

(2012) 04 GUJ CK 0044

In the Gujarat High Court

Case No : Special Civil Application No. 8017 of 2011

Maheshkumar Balubhai

APPELLANT

Vs

Pramodbhai Balubhai Patel and Others

RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 22
Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 26

Citation : (2013) 1 GLR 155

Hon'ble Judges : S.G. Gokani, J

Bench : Single Bench

Advocate : Dhaval D. Vyas, for the Appellant; Mihir Thakore with A.B. Munshi for Respondent Nos. 1 and 4-6, for the Respondent

Final Decision : Dismissed

Judgement

Sonia Gokani, J.—This application is preferred under Art. 227 of the Constitution of India. Petitioner herein has challenged the order of learned Principal Civil Judge, Olpad, Surat passed in Regular Civil Suit No. 23 of 2008, challenging the order of rejection seeking amendment in the plaint. It would be necessary to briefly narrate the facts. Petitioner-plaintiff filed the suit in respect of land bearing Survey No. 76/01 of Block No. 107 situated at Olpad, Surat owned by Smt. Diwaliben D/o. Keshav Mulji who died intestate on 24th May, 1958 leaving behind heirs and legal representatives.

2. Shri Balubhai Patel had represented and survived the properties of Smt. Diwaliben and on partition, mutation entry was entered into the record of rights which was certified on 10-5-1961. As there was no partition by metes and bounds, name of present petitioner continued in the revenue record till 2007 and by a relinquishment deed, his name was deleted.

3. Petitioner filed Regular Civil Suit No. 23 of 2008 inter alia for declaration of right, partition and injunction in respect of suit property taking specific plea that

relinquishment deed was prepared fraudulently and deleting his name from the record was the act of the respondent contrary to the law.

4. Respondent-original defendants filed their written statement contending therein that the petitioner-plaintiff ceased to be a member of Mr. Balubhai's family as he was given in adoption by a deed dated 18th May, 1979 to his maternal uncle and aunt Shri Chhotubhai and Savitaben Patel. On 30th September, 1996, both the adopting parents also declared before Government authorities that the petitioner is taken in adoption. In such factual background, application below Exh. 34 was moved by the present petitioner for the amendment of the plaint challenging the deed of adoption and after receiving the reply of the respondent herein, learned Principal Civil Judge, Olpad rejected such an application for amendment dated 29th April, 2011 by holding that not only this changes the very nature of the suit but the same very seriously prejudices the rights of the defendants-respondent. Impugned order requires scrutiny in the present petition.

5. Learned Advocate Mr. D.D. Vyas appearing with Mr. Dhaval Vyas for petitioner urged the Court that Order 6, Rule 17 of the Civil Procedure Code, permits amendment at any stage of proceedings and same should be allowed as that targets minimizing of future disputes between the parties. Moreover, Court cannot go into the merits of the amendment at the stage of deciding such applications. It has merely to restrict inquiry whether such an amendment is necessary for addressing dispute between the parties. The aspect of limitation also can be adjudicated finally. According to the learned Advocate, this was not a stage for Court to enter into merit and reject the application. He substantiated his submissions with the following authorities:

1. Mohanlal Motilal Sevak Vs. Bhikhabhai Himatlal Sevak and Another,
2. Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another,
3. Prem Singh and Others Vs. Birbal and Others,
4. B.K.N. Narayana Pillai Vs. P. Pillai and Another,
5. Daya Singh and Another Vs. Gurdev Singh (Dead) by L.Rs. and Others,
6. Dhanraj Vs. Smt. Suraj Bai,
7. Ragu Thilak D. John Vs. S. Rayappan and Others,
8. Puran Ram Vs. Bhaguram and Another,
9. North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs.,
10. Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others,
11. Usha Devi Vs. Rijwan Ahamd and Others,

12. Daya Singh and Another Vs. Gurdev Singh (Dead) by L.Rs. and Others,
13. Pankaja and Another Vs. Yellappa (D) by Lrs. and Others,
14. South Konkan Distilleries and Another Vs. Prabhakar Gajanan Naik and Others,
15. Mavji Dhorji v. State of Gujarat, reported in 1994 (1) GLH 20
16. Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another,
17. State of Orissa v. Brindaban Sharma
18. Ranganayakamma and Another Vs. K.S. Prakash (D) by L.Rs. and Others,
19. Suraj Prakash Bhasin Vs. Smt. Raj Rani Bhasin and Others,

6. Per contra, learned Senior Advocate Shri Mihir Thakore appearing for the respondent forcefully submitted that this is a classic example of dishonest pleadings. Having taken advantage of being an adopted son, petitioner has now chosen to claim the property where by sheer co-incidence, his name continued in the revenue record. His suit to get his share by partition from the property itself does not reveal anywhere that he was already given in adoption by his maternal uncle and aunt. Therefore, he ceased to be the part of the family of Shri Balubhai and Diwaliben. He further urged that challenge to the adoption deed is on the count that he was already 25 years of age and Hindu Adoption and Maintenance Act permits only a person below the age of 15 years to be given in adoption. However, customs of many communities permit such adoption which is a valid adoption as per statute and community of petitioner is one of them. Moreover, according to the learned Advocate, he himself has changed his name from Mahesh Babubhai to Mahesh Chhotubhai by making an application to the competent authority which was signed by him for publishing the same in the Official Gazette. Thus, from 1992, he was aware of such adoption and he has also taken benefit of adoption by getting property of Chhotubhai and now at this stage, by bringing amendment in the suit for partition, he seeks to challenge the deed of adoption of the year 1978, which is ex-fade time-barred. Counsel contended that even if the challenge could have been made to such deed, for declaring the same as null and void, the same ought to be within three years from such adoption on his knowledge. In the suit itself according to the learned Counsel, the entire structure and basis as also the cause of action would change if the same is allowed. Following are the authorities which are sought to be relied upon for the purpose:

1. Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) Thr. LRs.,
2. Adambhai Sulemanbhai Desai Vs. State of Gujarat,
3. Sampath Kumar Vs. Ayyakannu and Another,

7. Before advertizing the facts of this case, it will be profitable to reproduce the provision of Order 6, Rule 17 of the CPC at the outset.

17. Amendment of pleadings:- 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.

8. Admittedly, this being the suit of the year 2008, amended provision shall be made applicable to the same. Amendment sought is at pretrial stage admittedly, and hence, proviso is not required to be employed. What is required of the Court which is presented such application of amendment is to allow the alteration or amendment of pleadings at any stage of proceeding if found necessary for determining disputes between the parties. Entire thrust is to minimize the litigation by permitting such request. However, predominant consideration at such juncture while exercising discretion is to ensure that the same is necessary for adjudicating real controversy between the parties.

9. Law on the subject is very well laid down and hereinafter some of those decisions are reproduced for appreciation of the order in question.

10. Learned Advocate for the petitioner insisted that this being the partition suit, ratio laid down in case of Mohanlal Motilal Sevak v. Bhikhabhai Sevak (supra) would apply to the partition suit and his right is required to be determined in both the capacities of defendant and plaintiff.

3. In *Edjlji Muncherji Wooba v. Vullebhoy Khaubhoy*, LR 1878 (7) Bom. 167 the plaintiff had filed a suit for taking accounts of the partnership firm and had joined to that suit 21 defendants. He thereafter, applied to the Court for leave to withdraw the suit or in the alternative he prayed that the suit might be dismissed. Out of 21 defendants 10 defendants supported the plaintiffs application for withdrawal or dismissal of the suit. Two defendants objected to the application for withdrawal and applied under Sec. 22 of the Civil Procedure Code, 1877 for transposing them as plaintiffs. The Court granted their application. While granting that application it was observed that a partnership suit is a suit of a peculiar character and that the parties to such a suit do not stand to each other precisely in the same relation as parties to suits generally. Next, it has been observed in that decision that each of the parties to a partnership suit, however he may be formally ranked, is really in turn plaintiff and defendant and in both capacities he comes before the Court for the adjudication of his rights relatively to the other partners which the Court endeavours to determine by its decree. What has been observed by the High

Court of Bombay in regard to a partnership suit applies, in our opinion, with equal force to a suit for partition where also each one of the parties to the suit, however he may have been ranked, is plaintiff in his turn claiming his own share, if in the instant case respondent No. 2 is not transposed as appellant, respondent No. 1 would walk away without any let or hindrance with the entire property and for aught we know the appellant might have colluded with him.

11. For present, issue to be determined is whether the amendment proposed has rightly been denied or not.

In case of *Rajkumar Gurawara (Dead) through L.Rs. v. M/s. S.K. Sarwagi & Co. Pvt. Ltd.* (supra) Court has held that at any stage either party can be allowed to alter or amend his pleadings, if such amendment seeks determination of the real question of the controversy between the parties. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial as the opposite party is not much prejudiced in pre-trial amendment because he will have an opportunity of meeting the amendment sought to be made.

12. In case of *Prem Singh v. Birbal* (supra), it is held that for documents, which are void ab initio, there would be no need of decree to set aside them as such documents itself would be a nullity. It is held that limitation is statute of repose; it ordinarily bars a remedy but does not extinguish a right.

13. In case of *B.K. Narayana Pillai v. Parameswaran Pillai* (supra), Court has reiterated well-known principle that amendment should be permitted where it would result in solution of real controversy between parties, without altering original cause of action. It further says that, however, amendment cannot be claimed as a matter of right under all circumstances, but at the same time, Court ought not to adopt hypertechnical approach while deciding such prayers. It should be liberal particularly where any prejudice suffered by the other side can be compensated by costs.

14. In case of *Daya Singh v. Gurudev Singh (Dead) by L.Rs.* (supra), it is held that right to sue accrues when there is clear and unequivocal threat to infringe a right. In a matter before the Apex Court cause of action had arisen when wrong entries in revenue record were discovered for the first time by appellants and respondents refused to admit claim of appellants which had accrued to them consequent on compromise. It is held that the starting point of limitation in such case is from the time, cause of action/Right to sue when accrues.

15. In case of *Ragu Thilak D. John v. S. Rayappan* (supra), the Apex Court was considering the provision of Order 6, Rule 17 of CPC in a suit for permanent injunction for restraining defendants from demolishing compound wall of suit property where the defendants had already demolished compound wall, and therefore, plaintiff had sought amendment to add relief of recovery of damages and the Court held that the same should be allowed. Plea that the relief was barred by limitation could be raised after allowing amendment. Court reiterated

that the dominant purpose of allowing the amendment is to minimise the litigation and the plea that the relief sought by way of amendment was barred by time is arguable in the circumstances and of the case and the plea of limitation being disputed question could be made a subject-matter of the issue after allowing the amendment prayed for.

16. In case of *Puran Ram v. Bhaguram* (supra) it is held that mistake in description of suit property in plaint was sought to be rectified by bringing the amendment. Court was of the opinion that the amendment seeks only a change in a part of the description of the suit property, which was wrongly described by mutual mistake. Such change cannot convert the plaint the suit for specific performance of the contract to a suit for declaration Court held that Sec. 26 of the Specific Relief Act clearly says as to when a contract or other instrument can be rectified and provided that when through fraud or a mutual mistake of the parties, the agreement in writing does not express their real intention, it is open to the parties to apply for amendment of the instrument by bringing suit by either side.

Court also opined in this judgment:

15. Before parting with this judgment, we may deal with the submission of the learned Counsel for the respondent that the application for amendment could not be allowed inasmuch as the same was barred by limitation. We are unable to accept this contention of the learned Counsel for the respondents. In this regard, we may observe that the Court may, in its discretion, allow an application for amendment of the plaint even where the relief sought to be added by amendment is allegedly barred by limitation. This view was also expressed by this Court in *Pankaja and Another Vs. Yellappa (D) by Lrs. and Others*, . In that decision, it was held that there is no absolute rule that in such a case, the amendment should not be allowed and the discretion of the Court in that regard depends on the facts and circumstances of the case and such discretion has to be exercised on a judicious evaluation thereof. It was further held in that decision that an amendment, which subserves the ultimate cause of justice and avoids further litigation, should be allowed. It is well settled by a catena of decisions of this Court that allowing and rejecting an application for amendment of a plaint is really the discretion of the Court and amendment of the plaint also should not be refused on technical grounds. In this connection reliance can be placed on a decision of this Court in *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*, , In Paragraph 8 of the said decision this Court observed that "Since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted." A reading of this observation would amply clear the position that no question of limitation shall arise when misdescription of the name of the original plaintiff or misdescription of the suit property arose in a particular case. Apart from that in the present case,

although, the relief claimed before as well as after the amendment remained the same i.e. a decree for specific performance of the contract for sale, even then, in the facts and circumstances of the present case, as noted herein earlier, we do not find why the High Court should have interfered with the discretion used by the trial Court in allowing the application for amendment of the plaint.

17. In case of North Eastern Railway Admin., Gorakhpur v. Bhagwan Das (D) by L.Rs. (supra) which says that even at appellate stage, amendment of pleading is permissible, provided such amendment does not work injustice to other party and is necessary for determination of question in controversy.

18. In case of Rajesh Kumar Aggarwal v. K.K. Modi (supra), it is held that object of provision is partly mandatory and partly directory and the test that governs issue of amendment is the real controversy test.

19. Sum and substance of the above discussion is that the amendment, as provided under Order 6, Rule 17 of the Civil Procedure Code, can be permitted at any stage of proceedings. After amendment in the C.P.C. on 1st July, 2002, proviso which has been added makes incumbent upon the litigant seeking amendment at post trial stage to prove that despite due diligence before the trial Court begun, he was unable to move such an amendment.

20. However, as mentioned earlier, in the instant case, stage has not come where question of invocation of proviso would be necessary, and therefore, there cannot be any dispute with the principle that the amendment could be allowed at any point of time. So much so that the same is permissible, even at the appellate stage as the whole endeavour is to reduce the litigation between the parties, and therefore, the same is to be addressed with the real controversy test.

21. Basic aspect that cannot be forgotten while allowing the amendment is whether the same changes the very basic nature of the suit and if an amendment sought alters the very structure, the Court cannot permit the same. Moreover, if the same prejudices the defence of the parties incapable of being compensated, there also, Court should not grant the request of the amendment.

22. Moreover, with regard to the question of limitation also though there are judgments to the effect that when the question of limitation becomes a issue which cannot be decided as a pure question of law, on account of certain complicated facts in that case, Court can permit amendment from the facts and circumstances and issue of limitation can be framed as one of the issues to be determined at trial. However, if the question of limitation can be addressed directly without being saddled by complicated facts in a case where law ex-facie bars the fresh suit, Court can disallow such amendment.

23. Judgment of the Supreme Court is required to be profitably mentioned at this stage to support such say which is rendered in case of Ashutosh Chaturvedi Vs. Prano Devi @ Parani Devi and Others, .

24. For applying the aforementioned propositions of law to the facts of the

instant case, it needs to be regarded that it is very apparent that suit has been filed by present petitioner-plaintiff by not revealing true facts relating to his adoption by his maternal uncle and aunt. Petitioner also enjoyed the rights of being an adoptee son. He himself has given application to change his name in the Official Gazette and incidentally, his name continued in the revenue record, in the joint property of the family of his natural parents where he had released his right on documents and yet he mislead the Court and obtained the injunction against any change in the entry of mutation.

25. It was only when the defendants were served with the summons of the suit, they disclosed the true facts. Petitioner at this stage, is attempting to take advantage of legal provisions by stating that adoption itself was illegal as he was more than 15 years of age.

26. Assuming for a moment that even this apparently unpalatable stand he is permitted to take under the law as customary adoption is a matter of proof, then also, in the opinion of this Court, this amendment is sure to change the entire nature and structure of the suit. As the initial suit was merely seeking relief of declaration of right, partition and injunction in respect of jointly owned family property, challenging the relinquishment deed on the ground of alleged fraud played by the respondents herein whereas at this stage what is being challenged is the adoption deed, which he could not have done by preferring suit, and therefore, trial Court rightly held that the petitioner does not fulfil very basic criteria to allow his plea. This Court is of the firm opinion that since amendment would change entirely the nature of suit, the same cannot be permitted. This adoption deed was executed way back in the year 1979 and if he had intended to challenge by way of a separate suit, ex-facie such claim would be time-barred. His knowledge does not begin from the date of his knowledge of the entry in the revenue record. His knowledge will be from the date of deed of adoption and if not on that day, at least on the date of which he made an application for changing his name in the Official Gazette which was dated 14-12-1996. Thus, even simply calculating the period of his such claim to challenge the deed from 1996, ex-facie it is a time-barred claim. His case even otherwise does not require any consideration as this is an apparent case of manipulation of facts to gain advantage of the situations on the basis of legal provisions. There are no complicated facts which require adjudication as far as plea of amendment is concerned. Ordinarily merit of the case at length may not be necessary to be gone into at this stage, yet the facts which are necessary to be dealt with for allowing or disallowing such plea, will need consideration of course. Trial Court has not committed either jurisdictional error nor committed any material illegality necessitating invocation of writ jurisdiction which even otherwise is required to be exercised very sparingly in appropriate cases only. This is not one such case surely petition being devoid of any merit, is dismissed.