

(1996) 03 AHC CK 0055

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 33386 of 1993

Ramesh Lal Kapoor

APPELLANT

Vs

IXth Addl. D.J., Ghaziabad & Ors.

RESPONDENT

Date of Decision : 13-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 1, Order 6 Rule 17, Order 6 Rule 18, Order 6 Rule 5, Order 6 Rule 7
Constitution of India, 1950 — Article 226
Provincial Small Cause Courts Act, 1887 — Section 17, 25

Citation : (1996) 03 AHC CK 0055

Hon'ble Judges : D.K.Seth, J

Final Decision : Disposed Of

Judgement

D.K. Seth, J.—On 1st July, 1989, opposite parties 2 and 3 filed a suit being S.C.C. Suit No. 48 of 1989 for ejectment, arrears of rent and damages against the petitioner in the Small Cause Court, Ghaziabad. In the written statement filed by the petitioner, it was contended that U.P. Act No. 13 of 1972 is not applicable to the suit property since the house was constructed beyond the period of 10 years. The opposite parties filed a replication on 28th July, 1992 incorporating the fact that the plaintiffs had taken a loan of a sum of Rs. 80,000 from the Hindustan Development Finance Corporation, Delhi for the construction of the house on the aforesaid plot securing the said plot with the Corporation. On 28th October, 1992 in the course of examination of witnesses, which continued on 29th October, 1992, when P.W. 1. stated the fact of taking loan of a sum of Rs. 80,000 from the Hindustan Development Finance Corporation, Delhi, the defendant raised objection to this effect that since the said fact was not within the pleading, within the meaning of Order VI, Rule 1 of the Code of Civil Procedure, no evidence could be led on the said fact and the evidence so adduced was inadmissible. By order dated 16th August, 1993, the trial Court while rejecting the objection raised by the defendant held that the replication in part of the pleading and therefore the statement of P.W. 1 with regard to the fact

stated above, was admissible. It is against these orders the present writ petition has been filed.

2. Learned counsel for the petitioner contends that the replication cannot be treated to be part of pleading, inasmuch as the Order VI, Rule 1 does not include the replication as part of the pleading. In case, any other pleading is to be relied on, the same can only be brought by means of amendment and not otherwise.

3. On the other hand, learned counsel for the opposite parties contends that the replication is part of the pleading since the replication has been filed in reply to the statement made in the written statement. He contended further that no objection was taken to the filing of the replication before evidence had started and that on the contrary the defendant had filed Additional Written Statement. Therefore, the objection raised by the defendant at the time of hearing cannot be sustained.

4. The suit is governed by the provision contained in the Provincial Small Cause Courts Act, 1887. Therefore, the Civil Procedure Code is applicable only to the extent as provided in Section 17 of the said Act. Section 7 of the Code of Civil Procedure specified the provision of the Code which shall not be applied to the Provincial Small Cause Courts, while Order L of the Code supplant. Section 7 specifying the portion of the First Schedule which does not apply to the Provincial Small Cause Courts. In the facts and circumstances of the case, I am more concerned with Order L of the Code than Section 7, though, however, Order L flows from Section 7, inasmuch as body of the Code does not provide any thing with regard to the solution of the present dispute for which reference is required to be made to the First Schedule of the Code. Order L provides that the provisions enumerated thereunder, shall not extend to the Small Cause Courts. The provisions relating to the frame of suit, as provided under Order II, Rule 1, has been extended by the provisions relating to the pleading has not been excepted. At the same time, the Provincial Small Cause Courts Act does not provide specifically anything with regard to the pleading. The Civil Procedure Code applies only to the extent as provided in Section 17 of the said Act. The real object of Section 17 is that a suit or proceedings arising out of decision of Small Cause Courts is to be governed by the Provincial Small Cause Courts Act, 1887 and not by the provisions of the Code of Civil Procedure, 1908. [Vide *Kanhaiya v. Gurwant*, AIR 1962 All 514 and *Brij Behari v. Lalta Prasad*, AIR 1934 All. 943], but where there is no specific provision in the Act to cover a particular controversy, than the provisions of the Code of Civil Procedure can be taken resort to help the litigants and also the ends of justice [vide *Satyabadi v. Kanhei Pradhan*, AIR 1943 Pat 72].

5. Now Section 17 of the Act is to be read with reference to Section 158 of the Code of Civil Procedure and so it should be deemed to relate to the application of Section 7 of the Code or Order L of the same Code in the proceedings of Court's of Small Causes [vide *Eipin v. Abdul Ban*, AIR 1917 Cal 548 *Abdul Hamid v. Shyam*, AIR 1935 All. 502 and *YusufAkram v. Arfan Ali*, AIR 1961 Cal 464].

6. Therefore, now Section 96 of the Code of Civil Procedure cannot be extended in respect of any decision of the Small Cause Court. If Section 96 is not extended then there cannot be any scope for attracting section 100. Section 24 of the Small Cause Courts Act provides appeal from the order only in respect of Clause (ff) and Clause (h) of subsection (1) of Section 104 of the Code of Civil Procedure, 1908 but there is no provision in the said Act akin to Section 96 of the Civil Procedure Code. However, the decree or order passed by the Small Cause Court has been made revisable under Section 25 of the said Act, which runs as follows:

"25. Revision of decree and orders of Court of Small Causes The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect there of as it thinks fit."

7. In the present case, it is not an order which come within the ambit as provided in Section 24 of the said Act, therefore, the said order is revisable under Section 25 of the said Act. The only question to be decided is as to whether the said order amounts to "a case decided". The scope of revision is also different from that of Section 115 of the Code to the extent that the scope of revision embraces as to whether the order "was according to law". Therefore, this scope is little wider than that of section 115 when exercised under Section 25. Then again such power is given to the High Court, but the situation is little different when it comes to be appalled in the State of U.P. because of the amendment made in the said Act by U.P. Small Cause Courts (Sansodhan) Act XVII of 1966. Some more amendments were made by U.P. Civil Laws (Amendment) Act, 1972 (XXXVI of 1972), and the U.P. Civil Laws (Reforms and Amendment) Act, 1976 (U.P. Act No. 57 of 1976, but we are not concerned with the 1976 amendment.

8. In order to appreciate the present situation, it is necessary to refer to the U.P. Amendment of Section 25 of the said Act as substituted by U.P. Act No. 17 of 1966 which is quoted below:

"25. Revision of decrees and orders of Small Causes. The District Judge, for the purpose of satisfying himself that a decree or order made in any case decided by a Court of Small Causes was according to law, may of his own motion, or on the application of an aggrieved party made within thirty days from the date of such decree or order, call for the case and pass such order with respect thereto as he thinks fit."

Further amendment was made by U.P. Act No. XXXVI of 1972 by adding the proviso after the amendment made in the year 1966, which runs as follows:

"Provided that in relation to any case decided by a District Judge or Additional District Judge exercising the jurisdiction of a Judge of Small Causes, the power of revision under this section shall vest in the High Court."

9. Now in the present case, the order has been passed by 9th Additional District Judge, Ghaziabad, therefore, the same cases within the purviews of the proviso added by the 1972 amendment Act, namely, that revision under Section 25 lies in the High Court.

10. In my view Article 226 of the Constitution of India cannot be invoked when there are specific provisions contained in the Act itself. When confronted with the question of maintainability of the writ petition under Article 226 of the Constitution learned counsel for the petitioner submits that the writ petition is maintainable in the High Court when there is no provision for revision or appeal against the order. He relied on a decision in the case of Ganga Saran v. District Judge, Hapur, AIR 1991 All 114.

11. In my view, the ratio decided in the case of Ganga Saran (Supra) has no manner of application so far as the present question is concerned. Inasmuch as this case proceeds on the question as to whether the writ petition is maintainable against the order passed by the District Judge in Revision under Section 115 of the Code of Civil Procedure as amended by the U.P. (Amendment) Act 1978 substituting the U.P. Amendment Act, 1974. Under the U.P. Amendment Act, 1978 an order passed in a suit valued at Rs. 20,000 or below is reviable before the District Judge and the order passed by the District Judge in exercise of Section 115 as amended by U.P. Amendment Act, 1978 was no more subject to revision or otherwise. Therefore, the question arose whether such order could be revised by the High Court in exercise of writ jurisdiction. The entire question was gone into on the basis that there was no remedy against the order passed by the District Judge under Section 115 as amended in U.P. though, however, attention was not drawn to Article 227 of the Constitution of India in the case of Ganga Saran to the extent it deserved. But still the decision being that of the Full Bench is stare decision for a single Judge so that the said judgment prevail with regard the ratio decided therein. But by no stretch of imagination it can be said that the ratio laid down in Ganga Sran's case had contemplated that despite provision under Article 227 the provision of Article 226 can be resorted to inasmuch as it had referred to the revisional power under Article 226 or 227 of the Constitution of India. Therefore, it cannot be said that despite existence of adequate remedy in the form of Section 25 of the said Act, the writ petition can be held to be maintainable. In that view of the matter, writ petition under Article 226, is not maintainable in view of specific provisions contained in Section 25 of the said Act.

12. At this stage, learned counsel prayed for leave to convert the writ petition into one under Section 25 of the said Act. Learned counsel for the opposite parties, on the other hand, contended that such a leave cannot be granted since the writ petition under Article 226 of the Constitution of India is not maintainable and the same is to be dismissed. The High Court cannot convert the same into one under Section 25 of the said Act thereby making a nonmaintainable writ petition to be a maintainable one in another form.

13. I am unable to accept the said contention of the learned counsel for the

respondent. The High Court has power to convert the said application into one under Section 25 of the said Act for the ends of justice, if it so appears to High Court. Similar question arose in the case of *Shamshuddin Mia v. Munshi Adal Alim*, AIR 1976 Cal 52. In the said case it was the question before the Court whether an application under Sec. 115 against the order of Small Cause Court is maintainable and whether such a nonmaintainable application could be converted into one under Section 25 of the said Act. It was held in the said case that application under Section 115 against the Order of Small Cause Court is not maintainable and the High Court can convert such application into one under Section 25 of the said Act.

14. Looking into the merits of the case, it appears that the present one is a fit case where for the ends of justice such leave to convert the application ought to be given. I, therefore, allow the prayer made by the learned counsel for the petitioner and treat the present application as one under Section 25 of the Small Cause Court.

15. In the present case, the question has been raised as to whether the replication can be treated as pleading. Since the Small Cause Courts Act does not specifically provide anything to cover a particular controversy, it is necessary to fall back on the Code for helping ourselves to solve the problem for the ends of justice as observed in the case of *Satyabadi* (supra). The reasoning given in this case appears to be reasonable and acceptable in view of the analysis made therein with which no fault can be found to enable this Court to follow the said decision. It is also supported by the reason given in the case of *Abdul Hamid* (supra) by this Court. Therefore, for the purpose the present controversy we will refer to the different provisions of the Code so as to help up to settle the controversy, which is admittedly a case decided and which can be looked into as to whether the same was according to law.

16. The provisions relating to pleading are engrafted in Orders VI, VII, and VIII. The Order VI deals with the pleading generally, while Order VII deals with the plaint and Order VIII deals with Written Statement. Order VI, Rule 1 defines pleading. In the terms that pleading shall "main plaint or written statement." Subrule 3 prescribes the form of pleading, which should be the form in Appendix A, when applicable and where they are not applicable form of the like character, as nearly as may be, shall be used for all pleading. The said Appendix does not contain anything by way of form relating to replication. The expression used in Rule 1 "plaint or written statement" is also clear and specific. In order to include replication, it would be necessary to read something mere which is absent in the statute. When the meaning is clear unambiguous and simple, the Court is not invited to add anything or to read something more which is totally absent.

In the case of *Assessing AuthoritycumExcise and Taxation Officer, Gurgaon and another v. M/s East India Cotton Mfg. Co. Ltd., Faridabad*, AIR 1981 SC 1610, it has been held:

"Now it is well settled rule of interpretation that a statute must be construed according to its plain language and neither should anything be added for subtracted unless there are adequate grounds to justify the inference that the Legislature clearly so intended. It was said more than seven decades ago by Lord Mersey in *Thompson v. Gold and Company*, 1910 AC 409;

"It is strong thing to read into an Act of Parliament words which are not there an^ in the absence of their clear necessity, it is a wrong thing to do."

Lord Loreborn L.C. also observed in *Vickers, Sons and Maxim Ltd. v. Evans*, 1910 AC 444:

"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

Because Rule 1, Order VI did not contemplate any replication, therefore, the Legislature had thought to incorporate Rule 17. The provision has been incorporated in order to bring clearly to the case made out by both the parties and because it should be confined to one document. The Courts have, while interpreting the scope of Rule 17 has laid down certain principle, namely, as to whether pleadings are inconsistent with the pleading already made or it changes the nature and character of the suit or it brings about a new cause of action, in such case amendments are not allowed. This has been done only to confine the parties to the case made out so as not to create any confusion. Rule 18 provides consequence of failure to amend after an order of amendment is obtained. Rule 1 read with Rules 17 and 18 implies that the Legislature made the conception of pleading clear to the extent of its definition contained in Rule 1, inasmuch as in case of pleading is sought to be altered, the said alteration is to be made with the leave of the Court. When the said order is obtained, it is to be done within the time allowed by the Court as provided under Section 18 of the C.P.C., therefore, no other document can be brought into to add, alter the pleading by means of replication or otherwise.

In that event it will lead to serious controversy with regard to interpretation of the averments made in the plaint and in the replication which will create confusion both in the mind of the Court and litigants. If the replication is allowed to be treated as part of the pleading in that event there will be an additional plaint against the clear and express provision contained in Rules 1, 7, 17 and 18 of the order VI. Rule 7 then would have no meaning which specifically lays down that no pleading shall raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same except by way of amendment. Even if Rule 5 of Order VI is taken, then, again the same ought to be only further and better statement of the nature of claim or defence or further and better particulars of any matter stated in any pleading and in all cases by ordered upon such terms as to costs and otherwise as may be just. Therefore replication filed without any such order under Rule 5 and without considering whether the same amount to further or better particular, it cannot be

said that a replication can do form a part of the pleading. Thus, Specific provisions has been laid down in Order VI read with Rules 1, 5, 7, 17 and 18 construed harmoniously reconciling each provision support the view I have taken. It is very difficult to accept the contention of the learned counsel for the opposite parties that replication to form part to the pleading. Order VII also does not provided anything else to support the contention of the learned counsel for the opposite parties. Similarly, there is no provision by which deviation from the Written Statement be made except as provided in Rules 8 and 9. In the present case as made out, the replication does not come within the purview of Rule 1 of Order VIII, inasmuch as the fact sought to be introduced in the replication is not a fact arising out of the institution of the suit or presentation of the written statement. Rule 9 of Order VIII prohibits introduction of subsequent fact except with the leave of the court upon such terms as the Court thinks fit, may require a written statement or additional written statement from any of the parties and fix a time for presenting the same. The replication filed in the present case has not come in the manner prescribed under Rule 9 of Order VIII.

17. In the present case, the replication does not come within the purview of Order VIII, Rule 8 nor under Order VIII, Rule 9. Admittedly no leave was sought for presentation of replication by the plaintiff neither additional written statement was file with the leave of the Court in terms of Rule 9.

The judgment referred to in the impugned order, namely, *Jag Dun v. Savitri Devi*, AIR 1977 P & H 68, supports the view that replication is part of the pleading, has not dealt with the above provision. In the said judgment, the proposition has been expressed abruptly" It is an established proposition of law that replication is part of the pleadings. The said judgment does not contain any specific reasoning to impel me to persuade myself to agree with the said judgment. With the respect, I am unable to persuable myself, to agree with the observation made in the said judgment in view of specific provisions of Order VI, Rules 1, 5, 7, 17 and 18 read with Order VIII, Rules 8 and 9 of the Code.

18. The learned counsel for the respondent relied on the case of *Smt. Sulochana v. Ram Kumar Chauhan*, AIR 1981 All 78, in order to support his contention that replication is part of the pleading, but in para 12 of the said judgment, it was held:

"The provisions of the Code of Civil Procedure, as noticed earlier, are to regulate the proceedings under the Hindu Marriage Act subject to the other provisions contained in that Act or the Rules framed by the High Court as provided in Section 21 of the Act. The requirement that the facts in which the claim to relief is founded shall be stated in every petition as distinctly as the nature of the case permits contained in Section 20 of the Act and as prescribed by the Rules framed by the High Court, referred to above, is, therefore, of an overriding nature which would clearly rule out the grant of relief on the basis of the allegations contained in the replication which according to a Division Bench of the Punjab and Haryana High Court in *Jag Dutta v. Savitri Devi*, AIR 1977 P & H 68" is a part of pleading".

The submission of Sri Graver that the allegation of cruelty on the part of the wife made in paragraph 14 of the replication could entitle the husband to seek relief on that ground, even though no allegation had been made by him in the petition, cannot be accepted." Therefore, the said decision cannot help the petitioner inasmuch as the question of replication being part of the pleading, as held in the case of Jag Dutta has been ruled put. The said judgment has neither approved nor followed the said judgment though it has been referred to. In view of the specific provision of the Rules framed under Section 21 of the Hindu Marriage Act, this Court was not called upon to decide the said question. Therefore, the passing remark cannot be accepted to be the approval of the said judgment.

19. The next case relied upon by the learned counsel for the opposite party is *Ram Saroop Gupta v. Bishan Narain Inter College*, 1978 ARC 516, wherein it was recorded that after the written statement was amended, the plaintiff filed his replication giving reply to the averments made in paragraph 11A of the amended written statement and reiterated that the defendants were occupying the said building as licensees. On these facts, in this case, the judgment proceeded on the footing that technicality should not be relied upon and that construction of form cannot obverrindge the legitimate construction of the substance. But in the said case replication, contained only an answer to paragraph 1 IA as added by amendment in the written statement and reiterated what has been said in the plaint, Only expression "rent free accommodation" was ascertained to be that of a licensee. But in the present case, the replication contains a whole lot of paragraphs denying the statements made in various paragraphs of the written statement which is a thing unknown in view of Order VI, Rule 1, C.P.C. In the said judgment as well the provision of Order VI, Rules 1, 5, 7, 17, and 18 have not been taken into consideration. In that view of the matter, because of the facts involved in the said case, the same is distinguishable and cannot be attracted.

20. The learned counsel thereafter relied on the case of *Mukundi Lal v. Srimati Ram Pyari and another*, 1971 ALJ 137. In the present case, the replication was filed after obtaining leave of the court under Order VIII, Rule 9, CPC and no objection was raised by the defendant to the filing of the replication by the plaintiff and that the defendant had never alleged either in his written statement or before the courts below that any prejudice had been caused to him by filing the replication by the plaintiff. Therefore, the evidence adduced on the facts stated in the replication was allowed. Thus it appears that the facts of the said case stands altogether different footing from that of the present case. Inasmuch as in the present case, no leave was obtained by the plaintiff while filing the application. At the same time, though the plaintiff did not raise any objection earlier, but he had raised the objection before the evidence could be laid on the replication itself. Therefore, the facts of *Mukundi Lal* (supra) is distinguishable so far as the facts of the present case are concerned. Therefore, the principles laid down therein cannot be attracted so far as the present case is concerned.

21. On the other hand, the learned counsel for the petitioner relies on the judgment in the case of Smt. Bibbe v. Smt. Ram Kali and others, 1982 AWC 665, wherein it has been held:

"It is by new well settled that a decision cannot be based on facts not pleaded and that no evidence would be permissible to be led with regard to a fact which has not been pleaded." This is a well established principle and there is no quarrel about the same.

22. In the present case, as observed above, the replication cannot be treated to be part of the pleading. Therefore, no evidence could be led on the basis thereof.

23. In the result, the impugned order cannot be sustained and is hereby set aside. This order, however, shall not prevent the plaintiffopposite party to seek amendment of his plaint in order to incorporate the facts pleaded in the replication. If such an application is made, the court shall allow the same within a period of four weeks from the date of making such application if the same is not inconsistent with the pleading made earlier or cannot be allowed, and thereafter allowing opportunity to file additional written statement to the defendant within a period of two weeks from the date of allowing such amendment, proceed with the hearing of the suit as expeditiously as possible. Since in the meantime, sufficient time has passed, this court hopes and trusts that the suit would be disposed of by the learned trial Court preferably within one year from the date of production of certified copy of this order before the learned trial court.

24. This petition thus stands allowed to the extent indicated above. There will, however, be no order as to costs.

25. A certified copy of this order may be issued to the learned counsel for the parties on payment of usual charges within seven days.