

(1987) 08 MAD CK 0035
In the Madras High Court

Seetharama Reddiar

APPELLANT

Vs

Sri Arulmighu Arunachaleswarar Devasthanam

RESPONDENT

Date of Decision : 14-08-1987

Acts Referred:

Citation : (1988) 1 LW 69 : (1987) 2 MLJ 497

Hon'ble Judges : K.R. Natarajan, J

Bench : Division Bench

Judgement

K.R. Natarajan, J.—This revision is directed against the order passed by the learned Appellate Judge allowing the amendment of the plaint.

The facts which are necessary for the disposal of the revision are briefly as follows: The respondent herein viz. Aruhnighu Arunachaleswarar

Devasthanam, filed a suit against the revision petitioner or recovery of arrears of lease amount for Faslis 1387 to 1391. According to the plaint

filed by the respondent, the leasehold property was survey No. 107/11 and 1.50 acres of wet land at Membagha-pattu. After examining two

witnesses the respondent filed amendment application stating that the land cultivated by the revision petitioner was not 107/11 but only dry land

Survey No. 130/11 and of 1.50 acres. The said amendment petition, though resisted by the petitioner herein, was allowed, ultimately, the learned

trial Munsif dismissed the suit.

2. Against the said dismissal of the suit the respondent herein filed appeal in A.S. No. 83 of 85 before the Sub-Judge, Villupuram. The respondent

also filed an application in .A.No. 339 of 86 for permitting to amend the plaint as well as the memorandum of appeal by substituting the suit

properties Survey Nos. R.S. 319/4 of 32 cents and R.S. 328/23 of 84 cents,

totalling 1.15 acres of nanja lands in place of R.S. 137/11 of 1.58

acres dry land. The reason alleged in the affidavit in the Court of the SubJudge is that the respondent came to know the mistake only when he

obtained the Adangal to file suit for recovery of arrears for subsequent Faslis in CS. No. 872 of 86. The said application was resisted by the

petitioner herein on the ground that by allowing the amendment the entire character of the suit changed and further the respondent should not be

allowed to change the entire subjectmatter in the appeal, having lost before the lower Court. Further there cannot be any mistake in respect of the

description of property as it is the case of the petitioner that he is not cultivating the property of the respondent from 1978 onwards. The learned

appellate Judge allowed the amendment in one sentence observing that the amendment will not change the nature and character of the suit.

Aggrieved by the same, this revision is filed.

3. The question now arises for consideration in this revision whether the respondent is entitled to amend the subject matter of the suit by substituting

entirely new property in the place of the existing one. It is not disputed that the respondent originally filed the suit claiming that the petitioner is a

tenant of the land hearing Survey No. 107/11 wet land of 1.58 acres and subsequently amended the same when the suit was part-heard, by

changing the survey Number into 137/11 punja land of 1.58 acres. It is the case of the petitioner that he is not cultivating any of these lands, or any

of the lands belonging to the Devasthanam from 1978. The learned District Munsif who heard the suit came to the conclusion -that the records

produced in the case did not relate to the suit properties and as per Ex. P1 the respondent Devasthanam already took possession of the property

from the petitioner herein and as such, the suit is liable to be dismissed. Even the document Ex. P3 produced clearly shows only Survey No.

107/11 but the suit filed in respect of Survey No. 137/11 is liable to be dismissed. Even the Adangal Ex. P4 produced by the respondent does not

establish the case of the plaintiff.

4. The learned Counsel for the petitioner drew my attention to a decision in Angammal Vs. Muthupechiammal Meenal, , wherein T. Ramaprasada

Rao, J., held:

Invocation or Order 6, Rule 17, Code of Civil Procedure, is possible only when the

substance of the relief asked for in the original pleading is maintained, though in a different form it is sought to be corrected as to suit the convenience of the litigant. But when the amendment sought for by the plaintiff would alter the very foundation of the claim and the said amendment Prima Facie is distinct, separate and independent of the original relief asked for, then it would not come within the purview of amendment of pleadings at all. On the other hand it would be a substitution of a relief which is different and not asked for in the original plaint. Where, under the guise of an amendment a distinct and separate prayer is sought to be introduced in the pleading it would not be amendment at all, but it would be the setting up of a new case, not thought of and not even pleaded by the person concerned. When a plaint is sought to be amended and when the relief sought for, appears, on the face of it, to be an after-thought and totally disjunct from the prayer in the original plaint, then, such an application for amendment of plaint ought not to be countenanced at all.

The learned Counsel for the petitioner also drew my attention to a decision in *Kanda v. Usha* (1950) 1 M.L.J. 417 : 1950 L.R. 77 IndAp 15 : 63

L.W. 232 : AIR 1950 P.C. 68 , where it was held that the powers of amendment conferred by the Code are very wide, but they must be

exercised, in accordance with legal principles, and their Lordships cannot allow an amendment which would involve the setting up of a new case. It

was further held that it was not open to a Court u/s 153 and Order 6, Rule 17, to allow an amendment which altered the real matter in controversy

between the parties. The learned Counsel invited my attention to a decision in *Monika Banerjee Vs. Biswabikash Sengupta*, , where it was held

that A's application for amendment could not be allowed as A came with two different cases on two occasions. Secondly the proposed

amendment was also not in the aid of the case of A. By way of amendment A could not ask for a decree for specific performance of the agreement

for sale of the disputed plot at any other price than what had been alleged to have been agreed to, between the parties.

5. Next it was contended by the learned Counsel for the petitioner that on the date when the amendment was allowed in respect of the new

property, the suit claim was barred by limitation. In this connection the learned Counsel drew my attention to a decision in *L.J. Leach and*

Company Ltd. Vs. Jardine Skinner and Co., , where it was held:

It is no doubt true that Court would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on

the date of the application. But what Is the factor to " be taken into account in exercise of the discretion as to whether amendment should be

ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice.

The learned Counsel also drew my attention to a decision in Maitreyee Banerjee Vs. Prabir Kumar Mukherjee, . That was a case where the

Supreme Court held that it was a case in which the suit was barred by limitation and the amendment could not be allowed as a matter of course. In

AIR 1948 100 (Privy Council) , it was held that amendment of the pficnt introducing a new claim which would have been barred by limitation, at

the time when the leave was sought, cannot be allowed. In Mashewamja v. Maung Mo Naung I.L.R.(1921) Cal.332 , it was also held that the

subject-matter of the suit cannot be changed by way of amendment.

6. On the other hand, the learned Counsel for the respondent submitted that under Order 6, Rule 17, at any stage, the amendment can be allowed,

if it is necessary for determining the controversy between the parties and further each case has to be decided on its own merits. In the instant case

the suit is only for recovery of arrears and that only the subject-matter of the leasehold property alone is now sought to be altered by way of

amendment and an such the order passed by the Court below is perfectly legal. He also draw my attention to a decision of the Patna High Court in

Muhammad Raza Vs. Zamiruddin, , where it was held that Section 148 (b 1) requires that the plaint shall set forth a list of the survey plots

comprised in the tenancy and a statement of the rental of the tenancy according to the Record of Rights. If the plaint does not contain those

particulars or if it contains such particulars erroneously set forth, the Court should give the plaintiff opportunity to supply those particulars. The suit

should not be dismissed but should be allowed to be amended on payment of costs. On going, through the above decision Tind that the same is not

helpful to the case of the respondent. That was a case where the suits were framed as claims for rent and the plaint in each case set forth the kata

number of the holding in respect of which the claim was made. The plaint then

went on to set forth the plot in numbers appertaining to the plots comprised in the khata and it appears that the list of plot numbers was in each of these six cases incorrectly given. In some cases the specification in the plaint did not comprise the whole of the plot numbers in the holding and in some cases it set forth plots which were not in fact comprised in the holding. The suit was dismissed by the District Munsif and the Appellate Court allowed the amendment of the plaint so as to bring the plot numbers into conformity with the facts as regards each plot. In the instant case it is not the mistake in respect of a boundary or extent of a portion of the property or whole property. But the respondent wants to substitute altogether a new property in the appeal. As rightly observed by the learned Counsel for the revision petitioner the respondent originally filed a suit in respect of one survey number which is described as nanja land and during the pendency of appeal amended the suit property giving a different survey number and different nature viz., dry land. How the respondent sought the amendment to substitute altogether two different survey numbers and different extent and also nature of the property as wet.

7. The learned Counsel also invited my attention to a decision in Smt. Ganga Bai Vs. Vijay Kumar and Others, , where it was held:

The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial consideration and wider the discretion, greater ought to be the care and circumspection on the part of the Court.

But, ultimately it was held that the High Court was wholly in error in allowing such a belated amendment when valuable rights had accrued to the decree-holder by a lapse of time, thereby reversing the judgment of the Bombay High Court. That decision is also not helpful to the respondent, but, on the other hand, supports the case of the petitioner.

In this connection, it is worthwhile to quote the Full Bench decision of this Court reported in Kumaraswami Gounder and Others Vs. D.R.

Nanjappa Gounder (dead) and Others, , wherein it was held:

A pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings, but

under the guise of an amendment a new cause cannot be substituted and the Courts cannot be asked to adjudicate the alternative case instead of the original case. Though it is expedient under certain circumstances to take into consideration the supervening facts in the course of litigation which is long drawn, yet the mere lapse of such time alone cannot be the foundation to mechanically accept the request for amendment because due to such passage of time, several events had happened and several matters have intervened. It would be hazardous to accept such an application for amendment to a plaint on the only ground of passage of time and change of circumstances. For, that would run counter to the essential ratio governing the principle of amendment of pleading which is that no amendment can introduce a cause of action which was never thought of originally or could not have been thought of earlier and which is diametrically opposed to that stated in the original plaint.

After a careful analysis of the entire materials placed before me and the order passed by the learned Sub Judge and in view of the ratio laid down in the above decision, I am of the view that the order passed by the learned Sub Judge substituting the entire new subject-matter of the suit by way of amendment of the plaint in the appeal and that too after the expiry of the period of limitation especially in the circumstances of the case when the respondent should have been aware of the properties that were leased out to the petitioner and when he was not certain about the same and further when the lower Court has already allowed the amendment of the property, namely, subjectmatter of the suit, by substituting a different survey number during the trial contrary to the one mentioned in the original plaint, is unsustainable and is liable to be set aside. The Appellate Judge, while passing the impugned order has not at all, applied his mind to the contentions raised by the petitioner opposing the application and erred in disposing of the application in casual way contrary to the well established ratio laid down in the decisions referred above including the decision of the Supreme Court.

In the result, the revision is allowed and the order passed by the learned Subordinate Judge is set aside and consequently I.A. No. 338 of 1986 is dismissed. The Sub Judge is directed to dispose of the appeal on the available material. In the circumstances of the case, there will be no order as

to costs in this revision. It is also made clear that the decision rendered in this proceeding, will not in any way affect the subsequent? suit already filed by the respondent for recovery of arrears for the subsequent period in respect of the alleged new subjectmatter of the suit in case the respondent is able to establish that the said property was leased out to the petitioner and that he cultivated the same during the relevant period.