

(2010) 01 GAU CK 0007

In the Gauhati High Court

Case No : Civil Revision Petition No. 16 of 2010

Pradip Kr. Banik

APPELLANT

Vs

Manindra Mandal and Others

RESPONDENT

Date of Decision : 27-01-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2010) 3 GLR 21 : (2010) 1 GLT 715

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : A.K. Purkayastha, B.J. Das and M.M. Mali, for the Appellant; P. Sundhi, for the Respondent

Judgement

I.A. Ansari, J.—The petitioner herein instituted, as plaintiff, Title Suit No. 13(K) of 2008, wherein he sought for a decree of declaration of his rights, title and interest over the suit land and confirmation of possession thereof. The suit was resisted by the defendants by filing written statement, wherein, apart from denying the plaintiff-petitioner's title to the suit land, they also contended to the effect that they had been in possession of the suit land and have a pucca house with CI sheet roofing constructed on the eastern wide of the suit land and, hence, the question of granting a decree, in favour of the plaintiff, confirming his possession over the suit land, or any part thereof, does not arise. In their written statement, the defendants also took the plea that there was a proceeding u/s 145, Cr.PC between the parties concerned in respect of the suit land, wherein it had surfaced that the suit land had been in possession of the defendants.

2. Following the filing of the written statement, the plaintiff filed an application, under Order VI, Rule 17, CPC, seeking amendment of the plaint by incorporating, in the plaint, facts to the effect that subsequent to the institution of the suit, the defendants had entered into the suit land and constructed pucca house, with CI sheet roofing, over the same during the puja vacation, when the civil courts were

closed. This application for amendment was resisted by the defendants by contending, inter alia, that in their written statement, they had already indicated that they were in possession of the suit land and this fact was known to the plaintiff and yet he had suppressed the same and it is unbelievable that a pucca house could have been constructed over the suit land after the institution of the suit. The defendants, therefore, sought to get the application for amendment rejected.

3. By the order, dated 2.2.2009, passed in the said suit, as the learned Munsiff, Kaliabor, has rejected the said application for amendment, the plaintiff has impugned the same in this revision.

4. Heard Mr. A.K. Purkayastha, learned Counsel for the petitioner, and Mr. P. Sundhi, learned Counsel for the opposite parties.

5. While considering this revision, what needs to be noted is that the plaintiff's application for amendment has been rejected by the learned court below by observing, in the impugned order, that it finds hard to digest the plaintiff's contention that the defendants had encroached upon the eastern side of the suit land and constructed a pucca house for CI sheet roofing during the puja vacation. The observations, so made by the learned trial court, show that the learned trial court has rejected the plaintiff's application for amendment on the ground that the facts, sought to be incorporated in the plaint by way of amendment, were untrue or false or, at least, highly improbable or almost unlikely.

6. It may be pointed out that while considering an application seeking amendment of pleadings, the court is not to decide the veracity or correctness of a factual assertion, which a party seeks to incorporate in his pleadings, for, determination of such a question, if the amendment is allowed, would be at the stage of trial. What is required to be determined by a trial court, at the stage of considering an application for amendment seeking to incorporate certain facts in the plaint or written statement, is as to whether the amendment, which is sought to be made, is necessary for determination of real controversy in the suit and whether the amendment, if allowed, would amount to allowing the plaintiff to change the nature or character of the suit or would give rise to new cause of action, which is unconnected with the cause of action in issue in the suit.

7. It may also be pointed out that while considering an application for amendment, the court has to proceed on assumption that the facts, sought to be incorporated in the plaint or written statement, are true and, then, determine whether the statements, made in the amendment application, can help the court in resolving the real controversy in issue in the suit, subject, of course, to the condition that no amendment can be allowed to be made by the plaintiff, which would amount to changing the nature and character of the suit or would help to introduce into a suit a new cause of action, wholly unconnected with the cause of action based on which the suit was instituted. Whether, as a matter of fact, the

statement, sought to be incorporated by way of amendment, is or is not true, is a question, which can be decided, as already indicated above, at the trial and not in an application for amendment.

8. I may, at this stage, refer to the case of *Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others*, wherein the Apex Court observed and held as under:

11. Order VI, Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

12. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to subserve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and power of amendment should be exercised in the large interest of doing full and complete justice to the parties before the court.

13. While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment should to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.

9. Considered in the above backdrop of the position of law, it becomes clear that the plaintiff's case, at the time of institution of the suit, was that he not only had title to the suit land, but also possession thereof. In the face of the pleadings in the written statement, the plaintiff seeks, in effect, to incorporate, in his plaint, that subsequent to the institution of the suit, he had been ousted from a portion of the suit land and he is, therefore, required to incorporate his allegations as regards his ouster from the suit land and consequential relief of recovery of

possession from that part of the suit land from where he claims to have been ousted or dispossessed. Ordinarily, a court shall allow pleadings to be amended in the light of the subsequent events, for, it is the duty of the court to ensure, as far as practicable, that litigations are shortened and multiplicity of proceedings and suits are avoided. The facts, which the petitioner sought to incorporate in the plaint, reflected, according to the petitioner, events, which were subsequent to the institution of the suit. Whether, as a matter of fact, allegations as regard such subsequent events, were or were not true, is a question, which would be decided at the trial and could not have been decided at the stage of considering the application for amendment. This apart, in the face of the facts, which the petitioner seeks to incorporate, in his plaint, would not change the basic structure of the suit and there would only be a change in the nature of relief, which the petitioner, as plaintiff had claimed, the changed relief being commensurate with the subsequent development, as alleged by the petitioner.

10. In the facts and attending circumstances of the present case, the facts, sought to be incorporated, by way of amendment, were, in the considered view of this Court, necessary to be incorporated in the plaint for the purpose of resolving the real controversy in the suit inasmuch as the decree passed in the suit would be futile if the statements sought to be incorporated by the plaintiff were true, but not allowed to be brought on record. Whether the plaintiff was really in possession of the suit land or not at the time of institution of the suit will remain a question for determination at the trial; but in the face of the pleadings, which the petitioner seeks to make in this plaint, it cannot be said that allowing the amendments, sought to be made in the plaint, would amount to introducing a new cause of action in the suit.

11. Because of what have been discussed and pointed out above, this Court finds that the impugned order, disallowing the amendment, suffers from serious infirmity of law.

12. In the result and for the foregoing reasons, the impugned order, dated 2.2.2009, is hereby set aside and the learned trial court is hereby directed to pass appropriate order if the plaintiff-petitioner files amended plaint within the statutorily prescribed period of time.

13. With the above observations and directions, this revision shall stand disposed of.

14. No order as to costs.