

(1951) 04 GAU CK 0002
In the Gauhati High Court
Case No : Civil Revision No. 90 of 1950

Ramprosad Himmatsingka and another APPELLANT
Vs
Shehomoy Mitra and others RESPONDENT

Date of Decision : 02-04-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227

Citation : AIR 1952 Guw 10

Hon'ble Judges : T.V. Thadani, C.J.; Ram Labhaya, J

Bench : Division Bench

Advocate : S.K. Ghose and P. Chaudhuri, for the Appellant; S.M. Lahiri and N.M. Dam, for the Respondent

Final Decision : Dismissed

Judgement

Ram Labhaya, J.—This petition of revision is directed against an order of the Subordinate Judge, L. A. D., dated the 29th May 1950 by which he allowed an amendment of the plaint and also accepted the amended plaint. Defendants 1 and 2 are the petitioners. They assail the validity of the order by this petition under S. 115, Civil P.C. and also under Art. 227 of the Constitution of India.

2. There were 6 defdts, in the case. Land measuring 18 B. 3 K. 2 L. described in Schedule A attached to the plaint belonged to defendants 3, 4 and 5 and in equal shares. These defdts. are brothers. Defendant No 6 purchased some land out of the share of defendant 4, After the sale transaction, he instituted a suit for partition and separate possession of the share purchased by him in the Court of the Special Sub-Judge, A.V.D. Defendants 3, 4 and 5 of the present litigation were the defendants in the partition suit. In the course of this litigation, the learned Subordinate Judge issued a temporary injunction against the defdts. (now defdts. 3-5) on 6 6-1947 restraining them from alienating or otherwise disposing of any portion of the property involved in the suit until further orders of the Court; Defendant 5 was entitled to 6B. 1 K. 2/3D, of the land of Schedule A.

Before 30.8.1949 he had sold about 1 K. 11 L. out of his share. On 30 8 1948 his share was to the extent of 5 B. 4 K. 9 2/3 L. By reason of the injunction issued in the partition case, he could not sell away his share on 30-8-1943 as the suit was till pending and the injunction against him was subsisting. He, however, entered into an agreement with the plaintiffs to sell to them the remaining portion of his share of the land measuring 5 B. 4 K. 2 2/3 L. for Rs. 12,000. At the time of the execution of the agreement, he received Rs. 6,000 as part payment of the price. The plaintiffs alleged that they got formal possession of the property also at the time of the agreement. This agreement provided that the sale deed in favour of the plaintiffs would be executed and registered within 6 months from the date of the final disposal of the partition suit pending in the Court of the Special Sub Judge. It was at that time the balance of the consideration was also to be paid to defendant 5.

3. On 33-11-1948, defendants 1 and 2 got a sale deed executed by defendant 5 in their favour. The deed purported to convey 5 bighas of land out of his share to the two defdts. (defdts. 1 and 2) for a consideration of Rs. 10,000.

4. Plaintiffs' case as put in the original plaint was that the sale deed in favour of defdts. 1 and 2 was the result of a conclusive arrangement and that it was without any consideration. It was also alleged that defdts, 1 and 2 were fully aware of the agreement of sale in plaintiffs' favour and also of the injunction by which defdt. 5 was prohibited from alienating the land. Defendants 1 and 2 tried to obtain permission for sale but they did not succeed in this move. On these facts it was claimed that the sale in favour of defendants 1 and 3 was not valid and it did not confer any right or title in the land on them as against the rights which the plaintiffs had. The sale was challenged as illegal and void and as, according to the plaintiff, it cast a cloud on their title under the agreement, they prayed for a declaration that defendant 5 was under an obligation to sell 5B. 3K. 9 2/3 L. of land to the plaintiffs under the agreement dated 30-8-1948 within 6 months from the date of the final disposal of the partition suit and that defdts. 1 and 2, being the purchasers with notice of the plaintiffs' earlier agreement, were also bound by the contract of sale in plaintiffs' favour. The declaration prayed for was further to include the relief that the sale deed in favour of defdts. 1 and 2 was void. In addition to the declaratory relief an injunction was sought for against defdts. 1, 2 and 5 restraining them from acting on the sale in favour of defendants 1 and 2 until the final disposal of the suit.

5. Defendants were summoned; they put in their written statement and issues were also framed. The partition suit in the Court of the Special Sub-Judge was disposed of on 4-2-1949. On 6 4-1950, defendant 5 executed a registered deed of sale in favour of the plaintiffs in respect of land allotted to him in the partition case. It is alleged that this sale-deed was executed in pursuance of the agreement of sale and that at the time of sale defendant 5 got the balance of the consideration due to him. On 29-5-1959, plaintiffs applied for amendment of the plaint on the allegation that after the disposal of the partition suit, defendant 5

executed a registered conveyance in favour of the plaintiffs and gave them actual possession instead of formal possession that they had before. The alleged sale in favour of the plaintiffs is the only additional fact stated in the amended plaint. This apparently is a development that came after the institution of the suit. As a result of this development, subsequent to the institution of the suit, the plaintiffs claimed a declaration of title with respect to the land conveyed to them by sale-deed dated 5-4-1950. Formerly, they had asked for a declaration that they would be entitled to obtain a conveyance within 6 months after the disposal of the partition suit. The second relief claimed in the amended plaint is for a permanent injunction restraining defendants 1 and 9 from interfering with the possession of the plaintiffs.

6. The learned Subordinate Judge allowed the amendment prayed for. In his view the amendment asked for did not prejudice the defendants in any way. It was necessary for the purpose of determining the real question in controversy between the parties and for avoiding multiplicity of litigation. He also noticed that the amendment became necessary by reason of an event happening after the institution of the suit.

7. The Learned Counsel for the petitioners has urged that the trial Judge has acted illegally and with material irregularity in the exercise of his jurisdiction inasmuch as in permitting the amendment sought for he transgressed the recognised rules of procedure governing amendments. He pointed out that the amendment changes the character of the suit and for all practical purposes substitutes one cause of action for another. The amendment therefore, is not in consonance with the spirit of O. 6, R. 17, Civil P.C.

8. Order 6, R. 17 corresponds to S. 53 of the old Code. Under S. 53 the plaint could at the discretion of the Court at, or at any time before the settlement of issues, be returned for amendment on grounds specified in the section. It could also be amended by the Court at, or any time before judgment. But neither the party nor the Court could amend the plaint so as to convert a suit of one character into a suit of another and inconsistent character. Order 6, R. 17, which takes the place of S. 53 provides that 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. This is the first part of the rule. Under this part the Court has very wide discretion to allow amendments of pleadings in such manner and on such terms which the Court may deem just. The second part of the rule provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. A comparison of R. 17 with S. 53 of the old Code reveals that the powers of the Court to allow amendments are much wider under O. 6, R. 17 than they were under S. 53 of the old Code. The proviso to S. 58 that a suit of one character shall not be converted into one of another and inconsistent character by amendment is conspicuous by its omission. The effect of this omission is that, strictly speaking, an amendment introducing a new ground of claim or an

allegation of fact inconsistent with the original pleading may be allowed in proper cases. In the exercise of this wider power, Courts have allowed amendments which would not have been permissible under S. 53 of the old Code. In *Sheo Narayan v. Sam Prasad*, AIR 1923 Nag. 241, a suit for recovery of the sum of money due on settlement of accounts of a dissolved partnership was allowed to be amended by the substitution of a claim for accounts of a dissolved partnership. The character of the suit was changed, yet the amendment was allowed. In *Kubad Mia Vs. Guhi Mia and Others*, , it was recognised that the Court had the power to allow by amendment a suit for specific performance of a contract to be converted into a suit for damages for breach of the contract, if it did not cause injustice to the other side and if the amendment was asked for at an early stage. There are other instances in which amendments have been allowed even though the character of the suit was changed. But it must be conceded that though O. 6, R. 17 does not expressly or by necessary implication prohibit absolutely the conversion of a suit of one character into a suit of another and inconsistent character, normally such a conversion of the character of the suit is not to be permitted. The matter is entirely in the discretion of the Court and it would not be expedient to lay down any inflexible or rigid rule on the point.

9. This leads us on to the question whether there has been any change in the character of the suit by the amendment of the plaint. The basis of the claim in the original plaint was an agreement of sale in plaintiffs' favour. That agreement formed the foundation of the rights claimed. As there was no conveyance in plaintiffs' favour, they could merely ask for a declaration that they would be entitled to demand specific performance of the agreement of sale according to the terms of the agreement. As a consequential relief they asked for a certain injunction. Whatever relief was claimed was against defendants 1, 2 and 5. Defendant 5, according to the plaintiffs, was under a legal obligation to specifically perform the agreement of sale. As defendants 1 and 2 had obtained a sale-deed in their favour, the relief was claimed against them too. It was pleaded that they were as much bound by the agreement of sale as defendant 5. During the pendency of the suit, a conveyance was executed by defendant 5 in favour of the plaintiffs. The agreement of sale was thus specifically performed by defendant 5. But this did not dispose of the controversy as to the rights of the plaintiffs under the agreement of sale qua defendants 1 and 2. They could still say that the conveyance in plaintiffs' favour had no effect on their title. The decision of the dispute between the plaintiffs and defendants 1 and 2 depended on the validity and binding character of the agreement of sale and the circumstances surrounding the sale-deed in favour of defendants 1 and 2. In the absence of any legal bar to the plaintiffs' claim they would have succeeded if they could show that they had a binding agreement of sale in their favour and the conveyance in favour of defendants 1 and 2 was either with notice of their agreement or that it was otherwise void. The conveyance in plaintiffs' favour does not at all alter the situation. It does not improve their title. It merely entitles them, on the basis of the conveyance in their favour, to ask for a

different relief. For obtaining the new relief even, they have still to prove the validity of their agreement of sale and the circumstances on which they contend that the sale deed in favour of defendants has no effect on the rights conferred on them by the agreement of Bale. It will thus appear that the character of the suit has not been changed. Its basis remains the same. The questions of fact and law that were raised in the original plaint are all there now and if the plaintiffs succeed in proving the conveyance in their favour in addition to the facts alleged in the original plaint, they will be entitled to a different relief, viz., a declaration of title to the land itself. The consequential relief for an injunction also will undergo some change. It may also be said that a new cause of action has been added. But it is possible to add a fresh cause of action and to alter the relief without changing the character of the suit. The change in this case, if any, is surely of not such a fundamental or even substantial character that it may be said that it violates the recognised rule according to which amendments may not as a general rule be allowed which converts a suit of one character into a suit of another and inconsistent character. There is again absolutely no basis for saying that any new character that the suit may have assumed if at all is inconstant with the character of the suit as laid in the first instance. As held by Baguley J. in *Chettyar E. K.S. Firm v. Maungmin Maung*, AIR 1933 Rang. 247, what an amendment must not alter is the fundamental character of the suit which expression refers to the foundation on which the suit is based and not the prayer in the plaint. Judged by this test, the amendment does not introduce any change in the fundamental character of the suit.

10. In *Thakur Mahto and Others Vs. Jago Kuer and Another*, , a reversioner brought a suit to set aside a mortgage executed by a widow against the widow and her mortgagees. After receiving summons the widow conveyed the property to several vendees. Plaintiff applied for amendment of the plaint by adding the allegations that the sale deed had been brought into existence by the vendees in conspiracy with the original defendants. He also asked for leave to add the vendees as defendants. The amendment was allowed. A petition of revision against the order allowing the amendment was dismissed. Sinha J. who delivered the judgment, observed as follows :

The most important principle governing amendment of plaint was that amendments should be allowed if by doing so multiplicity of suits might be avoided. In this case that condition is entirely fulfilled. It cannot be said that by allowing the amendment, the lower Court has allowed the nature of the suit to be changed or has allowed one cause of action to be substituted for another. The Utmost that can be said against the order passed by the Court below allowing the amendment is that it has the effect of allowing the plaintiffs to add certain more causes of action to the original one. But as already indicated all these causes of action are allied to one another on the allegations made by the plaintiffs, namely, that all these transactions have been brought about as a result of a conspiracy amongst the defendants.

This case is a clear authority for the proposition that in certain cases a fresh cause of action may be added and such addition would not necessarily alter the character of the suit.

11. In *Bhimudu v. Pitchayya*, AIR 1946 Mad. 497 plaintiff's case in his original plaint was that he was adopted by his uncle deft. 1 who on the advice of his daughter was attempting to alienate the properties belonging to the joint family of the plaintiff and deft. 1. The relief asked for was, the partition of his share and separate possession thereof. After the institution of the suit deft. 1 died. His widow and daughter were brought on record. They set up a will in their favour and claimed the entire properties. By reason of the death of deft. 1 and in view of the will set up, the plaintiff sought to amend the plaint by asking for possession of the entire properties and for declaration that defdts. 3 and 4 had no right to the properties and the will set up by them was not genuine. It was held that the statutory test for determining whether the amendment of the pleadings should be allowed was whether the alteration of the pleadings or the amendment thereof that is asked for is just or whether it is necessary for the purpose of determining the real question in controversy between the parties, though under the guise of alteration or amendment of the pleadings, a party should not be allowed to substitute one cause of action for another or to change the subject matter of the suit. On the facts of the case it was found that the necessity for the amendment arose out of the circumstance, namely, the death of defendant 1, which happened after the institution of the suit. But this circumstance did not change the real foundation of the claim which was the alleged adoption. The fact that the claim to joint possession advanced in the original plaint was abandoned and in the amended plaint possession was claimed on the basis that plaintiff was out of possession was regarded as a necessary or just development of the original case and the finding arrived at was that there was no alteration of the fundamental character of the suit; nor had one cause of action been substituted for another.

12. In *Gopala Krishna Murthy v. Sreedhara Rao*, AIR 1850 Mad. 32, it was recognised that if by reason of the subsequent events certain rights accrue to the plaintiff, he would be entitled to claim relief under those rights by amendment. In *Appalasuri v. Kannamma Nayuralu*, AIR 1926 Mad. 6, it was held that events that happened after the institution of the suit including those that add to the title of the plaintiff, may be taken notice of. The proposition, however, was qualified by the observations that the discretion in favour of allowing amendment ought not to be exercised even in such cases if there is a change of jurisdiction, when there is a great delay in making the application and may not be exercised if a fresh enquiry on other facts is necessary. When these features do not exist, the amendment, as a general rule, may be allowed to avoid multiplicity of proceedings.

13. It seems to me that these authorities enunciate law which may be regarded as settled. The cases cited before us disclose no divergence. When therefore

events occur after the institution of the suit the Court has the powers to allow amendment of the plaint in proper cases even though the amendments asked for may involve addition of fresh causes of action particularly when the fundamental character of the suit is not altered. Judged by this test the amendment allowed was permissible. An event has occurred after the institution of the suit. It adds to the rights of the plaintiffs. They are in a position to claim fresh reliefs which were not open to them when they instituted the suit. The new cause of action which the event, happening after the institution of the suit, may be said to have given rise to, leaves the essential character of the suit unaltered and therefore the amendment is not open to objection on this score.

14. The second contention raised is that it is not permissible to allow a party to substitute one distinct cause of action for another or to change the subject matter of the suit. This proposition was laid down in AIR 1922 249 (Privy Council) . Lord Buckmaster in delivering the judgment of their Lordships of the Privy Council observed as follows:

All rules of Courts are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised but nonetheless no power has been given to enable one distinct cause of action to be substituted for another, nor to change, by amendment, the subject matter of the suit.

These observations were relied on in *Jiwanmal v. Allah Jawaya*, AIR 1931 Lah. 595. Both these cases were relied on by Mr. Ghose. No one has any quarrel with the proposition of the law laid down in the Privy Council case and relied on by Tek Chand J. in the Lahore case. But these cases have no application to the facts of the case before us. The subject matter of the suit remains the same even after amendment. There is no change in it. Nor is there any substitution of a cause of action distinct from that set up in the original plaint. The basic cause of action was the agreement. The execution of the conveyance would confer on the plaintiffs no right independently of the agreement of sale. The basis of the claim still is the original agreement. The execution of the conveyance in plaintiff's favour in pursuance of the original agreement of sale again cannot be regarded as a distinct cause of action which has nothing to do with the previous one. Besides, their Lordships of the Privy Council and the learned Judges of the Lahore High Court were not dealing with the question that arises before us. There were no developments in those cases subsequent to the institution of the suit. These authorities, therefore, are not helpful.

15. Mr. Ghose also relied on *Gyanendra Nath v. Pores Nath*, 26 Cal. W.N. 73. This case is also distinguishable on facts. In this case plaintiffs originally sued for damages and injunction against the defendant and then asked for leave to amend the plaint so as to convert the suit into one for declaration of title and then further by another amendment prayed for recovery of possession if in the opinion of the Court they are found to be out of possession. It was held that the

limitation applicable to the claim for damages being 3 years and that for declaration of title 6 years, the second amendment ought not to have been allowed as its effect was to enlarge the period of limitation to 12 years from the date of the dispossession and to take away from the defendant his right to defeat the suit as originally framed on the ground of limitation. It was farther found that the amendment altered the nature of the suit and that it also appeared from evidence that there was no bona fides on the part of the plaintiff.

16. I think this case has no bearing on the point before us. The contention raised by the Learned Counsel for the petitioners must be repelled for reasons given above. We find no basis for holding that the learned Sub Judge acted illegally or with material irregularity in the exercise of his jurisdiction. His order does not violate any recognised rule of procedure governing amendments. The order advances substantial justice by avoiding multiplicity of proceedings. The amendment was also necessary for determining the real question in controversy between the parties. The petition of revision, in these circumstances, must fail and is dismissed with costs.

Thadani, C.J.

17. I agree.