

(2012) 08 GAU CK 0052

In the Gauhati High Court

Case No : Civil Revision Petition No. 115 of 2012

North Lakhimpur Bengali Association @ Bengali Association
@ Natya Mandir

APPELLANT

Vs

Kamal Kumar Changkakoti and Anr.

RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Civil Procedure Code, 1908 — Order 6 Rule 7

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 7

Citation : (2013) 2 GLR 158

Hon'ble Judges : A.K.Goswami, J

Bench : Single Bench

Advocate : Mr.T.C. Khetri, Mr. S. Singh , Mr. N. Sarkar for the petitioner.??Mr. K. Agarwal, Mr. M. Dey, Mr. S. G. Bajaj, Mr. D. Hazarika, Mr. M. Chetia , Mr. N. Dekha for the respondents., Advocates appearing for Parties

Judgement

1. This is an application under section 115, CPC read with article 227 of the Constitution of India to set aside the order dated 21.6.2011 passed by the learned Munsiff, Lakhimpur a North Lakhimpur in Mice. (J) Case No. 10 of 2011 and the order dated 23.12.2011 passed by the learned Munsiff, Lakhimpur at North Lakhimpur in Misc. (J) Case No. 19 of 2011, rejecting 2 (two) separate applications for amendment of the plaint in Title Suit No. 26 of 2010.

2. Heard Mr. T.C. Khatri, learned senior counsel for the petitioner/ plaintiff. Also heard Mr. K. Agarwal, learned counsel appearing for the respondent/defendant No. 1 and Mr. N. Dekha, learned counsel appearing for respondent/defendant No.2.

3. The petitioner/plaintiff had filed Title Suit No. 26 of 2010 for cancellation of Memorandum of Agreement dated 17.3.2007 on being declared void and for recovery of possession of the suit premises and land.

4. The brief facts, as set out, in the plaint are that the plaintiff, which is a NonGovernmental Organization ("NGO"), working for social, cultural and religious betterment of general Bengali people living in the district of Lakhimpur,

has been in existence since prior to Independence and was registered in the year 2009/10 under the Societies Registration Act, 1860. The petitioner/plaintiff had purchased, through a registered Deed of Sale, a plot of land on 20.9.1947 measuring in total 1 Bigha, 1 Lecha. 7 Lechas of land covered under Dag No. 175 of Periodic Patta No. 10 is meant for ingress to and egress from 4 Kathas, 14 Lechas. of land in Dag No. 170 of Periodic Patta No. 10. Now the 4 Kathas, 14 Lechas land is covered under Dag No. 224 of Periodic Patta No. 118 of 1st part of North Lakhimpur Town.

5. In the Schedule A land measuring 4 Kathas, 14 Lechas, the plaintiff had constructed a building for the purpose of cinema and theatre shows and on 30.1.1974, an agreement was entered on behalf of the plaintiff organization with the father of the "present defendant", namely. Late Khagendra Nath Changkakati, leasing to him the cinema hall which is described in the Schedule B of the plaint. The agreement was for a period of 20 years or till the amount advanced for renovation by the father of the "present defendant" was fully adjusted/repaid by the organization. He was running cinema shows in the name and style of "Biswa Talkies" and no written agreement was entered into after expiry of the agreement dated 30.1.1974 and Late Khagendra Nath Changkakati continued with the cinema business by paying license fee in an irregular manner. After the death of Mr. Khagendra Nath Changkakati, the youngest of his three sons, the defendant No.1 took charge of Biswa Talkies and started running the said business without any intimation to the plaintiff.

6. Some correspondences were made by the petitioner/plaintiff, details of which are given in paragraphs 5 and 6 of the plaint, with the defendant No.1 and a new agreement was also sought to be entered into with the defendant No.1. Except for the letter dated 5.2.2008, defendant No.1 did not reply to the other letters. On 7.11.2009, the plaintiff noticed that the defendant No.1 had started demolition work on part of the balcony of the hall and started illegal construction of work of permanent nature in front of the building without taking any permission from the plaintiff. The request of the plaintiff to stop the work was not heeded by the defendant No.1, consequent where upon the matter being brought to the notice of the North Lakhimpur Development Authority, a show cause notice dated 12.11.2009 was issued to the defendant No.1 for such unauthorized construction without taking any permission and on receiving such notice, the defendant No. 1 stopped the construction. The matter was also brought to the notice of the Deputy Commissioner, Lakhimpur on 13.11.2009 by some members and office bearers of the plaintiff and at the initiative of the Deputy Commissioner, Lakhimpur, a meeting was held on 4.12.2009 in which the defendant No. 1 had also participated and in that meeting he had stated that he had entered into an agreement on 17.3.2007 for 35 years in writing and registered with the earlier Secretary of the plaintiff's association, the defendant No. 2, with unrestricted power to undertake modification and construction work. The petitioner/plaintiff had sought cancellation of this Memorandum of Agreement dated 17.3.2007 being fraudulent and being the result of collusion of

the then Secretary of the plaintiff's association with defendant No.1 as the defendant No.2 had no authority to enter into such agreement.

7. Separate written statements were filed on behalf of defendant No.1 and defendant No.2 contending the allegations, made in the plaint against them, are false. While it is not necessary for the purpose in hand to dwell upon the stand taken in detail, suffice it to say that a plea of limitation was set up by the defendants contending that the suit was filed in December 2010 seeking cancellation of Memorandum of Agreement dated 17.3.2007 after the period of limitation had expired on 17.3.2010. It is also stated that the Agreement dated 17.3.2007 was entered into after adoption of a resolution in a meeting of the Executive

Committee held on 8.12.2006. Defendant No. 1 in his written statement also stated that after the Development Authority had objected to the renovation carried out by him, he had stopped the renovation work.

8. On 12.4.2011, the plaintiff filed an application under order 6, rule 17 CPC for amendment. The relevant portion of the said application is extracted herein below :

"2. That there is need to add one sentence in the first paragraph which is consistent with the same and does not change in any way the character of the suit. The sentence to be added at the end of the first paragraph is "Earlier the association was an unregistered one prior to its registration."

3. That one error, which is apparent, has crept in at the last sentence of paragraph 7 at page 4 of the plaint. The present sentence reads as "On receiving the notice the defendantNo. 1 stopped the construction." This erroneous. The sentence should correctly read as "On receiving the notice the defendant No.1 stopped the construction for a while then restarted." A perusal of the next paragraph, i.e., para 8 of the plaint makes it clear that the defendant No.1 continued with the construction despite notice and hence the association had to bring the matter In the notice of the Deputy Commissioner. The error crept in due to by pographical error which is clear from the conjoint reading of the paragraphs 7 and 8 of the plaint. This error, if not corrected makes the sentence incoherent.

4. That this plaintiff has already stated that the defendant No.1 was a tenant holding over. He has got a deed in his favour through fraudulent means to prolong his stay. Hence, this plaintiff is also entitled to mesne profit and this plaintiff be kindly allowed to incorporate one prayer as (i)(a) reading as under

"(i) (a) decree for mense profit for illegal occupation by defendant No. 1 from such date and at such rate as the Hon"ble Court deems fit and proper."

9. Objection was raised by the defendant No.1. The learned trial court by the order dated 21.6.2011 in Misc. (J) Case No. 10 of 2011, which was registered on the basis of the application for amendment dated 12.4.2011, rejected the

application.

10. On 12.7.2011, the plaintiff filed another application under order 6, rule 17, CPC for amendment of the plaint. The relevant portion of the said application is extracted herein below :

"That after going through the written statement of the defendant No.2, it appears that certain typographical errors have crept in which need correction through amendment of the plaint

1. That, in the para No.3, line No.1, it is written as follows :

"Changkakoti father of the present defendant leasing to him the Cinema Hall" the word No. 1 is to be added in between the word defendant and leasing. The correct sentence should be "Changkakoti the father of the present defendant No.1 leasing to him the Cinema Hall."

2. That, in page No.6, para No. 13, Line No. 5 and 6, the words "defendant No.2" is inserted by mistake and these words "defendant No.2" needs to be deleted.

3. That, in page No.5, para No.9, Line No.1, the words "aware" needs to be replaced by the word confirmed."

4. That, in page No. 6, para No. 12, line No. 1, there is a wrong mentioning of a date as "28.4.2009" and should in fact be " 28.4.2010." This date (28.4.2009) has been wrongly mentioned and in fact its mentioning in the first line gives a wrong construction of the sentence and one word "and" is unnecessarily appearing in the first line as the last word. All this has happened due to "Copy and Pasting" feature available on a computer and while correcting plaint directly over the computer where the petitioner/plaintiff has no contribution. Hence, it is necessary that the date "28.4.2009" and the word "and" as appearing in the first line of the paragraph 12 be removed altogether.

5. That, another sentence needs to be added expressing the relevancy of 27.11.2009 clearly which is missing from there in paragraph.

11. The expression desired to be incorporated is necessary for clear understanding of the averments or else the averments may remain unclear. The sentence should be added after the first sentence and before second sentence starts reading as under

"It is worth nothing that one member of the plaintiff organization when visited the Office of the Lakhimpur Development Authority heard that the defendant No.2 executed some agreement in favour of the defendant No. 1 but without any specific details such as date of its execution, period etc. for which letter was issued on 27.11.2009 by the plaintiff organization to the defendant No.1."

12. Separate objections were filed by the defendants opposing the said prayer for amendment. By the order dated 23.12.2011, the said application was also dismissed.

13. Mr. T.C. Khatri, learned senior counsel submits that the learned trial court had failed to exercise the jurisdiction vested in it by law and had acted with material irregularity in rejecting both the applications for amendment. He submits that the proposed amendments will not bring about any change in the nature and character of the suit and in no way, will prejudice the defendants. It is further submitted by him that trial has not started and the applications are filed bona fide and the amendments are necessary for proper adjudication of the case.

14. Mr. K. Agarwal, learned counsel for the defendant/respondent No. 1 submits that this petition, clubbing together two causes of action, is not maintainable in law. He has submitted that no explanation has been given in this petition as to why the rejection order dated 21.6.2011 was not challenged before filing of the subsequent application for amendment on 12.7.2011. He, alternatively, submits that this court may not take cognizance of the challenge made to the order dated 21.6.2011 in this petition. Even on merit, according to him, no amendment is required in first paragraph of the suit as prayed for in the application dated 12.4.2011 and the prayer is wholly redundant. With regard to the paragraph 3 of the application dated 12.4.2011, he submits that the amendment sought for, changes the entire complexion of the allegation and as such, the same cannot be permitted. With regard to prayer for mesne profit as finding place in paragraph 4 of the said application, the learned counsel submits that the plaintiff is receiving rent after execution of the Agreement dated 17.3.2007 and allowing such a prayer, would change the nature and character of the suit. With regard to the application dated 12.7.2002, the learned counsel submits that he has no objection for allowing the amendment as sought for in paragraph 1. With regard to the rest of the amendments prayed, the learned counsel submits that the learned trial court was wholly justified in rejecting the prayer for amendment as the entire attempt in the said paragraphs is to fill up lacuna in the pleadings. The learned counsel relies upon the following judgment in support of his submission :

(i) Usha Balashahed Swami and Others v. Kiran Appaso Swami and Others, (2007) 5 SCC 602,

(ii) Revajeetu Builders and Developers v. Naryayanaswamy and Sons and Others, (2009) 10 SCC 84,

(iii) State of Madhya Pradesh v. Union of India and Another, (2001) 12 SCC 268 and

(iv) J. Samuel and Others v. Gattu Mahesh and Others, (2012) 2 SCC 300.

15. Mr. N. Deka, learned counsel appearing for the defendant/ respondent No. 2, endorses the submission advanced by Mr. Agarwal.

16. In Usha Balashahed (supra), the Supreme Court laid down that the court is conferred with powers, at any stage of the proceeding, to allow alteration and amendments of the pleadings if it is of the view that such amendments may be

necessary for determining the real question in controversy between the parties. The proviso to order 6, rule 17, CPC, however, provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to conclusion that in spite of due diligence, the parties could not have raised the matter before the commencement of the trial. It is reiterated that a prayer for amendment of the plaint and a prayer for amendment of the written statement stands on different footing. Addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable, while adding, altering or substituting a new cause of action in the plaint may be objectionable. It is laid down that admission in the written statement can be explained by way of amendment and it is also permissible to add a rider and/or proviso to the admission while keeping the admission intact. In the case of amendment of a written statement, the courts can be more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case.

17. In *Revojeetu Builders and Developers* (supra), the Supreme Court laid down some basic principles that ought to be taken into consideration while allowing or rejecting an application for amendment and the same are as follows :

"(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

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

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

Supreme Court also pointed out that those principles are only illustrative and not exhaustive.

18. In the case of *State of Madhya Pradesh* (supra), the Supreme Court reiterated the principles laid down in *Reuajeetu Builders and Developers* (supra). It is also highlighted that court should try the merits of the case and consequently, should, allow all amendments that may be necessary for determining the real question in controversy between the parties provided that it does not cause injustice or prejudice to the other side.

19. In *J. Samuel and Others* (supra), the Supreme Court stated that the term typographical error is defined as a mistake made in the printed/ typed materials during a printing/typing process and that the term includes errors due to

mechanical failure or slips of hand or finger, but usually excludes errors of ignorance. It is also held that the act of neglecting to perform an action which one has an obligation to do cannot be called as typographical error.

20. The instant application before this court was filed on 28.3.2012, after almost nine months from the date of passing of the order dated 21.6.2011 in the application for amendment filed on 12.4.2011. After the said application was rejected, the plaintiff filed another application on 12.7.2011 which came to be rejected by the order dated 23.12.2011. Both these orders have been assailed in this petition. There is not even an attempt on the part of the petitioner/plaintiff to show as to why the order dated 21.6.2011 was not assailed at an earlier point of time and it appears to this court that the petitioner/plaintiff has assailed the said order as if on second thought as a gamble, as it intended to assail the order dated 23.12.2012. "Subsequent action of the plaintiff in filing another application for amendment on different grounds without first challenging the said order dated 21.6.2011 clearly disentitles the petitioner/plaintiff to challenge the order dated 21.6.2011 subsequently. The applications for amendments filed by the plaintiff sought distinct and separate amendments and, therefore, rejection of each of the applications provides for separate causes of action, which cannot be clubbed together in a single petition. In that view of the matter, while not dismissing the application as not maintainable, this court is not inclined to examine the legality or otherwise of the order dated 21.6.2011 and as such the challenge made to the said order fails.

21. The pleading in the second application dated 12.7.2011 for amendment of the plaint rests on typographical errors as also clarification of the statements made in the plaint. The proposed amendment as prayed for in paragraph 5 seeks to explain the occasion to write the letter dated 27.11.2009, in paragraph 12 of the plaint. The list of documents annexed with the plaint shows that letters dated 27.11.2009 and 28.4.2010 were filed. This particular prayer for amendment was not specifically considered by the learned trial court. However, the learned trial court opined generally that the defendants are entitled to relief which has accrued to the defendants due to negligence of the plaintiff.

22. In the leading case of *Cropper v. Smith*, (1884) 26 Ch.D 700 (CA), Brown, LJ had laid down the object underlying amendment of pleadings in the following words :

".... [I]t is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a

decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

23. Assuming that there was negligence of some kind in not pleading the same when the suit was filed, in the facts of the case, it cannot be said that the amendments had been sought for by way of a fraudulent motive or that the same will cause prejudice to the defendants. In view of the above, amendment sought for in paragraph 5 of the application dated 12.7.2011 is allowed.

24. With regard to amendment sought for in paragraph 4 of the application, the learned trial court has accepted the argument of the defendants that the mentioning of application dated 28.4.2009 is a lacuna in the plaint and allowing deletion of the same along with the word "and" would change the contents of the plaint. This court is unable to accept the reasoning of the learned trial court. The plaintiff has not indicated the letter dated 28.4.2009 in the list of documents submitted along with the plaint and it appears to the court that as a result of not giving due attention, the mistake had occurred. Though 28.4.2010 and 28.4.2009 are two different dates, it would appear that the same was a result of typographical error coupled with error arising out of "copying and pasting" as stated by the petitioner/plaintiff. Deletion of the date "28.4.2009" and the word "and" will not, in any way, change the character of the suit and will not in any way cause prejudice to the defendants. As this court has held that the amendments as prayed for in paragraphs 4 and 5 of the application dated 12.7.2011 are required to be allowed, necessarily the word "aware" is to be replaced by the word "confirmed" as prayed for in paragraph 3 of the application, as otherwise, the same will not portray the correct picture.

25. The defendant No.2 in his written statement had stated that he continued as Secretary of the plaintiff's Association till 24.5.2007. The amendment in paragraph 2 of the application dated 12.7.2011 relates to deletion of the word "defendant No.2". The said word "defendant No.2" was used in the context of payment of rental since Durga Puja of 2008 which the then Secretary of the plaintiff Association had accepted. On his own showing, the defendant No.2 ceased to be Secretary in 2008. The same being an apparent mistake, for fair adjudication of the case, the word "defendant No.2" requires to be deleted. As noted earlier, the amendment sought for in paragraph 1 of the application dated 12.7.2011 is not opposed by the learned counsel for the respondents/defendants.

26. In the result, the impugned order dated 23.12.2011 is set aside and quashed. The amendments, as sought for in the application dated 12.7.2011 are allowed subject to payment of cost of Rs. 10,000 only to be deposited by the plaintiff before the learned trial court.

27. The parties to the proceeding will appear before the learned trial court on 27.9.2012 and the cost shall be deposited on that date.

27. The petition is partly allowed.