

(2015) 07 AHC CK 0018
In the Allahabad High Court
Case No : Writ Petition No. 3818 of 2008 (M/S)

Rajendra Prasad

APPELLANT

Vs

Additional District Judge/Fast Track Court-I, Gonda and
Others

RESPONDENT

Date of Decision : 20-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 96

Citation : (2015) 7 ADJ 695 : (2015) 112 ALR 196 : (2015) 6 AWC 5552 :
(2015) 129 RD 294

Hon'ble Judges : Devendra Kumar Arora, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Devendra Kumar Arora, J—Heard learned counsel for parties and perused the record. By means of instant writ petition, the petitioner has challenged the order dated 7.7.2008, passed by the Additional District Judge/Fast Track Court, Gonda (Opposite Party No. 1) whereby his application for amendment of the plaint at appellate stage has been rejected.

2. Facts of the case, in nut-shell, are that the petitioner filed a suit for permanent injunction in the Court of Civil Judge, Junior Division, Gonda in the year 1993, which was registered as Regular Suit No. 1036 of 1993, for restraining opposite party No. 2-Chandrika Singh from interfering in his peaceful possession over the property in dispute. Opposite Party No. 2-Chandrika Singh filed written statement on 28.1.1994 denying the allegations made in the plaint and alleged that he is in possession over the property in dispute. Accordingly, survey commission was issued by the Court below and the Survey Commissioner submitted his report which was confirmed subject to other evidence on record. Ultimately, the said suit was dismissed vide judgment and order dated 18.1.2006 (Annexure 4). Being aggrieved against the said judgment, the petitioner preferred an appeal, bearing Civil Appeal No. 15 of 2006 (Rajendra Prasad v.

Chandrika Singh) under Section 96 of the Code of Civil Procedure before the District Judge, Gonda.

3. During pendency of appeal, appellant/petitioner felt that the plaint has to be amended as per report of the Survey Commissioner in order to settle the issue finally. It was also found that the sketch map attached at the foot of the plaint was not prepared on the basis of scale whereas Amin had prepared survey report and site plan on the basis of scale. In these backgrounds, the petitioner moved an application for amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure on 24.4.2007, which was marked as K/27. Opposite Party No. 2- Chandrika Singh filed objection to the amendment application on 14.5.2007, alleging therein that the amendment in the plaint has been sought at a very belated stage and the same will alter the nature of the suit. It was also alleged that contradictory pleadings have been made in the proposed amendment.

4. The Court below after hearing the parties rejected the application for amendment by the order dated 7.7.2008, which is impugned in this petition.

5. Submission of learned counsel for the petitioner is that though the petitioner had not introduced any new fact in the amendment application and he had only to clarify the position already stated in the plaint but the Court below erred in not considering these facts and rejected the amendment application in a cursory and mechanical manner.

6. Elaborating his submission, learned counsel has contended that the Court should be liberal in allowing the amendment application at any stage of proceedings in the interest of justice and further the Court has to consider as to whether the amendment sought by the petitioner is necessary to decide the real controversy between the parties. In the instant case, the proposed amendment will not change the nature of the case nor any serious prejudice will be caused to other side. Thus, the Court below erred in rejecting the amendment application by means of the impugned order.

7. To strengthen his arguments, learned counsel for the petitioner has placed reliance upon the cases in State Bank of Hyderabad Vs. Town Municipal Council, (2006) 5 CTC 874 : (2007) 145 PLR 332 : (2006) 13 SCALE 332 : (2007) 1 SCC 765 : (2006) 9 SCR 919 Supp : (2006) 2 UJ 1557 ; M.C. Agrawal HUF Vs. Sahara India and Others, AIR 2008 SC 2887 : (2008) 3 CLT 636 : (2008) 6 JT 239 : (2009) 153 PLR 650 : (2008) 6 SCALE 778 : (2008) 5 SCC 642 : (2008) AIRSCW 4763 ; Andhra Bank Vs. ABN Amro Bank N.V. and Others, AIR 2007 SC 2511 : (2007) 139 CompCas 111 : (2007) 3 CompLJ 185 : (2007) 9 JT 244 : (2007) 9 SCALE 96 : (2007) 6 SCC 167 : (2007) 77 SCL 209 : (2007) 2 UJ 859 : (2007) AIRSCW 4466 : (2007) 5 Supreme 792 ; Prem Bakshi and Others Vs. Dharam Dev and Others, AIR 2002 SC 559 : (2002) 1 JT 34 : (2002) 1 SCALE 74 : (2002) 2 SCC 2 : (2002) 1 SCR 103 : (2002) AIRSCW 140 : (2002) 1 Supreme 40 ; Surender Kumar Sharma Vs. Makhan Singh, (2009) 12 SCALE 665 : (2009) 10 SCC 626 : (2009) 9 UJ 4486 and Rajendra Shanker Tripathi Vs. Ajay Kumar

Gupta, (2011) 113 RD 651 .

8. Per contra, learned counsel for the contesting opposite party No. 2 (Chandrika Singh) has submitted that the impugned order dated 7.7.2008 passed by the Court below rejecting the amendment application is perfectly legal and in accordance with the provisions of Code of Civil Procedure insofar as the petitioner has filed a suit for permanent injunction based on wrong facts and fabricated map. In the judgment delivered by the Civil Judge, Junior Division, Gonda, it has been specifically observed that the findings of Survey Report are contrary to the map and pleadings of the plaintiff and it is wrong to say that the petitioner came to know this fact that the map attached by him is contrary to Amin's Report during pendency of appeal i.e. after lapse of 13 years. The petitioner had ample opportunity to correct the map but he did not do so during the trial. Now, the petitioner wants to amend the map at the stage of appeal, after a lapse of 13 years, is only to harass the opposite party No. 2 and to drag him in litigation for more time. If the proposed amendment is allowed, it will change the suit property which will be highly illegal and miscarriage of justice.

9. Counsel for the contesting opposite party has submitted that the land in dispute shown in the amendment application is different with the land in dispute shown in the pleadings of the original suit. It is not acceptable that a person who is aggrieved with any matter regarding the disputed land but he does not know the actual location of the same and, as such, the application for amendment does not come within the ambit of Order VI Rule 17 of the Code of Civil Procedure. The procedure clearly states that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before commencement of the trial. The amendment sought by the petitioner will deviate the position of land in dispute which would be highly illegal and will lead to miscarriage of justice.

10. To strengthen his arguments, learned counsel for the contesting opposite parties has relied upon the case in *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*, (2009) 13 JT 366 : (2009) 10 SCC 84 : (2009) 15 SCR 103 : (2009) 10 UJ 4850 ; *Ganeshi Rai and another Vs. First Additional District Judge, Ghazipur and others*, AIR 1992 All 25 : (1991) 2 AWC 504 : (1992) RD 137 ; *Harendra Nath Sen Vs. Broadway Centre*, AIR 2000 Cal 214 : (1999) 2 CALLT 425 : 104 CWN 1010 .

11. I have considered the submissions of learned counsel for parties and perused the record.

12. From the arguments of the learned counsel for the parties and perusing the record, it comes out that the case of the petitioner is that against the order of dismissal of suit, he had filed appeal but after filing appeal, it was realized by the appellant/petitioner that the sketch map attached at the foot of the plaint was not prepared on the basis of scale whereas Amin had prepared survey report and

site plan on the scale and as such, the appellant/petitioner had preferred amendment application, which was rejected by the Court below vide impugned order, in a mechanical and cursory manner.

13. The case of the contesting opposite party is that while dismissing the suit, the Civil Judge, Junior Division, Gonda has specifically mentioned in its order that the findings of Survey Report are contrary to the map and pleadings of the plaintiff and it is wrong to say that the petitioner came to know this fact that the map attached by him is contrary to Amin Report during pendency of appeal i.e. after lapse of 13 years, thus, the Court below has rightly rejected the amendment application.

14. Order VI Rule 17 of the Code of Civil Procedure was amended with effect from 1.7.2002. As per the amendment, if a party desires to file an application for amendment of the pleadings under Order VI Rule 17 has to satisfy that in spite of due diligence, he could not raise the matter before the commencement of trial. It would be useful to extract Order VI Rule 17 of the Code of Civil Procedure and the same is extracted here under:

"17. Amendment of pleadings.--The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

15. From bare perusal of the above provision, it is clear that it consist of two parts. The first part is that the Court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real question in controversy raised between the parties. By the Amendment Act of 2002, the proviso has been added to Rule 17, Order 6 by which the right of a party seeking an amendment has been circumscribed as now it does not permit a litigant to amend the pleadings after commencement of trial, unless he satisfies the Court that inspite of due diligence, such amendment could not have been sought earlier. On considering the statement of objects and reasons it is clear that if the application is filed under Order VI Rule 17 after commencement of the trial, it cannot be allowed unless the Court comes to the conclusion that inspite of the due diligence such amendment could not have been sought earlier. The object is to prevent frivolous application which are filed to delay the trial.

16. On careful reading of the language of the proviso to Rule 17 Order VI of CPC, it is clear that it casts an obligation on the party applying for amendment, after commencement of the trial, to offer an explanation to the satisfaction of the

Court so as to come to the conclusion that inspite of "due diligence", the party could not have raised the matter before the commencement of trial. The proviso does not deal with the power of the Court and also does not specifically take away the power of the Court to allow the amendment after the commencement of trial. It empowers the Court to reject the application if it comes to the conclusion that inspite of "due diligence", the party could not have sought the amendment before the commencement of trial. The provision contained in Order VI Rule 17 is procedural. It is not a part of substantive law. The object behind introducing the proviso in the present shape is to curb the mischief of unscrupulous litigant adopting dilatory tactics to delay the disposal of the cases and to defeat the right of opposite party approaching the Court for quick relief and also to cause serious inconvenience of the Court faced with frequent prayers for adjournment. The object is to expedite the hearing and not to scuttle the same. The purpose of such like amendments is stated in the statement of objects and reasons as "to reduce delay in disposal of civil cases".

17. The Hon"ble Apex Court had an occasion to consider the matter in issue in Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another, AIR 2008 SC 2303 : (2008) 5 CTC 253 : (2008) 7 SCALE 471 : (2008) 14 SCC 364 : (2008) AIRSCW 4007 : (2008) 4 Supreme 435 , wherein, the Hon"ble Apex Court has held as follows:

"The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy. However, this rule is subject to Proviso appended therein. The said rule with Proviso again substituted by Act 22 of 2002 with effect from 1.7.2002 makes it clear that after the commencement of the trial, no Application for amendment shall be allowed. However, if the parties to the proceedings able to satisfy the Court that in spite of due diligence could not raise the issue before the commencement of trial and the Court satisfies their explanation, amendment can be allowed even after commencement of the trial."

18. Again in Vidyabai and Others Vs. Padmalatha and Another, AIR 2009 SC 1433 : (2009) 1 JT 302 : (2009) 154 PLR 490 : (2009) 1 SCALE 202 : (2009) 2 SCC 409 : (2009) 12 Vat Reporter 2524 : (2009) AIRSCW 899 : (2009) 1 Supreme 238 , the Hon"ble Apex Court has held as follows:

"Or. 6 R.17 CPC is couched in a mandatory form. Unless the jurisdictional fact, as envisaged in the proviso to Order 6 Rule 17 CPC is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. From the order passed by the trial Judge, it is evident that the respondents had not been able to fulfil the said precondition."

19. It is true that an amendment can be permitted to avoid, multiplicity of proceedings. But at the same time, Courts have held that an amendment cannot be allowed, if it causes prejudice to the right of the party against whom an amendment is sought for. It is also a settled law, that the scope of the appellate Court is to test the correctness of the judgment under the appeal and any benefit or vested right, on account of declaration of the rights, inter se between the parties to the lis, by the trial Court, cannot be allowed to be taken away by allowing an amendment to the pleadings, at the appellate stage, when the party seeking an amendment could have brought in such amendment, even at the time of the commencement of the trial. An amendment admitting to wipe out the pleadings and admissions of the party, already considered by the trial Court, for the purpose of arriving at a decision, in the suit, cannot be allowed to be substituted with a new case, at the appellate stage, which would certainly cause serious prejudice to the party, against whom the amendment is sought for. The effect of an admission in earlier pleading shall not be permitted to be taken away, by any proposed amendment.

20. In the instant case, the petitioner knew very well from the stage of trial of suit that Amin has submitted a map Ga-2/64 and there being difference between the map annexed with the plaint, and evidences were produced before the trial Court by the parties on the basis of map annexed with the plaint but no efforts was made on behalf of the plaintiff/petitioner to amend the plaint. After deciding the suit on merit, the plaintiff/appellant/petitioner had filed an appeal but even during filing the appeal, no specific ground, which is to be sought through amendment application, has been taken on behalf of the appellant/petitioner. After filing the appeal, the appellant/petitioner has filed amendment application, which was rejected by the appellate Court by means of the impugned order.

21. Learned counsel for the petitioner has relied upon the decisions in State Bank of Hyderabad Vs. Town Municipal Council, (2006) 5 CTC 874 : (2007) 145 PLR 332 : (2006) 13 SCALE 332 : (2007) 1 SCC 765 : (2006) 9 SCR 919 Supp : (2006) 2 UJ 1557 ; M.C. Agrawal HUF Vs. Sahara India and Others, AIR 2008 SC 2887 : (2008) 3 CLT 636 : (2008) 6 JT 239 : (2009) 153 PLR 650 : (2008) 6 SCALE 778 : (2008) 5 SCC 642 : (2008) AIRSCW 4763 ; Andhra Bank Vs. ABN Amro Bank N.V. and Others, AIR 2007 SC 2511 : (2007) 139 CompCas 111 : (2007) 3 CompLJ 185 : (2007) 9 JT 244 : (2007) 9 SCALE 96 : (2007) 6 SCC 167 : (2007) 77 SCL 209 : (2007) 2 UJ 859 : (2007) AIRSCW 4466 : (2007) 5 Supreme 792 ; Prem Bakshi and Others Vs. Dharam Dev and Others, AIR 2002 SC 559 : (2002) 1 JT 34 : (2002) 1 SCALE 74 : (2002) 2 SCC 2 : (2002) 1 SCR 103 : (2002) AIRSCW 140 : (2002) 1 Supreme 40 ; Surender Kumar Sharma Vs. Makhan Singh, (2009) 12 SCALE 665 : (2009) 10 SCC 626 : (2009) 9 UJ 4486 and Rajendra Shanker Tripathi Vs. Ajay Kumar Gupta, (2011) 113 RD 651 . All these cases does not apply in the facts and circumstances of the case insofar as in the instant case, as stated hereinabove, the petitioner was fully aware from the stage of the trial that Amin had submitted a map Ga-2/64 and there being difference between the map annexed with the plaint but no efforts was ever

made on behalf of the plaintiff/petitioner to amend the plaint rather plaintiff/petitioner proceeded and lead evidence on the basis of the pleadings of the plaint and the map annexed therewith and now, of late, at the appellate stage, the appellant/petitioner has preferred an application with a plea that on account of fault of his counsel, the plea which has been raised in the amendment application at the appellate stage could not be taken by the appellant. This plea cannot be sustainable in the facts and circumstances of the case as the petitioner led his evidence to support the pleadings and the map annexed with the plaint, therefore, it cannot be said that the plaintiff/appellant/petitioner was not aware about the position of the land in question.

22. In view of the above facts and circumstances of the case and in view of the decisions of the Hon"ble Apex Court referred to above, I am of the considered opinion that there is no infirmity and illegality in the impugned order dated 7.7.2008 passed by the appellate Court, which is hereby approved.

23. The writ petition stands dismissed and interim order is discharged. Consequently, the connected miscellaneous applications, if any, is closed. Costs easy.