

(2016) 05 AHC CK 0092
In the Allahabad High Court
Case No : Civil Revision No. 167 of 2016

Mohar Singh Yadav and Others

APPELLANT

Vs

Mahendra Singh Jain and Others

RESPONDENT

Date of Decision : 04-05-2016

Acts Referred:

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

Citation : (2016) 6 ADJ 794 : (2016) 4 ALLJ 640 : (2016) 116 ALR 840 : (2016) 2 ARC 501 : (2016) 4 CivCC 223 : (2016) 132 RD 494 : (2016) 2 RJ 1155

Hon'ble Judges : Manoj Misra, J.

Bench : Single Bench

Advocate : Ramendra Asthana, Advocate, for the Appellant;

Final Decision : Dismissed

Judgement

Manoj Misra, J.— Heard Sri Ramendra Asthana on behalf of revisionists and perused the record.

2. This is defendants' revision against an order dated 18.03.2016 passed by the Additional Civil Judge (Sr. Div.), Court No.4, Agra in Original Suit No. 818 of 2013 by which plaintiffs' amendment application 34 Ka, alleging dispossession during pendency of suit, to amend the plaint so as to add the relief of mandatory injunction to restore possession to the plaintiffs as also to pay mesne profits at the rate of Rs. 25,000/- per month, has been allowed.

3. The necessary facts of the case are that Original Suit No. 818 of 2013 was instituted by the plaintiff-respondents for permanent prohibitory injunction against the defendants in respect of property shown in the plaint by letters A, B, C, D and E comprising land in Khasra No. 651 and Khasra Nos. 648, 649, 652 and 654, situated at Mauza Kakretha Mustakil, Tehsil and District Agra.

4. It appears that during the pendency of the suit, the plaintiffs approached the District Administration. The District Administration passed order in favour of the plaintiffs. It is alleged that the plaintiffs though were not in possession but were

put in possession over the disputed property with the aid of District Administration, therefore, challenging the orders passed by the District Administration, Writ C No. 38708 of 2013 was filed by the revisionists which was allowed by order dated 12.08.2013 by holding that the District Administration had no authority to transfer possession in between private parties and, accordingly, direction was issued to restore the possession, as it existed prior to the order passed by the District Administration. It was also clarified that the order would be subject to final adjudication by a competent court of law. Thereafter, the application of the plaintiffs seeking temporary injunction came for hearing on which an order was passed on 17.02.2014 directing the parties not to raise any fresh constructions or change the nature of the property in suit as also not to create any third party interest.

5. Against the order dated 17.02.2014, the revisionists preferred First Appeal From Order No. 1037 of 2014 before this Court, which was disposed of by order dated 20.04.2015, by which, without interfering with the impugned order passed by the trial court it was observed that the trial court would proceed to dispose of the suit itself, as expeditiously as possible, within a period of six months from the date of production of a certified copy of the order.

6. Soon after direction was given by this Court to decide the suit, on 06.05.2015 an application was moved on behalf of the plaintiff-respondents seeking addition of relief of mandatory injunction to restore physical possession of the suit property to the plaintiffs as also for mesne profits at the rate of Rs. 25,000/- per month on the ground that pursuant to the Writ Court's order dated 12.08.2013 in Writ C No. 38708 of 2013, the possession had been transferred to the defendants and, therefore, the amendment in the plaint was necessitated.

7. By the impugned order, this amendment application has been allowed on the ground that it was necessary to decide the real controversy between the parties.

8. Sri Ramendra Asthana, who has appeared on behalf of the revisionists, has submitted that the transfer of possession had taken place admittedly in the year 2013, pursuant to the order passed by the Writ Court, but the amendment application has been filed after lapse of about 18 months and since there was inordinate delay in filing the amendment application and there was also a direction of the appellate court to dispose of the suit itself within six months, the amendment, being highly belated, ought not to have been allowed. It has been submitted that a suit for permanent injunction has been converted into one for possession, which is not justified.

9. Sri Ramendra Asthana has placed reliance on a decision of the Apex Court in *Mashyak Grihnirman Sahakari Sanstha Maryadit v. Usman Habib Dhuka and others* : (2013) 9 SCC 485 so as to contend that where an amendment is highly belated, then the Court should be loath to allow amendment. Sri Asthana has further submitted that the court below while allowing the amendment has not at all considered the facts of the case that is whether the plaintiffs had been in

possession on the date of institution of the suit or not because it was throughout the case of the defendants that the defendants had been in possession of the suit property from the very beginning.

10. I have given thoughtful consideration to the submissions of the learned counsel for the revisionists.

11. Before advertng to the facts of the case it would be useful to first examine the law relating to consideration of prayer for amendment in the pleadings. In *Abdul Rehman v. Mohd. Ruldu*, (2012) 11 SCC 341, the apex court held that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. It was observed that change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

12. In *Sampath Kumar v. Ayyakannu*, (2002) 7 SCC 559, the question was whether in a suit for permanent prohibitory injunction which remained pending for 11 years the relief for declaration and recovery of possession should be allowed to be added by way of amendment or not. While allowing such amendment, in paragraphs 7 to 11 of the judgment, as reported, the apex court observed as follows:

"7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the trial court, it was open to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the trial court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.

8. In *Rukhmabai v. Lala Laxminarayan* AIR 1960 SC 335 this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well-settled rule of practise not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

9. Order 6, Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than

those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma v. Mamtha Shenoy*.)

11. In the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed."

13. It is thus clear that pre-trial amendments which are required to address to the real controversy between parties in the suit are not to be disallowed ordinarily, keeping in mind that it prevents multiplicity of suits, unless it seriously prejudices the interest of the other side. For instance, in cases where a completely new case is introduced or new relief sought by way of amendment, *ex facie*, is barred by limitation, on the date of moving the application, or an

admission made is being completely withdrawn by the proposed amendment thereby causing prejudice to the other side, the court should be loath to allow such amendments. But where the question whether the relief sought by way of amendment is barred by limitation or not, is arguable, meaning thereby that it requires adjudication by entering into the merit of the plea upon examination of evidence in that regard, it is open to the court to allow amendment subject to such question being examined as an issue in the suit and in such a case it is also open to the court to make such an amendment effective from the date of filing of the amendment application so that it does not relate back to the date of institution of the suit as normally an amendment does unless directed otherwise by the court {vide (2001) 8 SCC 561: Siddalingamma v. Mamtha Shenoy}. It is equally important to note that nature of the case does not change by addition or subtraction of a relief. If the foundational facts are already available in the plaint by mere addition of an effective relief the nature of the case does not change. It is equally well settled that while considering the amendment application the Court is not required to address to the merit of the plea sought to be incorporated {(2006) 4 SCC 385: Rajesh Kumar Aggarwal v. K.K. Modi; (2007) 6 SCC 167: Andhra Bank v. ABN Amro NV Bank; (2008) 3 SCC 717: Usha Devi v. Rijwan Ahmed}.

14. Coming to the facts of the instant case, the Court finds that there is a dispute between the parties with regard to possession of the suit land. The plaintiff claims that he is in possession of the suit land whereas the defendant claims to be in possession of the suit land. During the course of the suit proceeding, it appears that by administrative order, the defendants were evicted and the plaintiffs were put in possession. The administrative order was challenged by the defendants and the challenge was accepted by the Writ Court and, thereafter, again, the defendants came in possession of the suit land. The Writ Court while adjudicating the matter had left the competent Civil Court to take a final call on the above issue. Under the circumstances, the real controversy in issue between the parties is as to whether the plaintiff had been in possession of the suit land or the defendant had been in possession of the suit land and since, admittedly, by order of the Writ Court, there has been alteration in possession during the pendency of the suit proceeding, it cannot be said that the amendment which has been sought by the plaintiff in the plaint was not necessitated by subsequent developments and, therefore, the amendment which has been sought is crucial and critical for deciding the real controversy in issue between the parties. As, admittedly, the amendment has been sought within two years of alleged dispossession, it cannot be said that the amendment was so highly belated that the relief, as sought, had become barred by time. Further, the contention of the learned counsel for the applicant that the court below erred in law by failing to address to the question as to which party was in possession on the date of the institution of the suit, cannot be accepted, because it is well settled that at the stage of consideration of an application for an amendment, the merit of the plea is not to be tested ordinarily, as the same is to be adjudged

on the weight of the evidence led during the course of trial.

15. Now, the next question which remains to be examined is whether the amendment was hit by the proviso to Order 6, Rule 17 CPC. In this regard on 02.05.2016, this Court had directed Sri Ramendra Asthana to seek instructions from his client as to whether the trial of the suit had commenced on the date of filing of the amendment application or not.

16. Sri Ramendra Asthana has informed the Court today that, according to the instructions which he has received, till date, issues have not been framed in the case though a written statement has been filed by the defendants.

17. Under the circumstances, the trial has not commenced in the suit and as such the rigours of the proviso to Order 6, Rule 17 CPC are not applicable on the prayer for amendment of the plaint.

18. In view of the above, this Court does not find any legal error in the order passed by the court below, the revision is devoid of merit and is dismissed.