
(2011) 12 UK CK 0053

In the Uttarakhand High Court

Case No : Writ Petition No. 1442 (M/S) of 2001

Padam Bahadur Singh and Others

APPELLANT

Vs

III Additional District Judge Dehradun and Others

RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2011) 12 UK CK 0053

Hon'ble Judges : Brahma Singh Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble B.S. Verma, J.—By means of this petition the petitioners have sought a writ in the nature of certiorari for quashing the order dated 5.11.1993 (Annexure No.6 to the writ petition), passed by respondent No.2, 1st Additional Munsif Dehradun in Case No. 153 of 1988 Bir Bahadur Vs. Kharak Singh and judgment dated 29.9.1997 (Annexure No.8 to the writ petition), passed by III Additional District Judge, Bijnor in Civil Revision No. 147 of 1993 Bir Bahadur Singh and Others vs. Kharak Singh and Others.

2. Briefly stated the facts of the case are that the petitioners alongwith respondent No.12 filed a suit for a decree of permanent injunction restraining the defendants from dispossessing the plaintiffs from the disputed land shown in the plaint and also claimed the relief for damages of boundary wall. The plaintiffs also claimed relief for removal of water pipe line and rain pipe from the land shown in the plaint map. The defendant Nos. 1 to 6 filed written statement denying the allegations contained in the plaint. The then learned Munsif framed issued in the suit. Thereafter the plaintiffs filed amendment application 79-A alleging therein that at the time of preparation of the suit, the mistake in the map was detected and a fresh map was got prepared, therefore, the map attached with the plaint be detached and the map attached with the amendment application be made part of the plaint. The defendant filed objection against the

amendment application moved by the plaintiffs. The trial court has rejected the amendment application holding that by the proposed amendment, the plaintiffs have changed the subject-matter of the suit materially and if the proposed amendment is allowed then the defendants shall suffer irreparable loss, which cannot be compensated by costs. It was also held that the plaintiffs had been repeatedly moving the amendment applications in order to harass the defendants. Feeling aggrieved by the rejection of amendment application the plaintiffs preferred revision which was dismissed by Additional District Judge-III, Dehradun vide impugned judgment and order dated 29-9-1997.

3. Now feeling aggrieved by the aforesaid judgment and orders passed by courts below the petitioners have preferred this writ petition. The grounds taken in the writ petition are that the judgment and order of the courts below being arbitrary, illegally, erroneous in law and are liable to be set aside. By means of amended map the plaintiffs want to clarify the position at the spot and the courts below have wrongly refused to accept the amended map on record on the ground that the plaintiffs want to withdraw their admission in the map. It is also alleged that the plaintiffs want to amend the map in which there is mistake due to wrong measurement, as such, the view taken by the courts below has no substance in the eye of law and are liable to be set aside.

4. The respondents have filed counter affidavit and alleged that by virtue of the substitution of the fresh map in place of the plaint map the plaintiffs have included whole of the property which was originally shown as "Khala" as belonging to him. In the plaint map he has shown "Khala" as 25 feet and now in the amended plan the width of the "Khala" has been shown as 13 feet. Originally the length was shown as 93 feet, but now it has been shown as 82 feet. Originally the plaintiff has claimed his property beyond the "Khala" beyond the point shown by word "K" and he has extended the same upto the word "K" covering the alleged "Khala" which infact is the property belonging to Sri Nar Bahadur Bhandari and Sri Manohar Singh Bhandari and partly to the State Bank of India. He has also changed the area as well as the topography of the area shown by green colour marked by words B,C,D,E,Y,B. Originally the southern boundary wall of the area marked by green colour was shown as 93 feet and now it has been shown as 100 feet and certain area at point "B" has also been included in his own property in order to further enter by 6 feet into the property belonging to Sri Madan Singh, Kharan Singh, Vijender Singh and others. The plaintiff also filed sanctioned map. The sanctioned map, the plaint map as well as the map attached with the amendment application differs altogether. In the sanctioned map no "Khala" has been shown between the property of the plaintiff and the defendants. Thus, the proposed plan, which has been prayed to be substituted, in fact is against the admissions made by the plaintiff at the time of filing of the suit.

5. I have heard learned counsel for parties and have gone through the record.

6. Learned counsel appearing on behalf of petitioner has submitted that it is true

that the plaintiff ought to have been diligent while preparing map attached with the plaint, but due to oversight the measurement of encroached area could not be mentioned correctly in the map and while preparing the case the said mistake was detected and a fresh plan was got prepared and the amendment application filed by the plaintiff is bonafide and by allowing amendment it does not affect the right of the other side and does not cause injustice to other side. Learned counsel also submitted that by allowing amendment of plaint, suit will still remain suit for permanent injunction and nature and character of suit will not change. In support of his contentions learned Advocate has placed reliance on the judgment of Peethani Suryanarayana and Another Vs. Repaka Venkata Ramana Kishore and Others, and the case of Surender Kumar Sharma Vs. Makhan Singh, .

7. I have gone through the above cited cases. In the case of Peethani Suryanarayana and Another Vs. Repaka Venkata Ramana Kishore and Others, , the Hon''ble Apex Court has held in para 10 as under:-

The power of the court to allow such an application for amendment of the plaint is neither in doubt nor in dispute. Such a wide power on the part of the court is circumscribed by two factors viz. (i) application is bona fide, (ii) the same should not cause injustice to other side, and (iii) does not affect the right already accrued to the defendants.

8. In para-15 of aforesaid cited judgment the Apex Court has made reference of the case of Sajjan Kumar v. Ram Kishan (SCC page 90-para-5), which is quoted below:-

5. Having heard learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rjecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Since an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 C.P.C. would not have been strictly applicable. It is true that the appellant-plaintiff ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the appellant-plaintiff succeeding in the suit.

9. In the another cited case of Surender Kumar Sharma Vs. Makhan Singh, , the Apex Court has held that belated application for amendment is not liable to be rejected merely on the ground of delay if court finds that by allowing application real controversy between the parties may be resolved, court can allow the application where opposite party can be compensation by costs or otherwise.

10. It has further been observed in the aforementioned case that in eviction suit filed on ground of arrears of rent, if the court is satisfied that even after allowing amendment of plaint, suit will still remain a suit for eviction and nature and character of suit will not change, belated application for amendment should be allowed by directing applicant to pay costs to opposite party.

11. On the other hand learned Senior Advocate appearing on behalf of respondents has submitted that by allowing amendment in the plaint the would amount to withdrawal of admission of plaintiffs made earlier in the plaint map. By way amendment the plaintiffs have shown more area of alleged encroachment and by allowing amendment nature of suit will change, and the courts below have rightly rejected the amendment application.

12. Thus, in above premise it is to be seen whether the amendment application is bona fide, (ii) the same should not cause injustice to other side, and (iii) does not affect the right already accrued to the defendants.

13. By way of amendment has been shown increased area of encroached property of 1800 square feet whereas in the map attached with the plaint it was shown 1196 square feet pertaining to area B,C,D,B,E. The relief sought in the plaint is in respect of land A,B,L,M, where according to plaintiffs the defendants have constructed water pipe line and drain pipe line. In respect of encroachment BCDE no relief has been sought. It appears that the plaintiffs want to bring on record the correct area of encroachment made by the defendants. It has specifically been alleged by the plaintiffs that after filing the suit while preparing the case the mistake of measurement of encroached area was detected in the map attached with the plaint. If the defendants have encroached the more area of A,B,C,D, then that certainly should come on record and by bringing that area on record it cannot be said to be withdrawal of admission. Similarly by way of amendment showing the "Khala" covering the area of word "K" does not affect the right of defendants in any way, as according to defendants themselves the said property belongs to Nar Bahadur Bhandari and Manohar Singh Bhandari and partly to State Bank of India. Thus it is quite clear that the amendment application moved by plaintiffs is bona fide; by way of amendment the plaintiffs want to bring on record the actual position at spot and it cannot be said withdrawal of admission. It is also to be mentioned here that by allowing amendment application the real controversy between the parties will be resolved and no prejudice is going to be caused to the rights of the defendants.

14. It will not be out of place to mention here that if the plaintiffs came to know about the width of encroached area during the pendency of suit, he cannot be stopped to bring on record the actual position of the spot. The plaintiffs have filed amendment application after framing of issues and no evidence has yet started in the suit and there was mistake of measurement then. Therefore, in view of the law laid down by Hon''ble Apex Court as noted above, as well as the facts and circumstances of the case, in the interest of justice and for bringing the actual position of spot on record, in my opinion the amendment application

should be allowed. The actual area of encroachment can very well be determined by the trial court by way of commission or by evidence of parties. I find that both the courts below have committed a manifest error of law by rejecting the amendment application.

15. The writ petition is allowed. The impugned judgment and orders passed by courts below are set aside. The amendment application 79-A moved by plaintiffs is allowed, subject to cost of Rs. 3000/- payable to defendants, and the map attached with the amendment application is made part of plaint.

16. The interim order dated 27-1-1998 is vacated.