of issues and during pendency of the trial; that the defendants have not stated that such amendment could not have been prayed before framing of issues and, thus, according to the plaintiff, the application for amendment was not maintainable in view of the proviso to Rule 17 of Order VI CPC. The plaintiff also submitted that because of the pleading taken by the defendants, substantial rights have accrued to him and he would be prejudiced by such amendment.

11. The learned Trial Court in its impugned order dated 08.12.2007 (Annex.12) has not agreed with the objections as taken by the plaintiff-petitioner to the prayer for amendment of the written statement with the observations that the plaintiff has alleged the property in dispute to be of his aunt and then having fallen in his ownership but the defendants have taken elaborate averments in that regard in their preliminary objections and, of course, have raised dispute about ownership but then, prima facie, the written statement does not make out if the defendants have clearly challenged the ownership of the plaintiff as such. The learned Trial Court has observed that in this case, only the issues have been framed and the evidence has not commenced; and the amendment as prayed for cannot be said to be improper or unwarranted nor does it take away any legal rights of the plaintiff. The learned Trial Court has, however, observed that the prayer for amendment was made about four years after filing of the written statement and looking to the aspect of delay, has allowed the prayer for amendment on costs of Rs.500/-.

12. Seeking to assail the order aforesaid, Learned Counsel Mr. K.S. Rathore appearing for the plaintiff-petitioner has contended with reference to the decision of the Hon"ble Supreme Court in the case of Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., that the prayer for amendment could not have been allowed in the present case so as to take away the accrued rights of the plaintiff and to displace him from the admissions made by the defendants in the written statement. Learned Counsel next contended that the application for amendment could not have been allowed for being hit by the proviso to Rule 17 of Order VI CPC. While pointing out that issues were framed in this case on 06.10.2006 and the application for amendment was moved only on 13.04.2007, Learned Counsel urged that the application was required to be rejected because it was moved much after framing of the issues and commencement of the trial and nothing was stated that the amendment could not have been prayed earlier despite due diligence. Learned Counsel has referred to and relied upon the decision of the Hon"ble Supreme Court in Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others, . Learned Counsel submitted that the defendants have consciously denied the title of the plaintiff-landlord and have incurred the liability for eviction for such denial; and the application for amendment has been moved only in order to frustrate the rights that have accrued to the plaintiff because of such pleading of the defendants and to frustrate the application moved under Order XII Rule 6 CPC.

13. Having given a thoughtful consideration to the entire matter, This Court is clearly of opinion that this writ petition remains bereft of substance and the impugned order does not call for any interference.

14. Looking to the overall circumstances of the case and the pleadings of the parties, This Court is unable to agree with the submissions of Learned Counsel that the amendment in question would take away the accrued rights of the plaintiff petitioner. There does not appear any such right that has ?accrued? to

the plaintiff and that is taken away by the amendment in question.

15. As noticed hereinbefore, in the averments taken in the written statement by way of preliminary objections, the defendants have not refused to recognise themselves as tenants and have rather alleged that they have inherited the tenancy from their father who inherited the same from his father. So far the landlord is concerned, the defendants have alleged none other but the father of the plaintiff to be the original landlord and have asserted that the heirs of the father of the plaintiff-petitioner, including the plaintiff himself, are now the landlords; and have further averred that such heirs, including the plaintiff, were served with the notice of deposit of rent by the Court and were also served with the lawyer's notice for disclosing bank account particulars. In that continuity, the defendants have raised the objection that the plaintiff has not impleaded the other heirs of his father Dr. Govind Singh as parties and has failed to show his exclusive ownership; and in that very sequence, the defendants have challenged the plaintiff's claim of his ownership preceded by the ownership of his aunt Dr. Parvati.

16. Noteworthy it is that apart from other averments, the defendants have prefaced their paragraph-wise reply with the submissions that the plaintiff has not filed any document in relation to the ownership of Dr. Parvati and of his having acquired ownership through her; and they would reserve their right to file written statement upon filing of such documents. Such preface before paragraph-wise reply reads as under:

;g gS fd oknh us okn i= ds in la[k&1 esa of.kZr gnwn dh nqdku dks iwoZ esa viuh HkqvK Mk- ikoZrh ds LokfeRo dh gksuk crkdj orZeku esa Loa; dk LokfeRo crk;k gS] ijUrQ bl ckcr gS] ijUrQ bl ckcr fdLh Hkh izdkj dk dksbZ nLrkost ikoZrh ds LokfeRo ds laca/k esa U;k;ky; gktk esa izLrqr ugha fd;k gS A blfy, tc rd oknh } kjk ikoZrh ds LokfeRo o mlds ekQZr vius LokfeRo gksus ds laca/k esa dksbZ nLrkost U;k;ky; esa izLrqr ugh dj fn;s tkrs gS rc rd izfroknHx.k dh vksj ls ikoZrh ds LokfeRo o mlds ekQZr oknh ds orZeku esa LokfeRo mDr nqdku ij gksus ds laca/k esa IEiw.kZ tckc nkok izLrqr djus ds vius vf/kdkj dks lqjf{kr j[krs gq, ;g inokj tckc fuEu fyf[kr izLrqr gS

17. Thereafter, in paragraphs 1,2,3 and 4 of the written statement, the defendants have stated their case in detail and, while denying the averments of the plaintiff regarding his ownership of the suit shop and regarding existence of relationship of landlord and tenant between Dr. Parvati Gehlot and their father, the defendants have averred that their grand father was the original tenant who was succeeded by their father and the landlord had been Dr. Govind Singh and after him, his heirs. The defendants have not denied the status of the plaintiff as an heir of the original landlord Dr. Govind Singh.

18. Thus, the denial of the claim of title of the plaintiff is coupled with the other averments in the written statement about the father of the plaintiff being the original landlord and such rights having been succeeded by his heirs; and is

further qualified by the submissions preceding the paragraph-wise reply that the plaintiff has not shown any document in support of his claim of ownership of Dr. Parvati, and of himself having acquired ownership through her. It remains trite in law that a pleading has to be read as a whole to ascertain its true import; and a sentence or a passage in a pleading cannot be read in isolation and out of context. A comprehensive reading of the written statement in question makes out that the underlying idea has been of questioning the source of the plaintiff's derivative title as stated in the plaint, i.e., through the plaintiff's aunt Dr. Parvati, whom the defendants do not admit to be the landlord and, instead, asserting another source of such derivative title, i.e., from the plaintiff's father Dr. Govind Singh, of course, with the objection that other heirs of the plaintiff's father have not been joined in the suit. It is difficult to conclude at this stage that such pleading of the defendants leads to unequivocal disclaimer or that there has 'accrued' any right in the plaintiff because of such pleading.

19. It may be pointed out that the Hon'ble Supreme Court in the case of Akshaya Restaurant Vs. P. Anjanappa and Another, has been pleased to indicate the settled position of law that even the admission in the pleadings can be explained. The Hon'ble Court said,

...It is settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings....

20. Though it is difficult to conclude in the present case that there had been any admission on the part of the defendants as repeatedly claimed on behalf of the plaintiff but, even if some so-called admission were to be culled out by some stretch of interpretation, in the totality of the circumstances of the case, that had only been of questioning the source of derivative title of the plaintiff as alleged in the plaint; and the averments in the written statement could definitely be explained to specify that the defendants are denying the pleadings of the plaintiff wherein he claims derivative title from his aunt. In view of the averments already taken in the preliminary objections and prefatory note to the paragraph-wise reply as referred hereinbefore, if the defendants wanted to modulate the averments wherever occurring in the paragraph-wise reply to the effect that 'the plaintiff is not the owner of the suit shop' by amendment to read that 'the plaintiff is not the owner of the suit shop on the basis of alleged Will of late Dr. Parvati', in the opinion of This Court, such amendment could only be treated clarificatory in nature and in conformity with the existing averments. The amendment in question does not in any manner alter the fundamentals of the stand of the defendants; and has rightly been allowed.

21. So far the decision in Modi Spinning & Weaving Mills Co. Ltd. (supra) is concerned, therein the suit was filed by the plaintiff for recovery of an amount of Rs.1,30,000/-. The defendants in paragraph 25 of their written statement admitted that the agreement dated 07.04.1967 was applicable to the transactions in which the plaintiff worked as their stockist-cum- distributor and was not applicable to the transactions in which the plaintiff acted as a principal.

The defendants also pleaded in the alternative in paragraph 26 that even if the said agreement be applied to the dealings in the suit, the plaintiff's position was merely that of an agent and he was not entitled to claim damages from the defendants for non-supply of its own goods for sale through the plaintiff. After three years, the defendants sought amendment of the written statement by substituting the said paragraphs 25 to 26 with a new plea that by virtue of the agreement, the plaintiff was appointed a mercantile agent and acted throughout in that capacity in placing orders on the defendants. The Trial Court rejected the prayer of amendment, inter alia, on the ground that the defendants wanted to resile from the admission made in paragraph 25 of the written statement (to the effect that the plaintiff was a stockist-cum-distributor) and such repudiation of clear admission was motivated to deprive the plaintiff of the valuable right accrued to him. The High Court affirmed the said order of the Trial Court while saying that by means of amendment, the defendants wanted to introduce an entirely different case and the amendment, if permitted, would prejudice the other side. The Hon'ble Apex Court approved such rejection of the prayer for amendment while observing that the defendants cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and to substitute an entirely different and new case.

22. For the obvious difference of the import of the pleadings in question, the decision in *Modi Spinning & Weaving Mills Co. Ltd.* (supra) has no application to the present case. Herein, the defendants have not changed completely their case as stated in the original written statement nor have introduced an entirely different or new case.

23. The other submission of the Learned Counsel for the petitioner with reference to the proviso to Rule 17 of Order VI CPC, in the fact situation of the present case, does not carry even a technical value what to say of substance. The expression 'before commencement of trial' in the said proviso is required to be understood in its context and cannot be applied in the manner as if immediately with signing of the memo of issues, the trial is deemed to have commenced and as if the application for amendment of pleadings if filed after framing of issues would be treated as the one filed after commencement of trial. In the case of *Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.*, the Hon'ble Supreme Court has explained:

17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the CPC must be understood in the limited sense as meaning the final hearing of the suit,

examination of witnesses, filing of documents and addressing of arguments. As noted herein after, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings.

24. In Ajendraprasadji's case (supra) as relied upon by Learned Counsel for the petitioner, the Hon'ble Supreme Court found that the prayer for amendment was made by the defendants after three witnesses had been examined although the matters sought to be introduced by way of additional written statement were known to the defendants and no grounds were raised in the application for amendment that despite exercise of due diligence such matters could not have been raised. After examining the history of the proceedings in the suit, the Hon'ble Supreme Court found that the defendants were lacking in bona fide and that the amendment would cause serious prejudice to the plaintiff. It was also found that by way of amendment a totally new and inconsistent case was sought to be introduced.

25. Even in Ajendraprasadji, the Hon'ble Supreme Court has not held that for the purpose of the said proviso to Rule 17 of Order VI CPC, trial commences with settlement of issues. In the case of Usha Devi Vs. Rijwan Ahamd and Others, , after reproducing paragraph 57 of the decision in Ajendraprasadji, the Hon'ble Supreme Court has been pleased to point out,-

From the above quoted passage, it appears that the decision did not hold that settlement of issues marks the commencement of trial. Earlier in the decision, the Court exhaustively examined the proceedings from date to date and on that basis came to hold and find that the prayer for amendment was made after the commencement of trial.

26. Thus, it cannot be concluded that with mere framing of issues the trial would be deemed to have commenced. Moreover, in the present case, the fact that the trial has not commenced is not far to seek; and is rather borne out from the very assertion of the plaintiff that instead of leading evidence after framing of issues, he moved an application under Order XII Rule 6 CPC on the suggestion that a decree be granted on the basis of so-called admission. For the very procedure adopted by the plaintiff, to claim a decree per Order XII Rule 6 CPC after framing of issues instead of adducing his evidence, it is but clear that the plaintiff himself has not permitted the trial to commence and hearing to begin. Having regard to the circumstances, This Court is clearly of opinion that it is not a case where amendment could not have been allowed because of operation of the proviso to Rule 17 of Order VI CPC.

27. It may further be pointed out that the proviso to Rule 17 of Order VI CPC is not of absolute bar against the amendment of pleadings. The provision is to the effect 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 commencement of the trial. Again, the requirement to consider if the party could not have raised the matter in spite of due diligence cannot be put to such a pedestal that refusal of amendment would be a rule and allowing would be an exception. The elements of 'due diligence' for the purpose of the said proviso to Rule 17 of Order VI CPC are required to be considered from a practical stand point and keeping in view the fact that the rules of procedure are intended to facilitate and not to hinder the cause of justice.

28. In the present case, it has more been a matter of aptness of expression in the original written statement, particularly in the paragraph-wise reply, of the case already set up and spelt out in the preliminary objections and in preface to the paragraph-wise reply. Want of felicity, if at all there be any, in a pleading could occur despite due diligence so far a litigant is concerned because the manner of expression depends on the diction of the person drafting the pleadings, something an ordinary litigant has little control over. Keeping in view such a ground reality and further keeping in view the principles that the rules of procedure are not intended to trip the people up, it is the substance and not the form that is looked at; and wherever necessary, a clarificatory amendment is permitted. The prayer for clarificatory amendment of written statement in the present case has rightly been allowed with application of relevant principles. It may, in the passing, be observed that the prayer for this amendment was rather enticed and induced by the plaintiff himself when, instead of leading evidence after framing of issues, he moved an application seeking decree on so-called admission; and the facts do not go unnoticed that even the expressions in the original plaint (produced later in this writ petition as Annex.13) have not been of specification and exactitude so far the claim of derivative title of the plaintiff is concerned.

29. Viewed from any angle, the present one being precisely the case of clarificatory and explanatory amendment of the written statement; and such amendment being necessary for determination of real questions in controversy, the learned Trial Court has not committed any error or illegality in allowing the same.

30. There is yet another aspect of the matter wherefor this writ petition does not merit admission. With amendment to the CPC by the Amendment Act of the year 1999, particularly with alteration in the scheme and operation of Section 115 CPC, interference under Article 227 of the Constitution of India is, sparingly, considered in such kind of cases where the impugned order might lead to substantial failure of justice or to such injury that could be said to be irreparable one to a party to the litigation; or the matters of the like nature. Having regard to the overall facts and circumstances, the exercise of jurisdiction by the learned Trial Court in the present case, of allowing clarificatory amendment, cannot be said to be leading to any injustice what to say of substantial failure of justice.

31. The writ petition fails and is, therefore, rejected.