

(1975) 06 CAL CK 0023

In the Calcutta High Court

Case No : First Appeal No's. 491 and 492 of 1962

Nirmala Bala Ghosh and Others

APPELLANT

Vs

Balai Chand Ghosh and Others

RESPONDENT

Date of Decision : 05-06-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1877 — Section 42

Citation : AIR 1975 Cal 404

Hon'ble Judges : M.N. Roy, J;K.J. Sen Gupta, J

Bench : Division Bench

Advocate : R.C. Deb and Madhusudan Banerjee, in F.A. No. 491 of 1962, Saktinath Mukherjee and Rathina Bhattacharya, in F.A. No. 492 of 1962, for the Appellant; A.N. Mitra and Ramesh Chandra Sen, (for No. 1), for the Respondent

Judgement

Sen Gupta, J.—The application for amendment of the plaint filed by Balaichand Ghosh plaintiff-respondent No. 1 is before us for consideration. The said prayer has strenuously been contested by the defendants-appellants.

2. To understand the point in question a short history of the case may be stated :--

The applicant Balai Chand filed Title Suit No. 68 of 1956 in the 8th Court of Subordinate Judge at Alipore for declaration that he is the owner of the property in suit, set out in schedules A to H of the plaint and that ostensible owners thereof were his benamdars. The said suit was re-numbered as Title Suit No. 2 of 1961 of the 4th Extra Court of the Addl. Dist. Judge at Alipore. That was the suit by Balai Chand against his sons and daughters-in-law. It is sufficient for the purpose of consideration of this question to state that the properties described in the schedule were stated to have been acquired by the plaintiff in the name of the defendants on different dates. The plaintiff alleged that the defendants conspired together to disown him as the real owner of those properties under the colour of ostensible title which they had to respective properties, claiming the

same to be real. On the said allegation all the dependents were joined in the same suit and the cause of action was stated to have arisen on the 10th July, 1954 when the plaintiff was first obstructed from realising rent from the suit property.

3. The plaintiff asserted his possession in the property, in question. The defendants, on the other hand, asserted that they were real owners of the property and the same were in their possession.

4. In addition to the prayer "a" in which a declaration that the plaintiff was the real owner of the property in suit, the prayer "b" was also added in which the plaintiff prayed for a decree for permanently restraining the defendants jointly and severally from realising the rents, issues and profit from the suit property and disposing of the properties in suit and/or dealing with or encumbering the same.

5. Two sets of written statements were filed--one by Ramesh and his wife Sandhya defendant Nos. 4 and 8 respectively and another by defendant No. 1, wife and 2, 3 and 5 sons of the plaintiff and 6 and 7 the wives of defendant Nos. 2 and 3. The objections in the written statement were, however, almost in the same tune. All the defendants pleaded, inter alia, that the suit as framed was not maintainable and that the plaintiff being out of possession from the suit property should have paid court-fees on the market value of the same. On the pleading of the parties eight issues were framed. Of them two are relevant for the purpose of our consideration, they are issue No. 1 which was to this effect :

Is the suit maintainable in law in its present form?

and (6). Is the suit barred u/s 42 of the Specific Relief Act?

After the issues were framed the plaintiff, by his application dated 12-4-1957 made a prayer for deletion of the prayer (b) as made by him in the plaint. The said prayer was allowed on 30th April, 1957.

6. The suit was decreed on 31st March, 1962. The plaintiff was declared to be the real owner of the properties described in the schedules A to H of the plaint. While disposing of the issue No. 6 the trial court observed in paragraph, 285 of its judgment that:

"On behalf of the defendants, it was sought to be contended that a suit for mere declaration would not be maintainable if the plaintiff was out of possession. I have already found that the possession of the defendants was on behalf of the plaintiff till August, 1954 and that the plaintiff instituted this suit within two years from the date of his alleged dispossession."

Against the judgment and decree passed by the trial court defendant Nos. 1, 2, 5 and 6 preferred F. A. No. 491 of 1962 and defendant Nos. 4 and 8 preferred F. A. No. 492 of 1962.

7. We have already indicated the finding of the trial court on issue No. 6. The

said finding may indicate that the plaintiff was in possession in the suit land upto August, 1954 and therefore, when the suit was filed on October 20, 1956 he was out of possession from the same. The said finding, of course, has not been accepted by the plaintiff before us but to avoid any future difficulty such an application for amendment of the plaint has been filed.

8. We now proceed to consider the contention of the respective parties before we come to our conclusion.

9. Mr. P. N. Mitter, learned Advocate submitted that on the materials on record and on the facts proved there may not be any necessity for amending the plaint. Our attention has been drawn to the finding on the issue in which the bar of Section 42 of the Specific Relief Act has been raised. But in the same breath it has been argued that by way of abundant caution this application for amendment has been filed.

10. Both Mr. R. C. Deb, learned Counsel for the appellants in F. A. No. 491 of 1962 and Mr. Saktinath Mukherjee, learned Advocate for the appellants in F. A. No. 492 of 1962 submitted that the prayer for amendment of the plaint should be refused. Mr. Mukherjee's first contention is that the facts as pleaded in the plaint did not contemplate a case for recovery of possession : that the majority of the properties being in the possession of the tenants--further relief as contemplated in the proviso to Section 42 of the Specific Relief Act (Old Act) (hereinafter referred to as the Act) ought to have been a prayer for permanent injunction and not a prayer for recovery of possession; the prayer for recovery of possession in the facts of the case is unnecessary as such it should be rejected.

11. In support of the said contention, series of decisions have been cited. In a suit where injunction in addition to declaration of certain rights is prayed for the suit may not be held to be barred by the proviso to Section 42 of the Act. Our attention has been drawn to the decision in the case of C. Mohammed Yunus Vs. Syed Unissa and Others, . Their Lordships held that a suit for declaration with consequential relief for injunction is not a suit for declaration simpliciter : it is a suit for declaration and for further relief. In that suit the management of certain institution vested in the Trustees. The plaintiffs filed the suit for a declaration that they were entitled to enjoy the properties described in the schedule annexed to the plaint and to manage the "Durgh", perform the "Urs" festival and receive all incomes, endowments and perquisites thereof once in every eight years since 1934 according to their turn. They also claimed an injunction restraining the defendant from interfering with their rights in that behalf. The objection of bar of Section 42 of the Act, was repelled by their Lordships by holding : that in the facts of that case, the prayer for injunction was the further relief prayed for and as such the suit was maintainable. On the strength of that decision, Mr. Mukherjee submits that as pleaded by the plaintiff, the majority of the properties are in possession of the tenants and as such the plaintiff very rightly prayed for injunction in para (b) of the prayer in the plaint; that is the appropriate relief which the plaintiff might get; the plaintiff therefore has deleted that prayer at his

risk. In that view of the matter, the prayer for khas possession of the properties is uncalled for. The said argument even if acceptable may not be available to the plaintiff in respect of properties described in schedules A and H of the plaint which are admittedly not tenanted properties. We may also note here that the above decision of the Supreme Court is an authority of the proposition that, whether further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case.

12. This is a suit in which majority of the properties in suit are in occupation of tenants. It has been contended that the defendants not being in a position to deliver possession of disputed lands to plaintiff, he need not pray for khas possession; prayer for injunction restraining the defendants to create obstruction for plaintiff's realisation of rents, is sufficient compliance of the proviso to Section 42 of the Act. The said proposition is sought to be established by a decision in the case of *Giribala Chowdhury v. Ushangini Debi* reported in AIR 1955 Gau 177. Sarjoo Prosad, C. J. agreeing with the decision of Ram Labhaya, J. came to such a decision. The said contention of Mr. Mukherjee is sought to be further strengthened by a decision in the case of *Yamunabai and Another Vs. Ram Maharaj Shreedhar Maharaj Pandit and Another*, wherein their Lordships Shah and Patel, JJ. referred with approval to the decision of the division Bench of that High Court in the case of *Farasram Ratanram v. Bhimbhai Kirparam*, reported in (1903) 5 Bom LR 195 holding :

"Where defendants are in constructive possession through tenants and plaintiff desires to have constructive possession only, the utmost that the plaintiff can ask for, or obtain, against the defendants is a declaration of rights, binding the defendants, coupled with an injunction preventing them from interfering with such rights. The plaintiff is not bound to ask for actual physical possession from the tenants, and that there is no rule of law to compel a man to seek for all the relief that he is entitled to or might obtain if he desired it."

13. The above decision does not lay down any principle that the plaintiff in such a circumstance can pray for declaration of his right and title in the property and for injunction only and that he is precluded in claiming khas possession. Mr. Mukherjee has next contended that the conduct of the plaintiff is such that he was already aware of the defect in the framing of the suit, it was specifically alleged that the plaintiff was not in the possession of the suit property as such without payment of proper court-fees, the suit was not maintainable, not only that a specific issue that the suit was hit by Section 42 of the Act, was raised and in spite of that, no step for recovery of possession, after amendment of the plaint was taken, rather he, in order to avoid payment of court-fees, deleted the original prayer in (b) for injunction. From the said facts it is contended that the plaintiff deliberately omitted to amend the plaint with full knowledge as to the defect in the plaint; this omission not being an omission by mistake or wrong advice, should not be condoned, particularly when a valuable right has already

accrued to the defendants. The said contention is sought to be supported by the decision in the case of Suryanarayanamurti v. Tammanna, reported in ILR (1902) Mad 504. In the facts of that case, claim for partition was considered to be further relief available to the plaintiff; non-inclusion of that claim was considered to be a bar for the maintainability of the suit u/s 42 of the Act. The plaintiff wanted to remove that defect by amending the plaint. Their Lordships refused that prayer as the objection as to the non-maintainability of the suit u/s 42 of the Act was taken from the very beginning and plaintiff notwithstanding, persisted in continuing the suit as framed. Another case between Mani Singh Harnam Singh Vs. Sher Singh, Shibhu and Others, has been cited in support of the contention that delay deliberately made in amending the plaint, forfeits the plaintiff's right, if any, to amend the same. That is a decision of Bishan Narayan and I. D. Dua, JJ. Their Lordships while holding the suit barred u/s 42 if the Act observed :

"It is no doubt open to the court in its wide discretion to permit amendment of plaint in a proper case after considering all the facts and circumstances of the case but a party cannot claim, as of right the indulgence for amendment of the plaint more particularly when this prayer is made in the second appeal."

14. Mr. Mitter has, on the other hand, referred to the provisions of Order 6, Rule 17 of the CPC and has contended that it provides for amendment of the pleadings for the purpose of determining the real question in controversy between the parties; there cannot be any yardstick of facts and circumstances where such relief can be granted. Our attention has been drawn to the decision in another case where Mr. Justice Dua, himself granted liberty to the plaintiff in the appellate stage to amend the plaint.

15. We shall presently discuss about the Russa Road Property. The plaintiff claimed to be in possession of the same except a room which is being possessed by one of the defendants. The claim of the defendants on the other hand is that the said property was the subject-matter of dispute between some of the defendants, wherein the plaintiff was not a party. That was in suit No. 99 of 1955 of the Original Side of this Court. The property in question was in the possession of the official receiver -- the plaintiff moved the court to get possession of the property from the official receiver but failed, but got leave to take steps against the receiver for possession of the property. The plaintiff thereafter filed T. S. No. 39 of 1964 in the City Civil Court for getting possession of the said property. That suit was dismissed. But in spite of that, the plaintiff got possession of that property from the official receiver amicably. In this connection our attention has been drawn to the application filed by the defendant Suresh for the appointment of a receiver in respect of that property in this court wherein he admitted plaintiff's possession in the entire premises except in one room. Mr. Mukherjee submits even if plaintiff be found to be in possession of the part of the disputed property, that will not save the bar u/s 42 of the Act. Such a point was raised in the case of Ram Saran and Another Vs. Smt. Ganga Devi, . Their Lordships held that though the defendant was in possession of a portion of the property and the

rest being in possession of the plaintiff, the suit was hit u/s 42 of the Act. The said case does not touch the point whether the plaintiff is entitled to amend the plaint. That is also the view expressed by A. C. Gupta and S. C. Deb, JJ. in the case of Shri Radha Gobinda Jew and Others Vs. Sm. Kewala Devi Jaiswal and Others, .

16. The contention of the plaintiff is that in order to avoid such a situation in future, a prayer for amendment has been made. So the moot question is whether the said prayer should be allowed at this stage. The submission of the defendants is that in the facts of the case, injunction should be considered as further relief which might be available to the plaintiff. Mr. Mitter, on the other hand, contends that prayer for khas possession is all comprehensive relief and, if it is prayed and allowed by the court, bar, if any, as to the maintainability of the suit may be removed. Mr. Mitter's further contention is that injunction in the facts of the case might be one of the further reliefs, but it cannot be said to be the only relief. In this context our attention has been drawn to the fact that item Nos. A and H of the properties are admittedly not in the possession of the tenants and as such question of constructive possession at least in respect of those two items of the properties do not arise at all. Mr. Mitter has next tried to show the reason why the original prayer (b) regarding injunction was deleted. In the instant case the plaintiff sued for declaration that the properties were acquired by him in the benami of the defendants and that he is The rightful owner of the same asserting therein that they are in possession of his tenants; in such a case no further relief may be prayed for, in view of the fact that the tenants' possession may be construed to be the possession of the rightful owner. In order to support the said views our attention has been drawn to the decision of Satish Chunder Bhattacharya and Another Vs. Satya Churn Majumdar . That is a case

Where the plaintiff sued for declaration of title to certain lands alleging that the same were in possession of his tenants, but that the defendant had thrown a cloud on his title by recovering rent decrees against some of the tenants.

17. Their Lordships held "that the plaintiff could not in this suit ask for any further relief than a mere declaration of title, and was proceeding in the right manner in suing for declaration of title only."

18. That decision might have led the plaintiff to think that in the facts of this case, prayer for declaration of his title in the property might have been sufficient; consequent to that, the prayer for deletion of the prayer (b) was made, we also find that in the background of this case, the said action on the part of the plaintiff for deletion of that prayer cannot be said to be mala fide.

19. Mr. Mitter has frankly admitted that an utter confusion has been created by the observation of the trial Judge in paragraph 285 of the judgment. The part of that observation may be quoted here :

"Issue No. 6 :-- On behalf of the defendants, it was sought to be contended that

a suit for mere declaration would not be maintainable if the plaintiff was out of possession. I have already found that the possession of the defendants was on behalf of the plaintiff till August 1954 and the plaintiff instituted this suit within two years from the date of his alleged dispossession The plaintiff's contention is that the above observation of the court is not justified on the materials on record, still when such an observation has been made, the plaintiff thinks it proper to make a prayer for the amendment of the plaint. Such a situation did not exist when the suit was filed. Such event has occurred in course of the proceeding of the suit, as such the plaintiff should be allowed to amend the plaint. A similar question was raised in the case of Sm. Annapurna Dasi and Others Vs. Sarat Chandra Bhattacharjee and Others, . Their Lordships (Akram and Pal, JJ.) held that court should take note of subsequent events and should allow the plaintiff to amend the plaint in order to mould the decree according to the circumstances. According to Mr. Mitter, that decision lends support to the plaintiff's prayer for amendment of the plaint, though belated one.

20. We may recall the submission of Mr. Mukherjee that in the facts of this case, the further relief of the plaintiff was only the prayer for injunction. In this connection the contention of the respective parties is that the plaintiff realised rents from the tenants and defendants also asserted such a realisation of rents. On behalf of the plaintiff it is submitted that in case it is found by the court that the defendants or any one of them had realised rents of some premises in suit, by asserting his own right, his remedy lies for recovery of possession, such a question was raised in the case of Narain Ram Agarhari Vs. Chandi Prasad Dubey and Another, . It has been held therein

"that the landlord whose title is questioned by any one else than a tenant, had a right to declaration u/s 42 of the Specific Relief Act and if any one entered and obtained the profits of the land and took the rent which were due to him, he was entitled as against that person, not only to obtain a decree declaring his title against that other but putting himself into possession."

21. We have gone through the pleadings. In paragraph 18 of the plaint, the plaintiff mentioned the date when the cause of action arose. The said date is 10th July, 1954 when the plaintiff was first obstructed from realising rent from the suit properties. The suit was filed on 22nd August, 1956. That is a statement which may suggest plaintiffs' dispossession from the suit properties in the matter of realisation of rent. This statement of the plaintiff gets more clarification in his averments made by him in his application for the appointment of receiver dated 29-9-1956 wherein in paragraph 6 he categorically stated that the defendants had been resisting him in the realisation of rents and were realising the same themselves and appropriating to their own use, which they had no right to do. The same is also the admission made in paragraph 8 of that application. Even if the plaintiff be found to have been dispossessed just prior to or immediately after the institution of the suit or at any time during the pendency of the suit, the plaintiff in order to get an effective decree, must make a prayer for

recovery of possession. For the reasons stated the plaintiffs' such prayer if not otherwise barred, should be considered as a reasonable and appropriate one.

22. Next question is whether after so many years of the institution of the suit, the plaintiff should be given an opportunity to amend the plaint. It is well established rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. The said views have been expressed in the decision reported in *Mst. Rukhmabai Vs. Lala Laxminarayan and Others*, .

23. In a suit, the plaintiff cannot as a matter of right, claim to amend the plaint, rather the power of a Court to amend the plaint in a suit should not as a rule be exercised, where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, but there are cases in which that consideration is outweighed by the special circumstances of the case. When the relief after the proposed amendment is based on the same cause of action, the Court should not reject the same, however, belated the said prayer is made, in order to do substantial justice. The said views have been expressed in the case of AIR 1921 50 (Privy Council) . Their Lordships of the Judicial Committee approved the order of the Judicial Commissioner who passed the said order when the plaintiff's right to claim possession on pre-emption was already barred. That lends support to our finding that if the relief after amendment is based on the same cause of action, the same may be allowed, even if that relief is already barred.

24. It has been argued from the Bar that when the plaintiff brings a suit for declaration only, the Court, if it is of the view that the plaintiff but for the bar u/s 42 of the Act, is otherwise entitled to get such a remedy, should not dismiss the suit straightway but he should be given an opportunity to amend his plaint; in case of non-compliance with the said direction of the court, the suit should be dismissed. That view has also been expressed in the case of *S. Bhagat Singh Vs. Satnam Transport Co. Ltd. and Others*, . That is a case, facts of which are almost similar. The plaintiff filed the suit for declaration with consequential relief by way of injunction. In the trial court, the plaintiff deleted the prayer, for injunction and the suit was subsequently found to be barred u/s 42 of the Act. In the court of appeal, the plaintiff was directed to amend the plaint to incorporate the prayer already deleted to save the suit against the bar u/s 42 of the Act. That was done on the principles indicated above. We have however noticed that such a prayer for amendment of the plaint has sometimes been refused in the court of the second appeal. Mr. Mukherjee cited that decision reported in *Mani Singh Harnam Singh Vs. Sher Singh, Shibhu and Others*, to support his contention that it is no part of the duty of the court to allow the plaintiff to amend the plaint where it is found that but for the bar u/s 42 of the Act, the suit would have been otherwise decreed. Mr. Justice Dua was one of the Judges who delivered that Judgment. It is however, noted that in the facts of that case Dua, J. refused the prayer for amendment of the plaint; subsequently however, his Lordship agreed with the

view that in such a case the court should not dismiss the suit but should give the plaintiff an opportunity to amend the plaint so as to include a prayer for consequential relief. That will appear from the decision in the case of Union of India (UOI), Ministry of Food and Agriculture (Dept. of Food), New Delhi Vs. Pearl Hosiery Mills and Others, . That decision is based on the similar views expressed in our courts as reported in Sm. Annapurna Dasi and Others Vs. Sarat Chandra Bhattacharjee and Others, .

25. Mr. Mukherjee has also contended that the view expressed in the above mentioned case that the court in such a case has a duty to allow the plaintiff to amend the plaint, is not an invariable proposition of law. In support of that contention he has cited the decision in Ram Saran and Another Vs. Smt. Ganga Devi, wherein their Lordships found on the fact of that case that the suit was not maintainable as proviso to Section 42 of the Act, was a bar. Such a point was not raised before their Lordships; the courts below found that the plaintiff's suit was barred by limitation as well, That was the reason for which no purpose might have been served, by allowing the plaintiff to amend the plaint by adding a prayer for consequential relief. That decision does not support the contention of Mr. Mukherjee; as such it fails.

26. The question of amendment of plaint depends upon the facts of individual case. As already noted, the circumstances under which the said prayer for amendment of the plaint is to be allowed cannot exhaustively be enumerated. But the said principle has always been applied to do substantial justice and not to punish the plaintiff on a technical ground. But that power of the court is not an unfettered one. We may refer to the decision in the case of A.K. Gupta and Sons Vs. Damodar Valley Corporation, , wherein their Lordships have enumerated the circumstances wherein such a right permitting the amendment of the pleadings should be exercised. It has been held:

"In the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred. Where however the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts the amendment is to be allowed even after expiry of the statutory period of limitation."

27. The above principle is based upon the desire to do justice and not to punish any party for his mistake. Accordingly, their Lordships held:

"The principal reasons that have led to the rule last mentioned are first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistake."

28. We are, therefore, of the views that the power to get the plaint amended is subject to the discretion of the Judge and cannot be claimed as a matter of right, or in all circumstances, but in case the addition of a new prayer does not convert

the suit to another of a different or inconsistent character -- the prayer for amendment may be allowed; the courts, having been satisfied as to the claim of the plaintiff but being not in a position to pass a decree on the technical bar of Section 42 of the Act, should give an opportunity to the plaintiff to amend the plaint.

29. In the facts of this case the plaintiff has very rightly prayed for amendment of the plaint and in our views the said prayer should be granted. That will save the court from taking such a step, if considered necessary at the very late stage, after hearing the arguments of the parties.

30. For the reasons stated the prayer for amendment of the plaint be allowed on condition of plaintiffs" paying 20 G. Ms. to each set of the appellants in F. A. Nos. 491 and 492 of 1962 within a fortnight through their learned Advocates on record. In case of non-payment of the said sum to the appellants as directed, the prayer for amendment will stand rejected.

31. In case of compliance of this order, the records will be sent to the trial court who will amend the plaint in terms of the prayer (b) in paragraph 14 of the petition for amendment which will form part of the plaint. In consequence, whereof on the prayer of the plaintiff, paragraph 19 of the plaint and the cause title of the same may also suitably be amended. The plaintiff may be permitted to put in the valuation statement showing how the properties have been valued for the purpose of payment of court-fees. The defendants thereafter will be given a chance to file the additional written statement, if they so desire.

32. The court will next frame an issue as to whether the valuation put and the court-fess paid are sufficient. The parties will thereafter be given an opportunity to adduce necessary evidence for the determination of that issue only. In case, the plaintiff is required to pay further court-fees, he will be given an opportunity to put in the same.

33. After taking steps as indicated above, the trial court will return the evidence to this court together with its findings on that issue, and the reasons thereof. The suit is already very old. So we direct the trial court to dispose of this matter as early as possible, as the business of that court permits.

34. Let this appeal be treated as part heard and it will be heard in accordance with law on its merit after getting the report from the trial court as indicated above.

35. In the circumstances of this case we do not pass any order for the payment of costs, for the hearing of this application.

M.N. Roy, J.

I agree.