
(1995) 11 AP CK 0070
In the Andhra Pradesh High Court
Case No : C.R.P. No. 135 of 1993

Shaik Peda Adam and Others

APPELLANT

Vs

Shaik Adam and Others

RESPONDENT

Date of Decision : 13-11-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17
Limitation Act, 1963 — Article 113

Citation : (1995) 3 ALT 581 : (1996) 1 CivCC 297

Hon'ble Judges : B. Subhashan Reddy, J

Bench : Single Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; P. Sree Rama Murthy, for the Respondent

Final Decision : Allowed

Judgement

B. Subhashan Reddy, J.—This revision petition is directed against the Order dated 21-9-1992 allowing the amendment petition of the plaintiffs in I.A. No. 2125 of 1992 in O.S. No. 117 of 1984 on the file of the Court of the Principal District Munsif, Ongole.

2. The defendants, who opposed unsuccessfully, are the petitioners. The said suit was instituted seeking relief of permanent injunction and mandatory injunction. Plaintiffs and the defendants are the neighbours having house properties. The plaintiffs' complaint is that windows and ventilators were illegally and unlawfully opened by the defendants into the property of the plaintiffs intruding their rights and as such mandatory injunction was sought for, to close the same. Preventive relief of permanent injunction was sought for restraining the defendants from laying the latrine pipe in portion marked P-2, P-3, P-4 and P-5.

3. Advocate-Commissioner was appointed to inspect the suit property. In the course of inspection, it was found that a channel was there constructed by the defendants. Then a petition in I.A. No. 2125 of 1992 under Order VI Rule 17 CPC was filed seeking amendment of the plaint incorporating a relief for the grant of

mandatory injunction to close that channel also. It is not disputed that the channel was existing even before. Even computing the time from the date of the report of the Advocate-Commissioner, three years lapsed in the year 1987, while the petition for amendment was filed in the year 1992. The amendment petition was contested; but, it was allowed even while holding that the petition was belated and that the relief was time barred. But, the Court below, however, felt that will be considered at the time of disposal of the suit and that the delay caused can be compensated by awarding costs of Rs. 50/-. The defendants, aggrieved by the said order, preferred this revision petition.

4. Mr. M V.S. Suresh Kumar, the learned Counsel for the petitioners, submits that the amendment petition was barred by the principles enunciated under Order II Rule 2 C.P.C. He also submits that the lower Court ought not to have allowed the same even while holding that petition was belated and that relief was also time barred.

5. Mr. P. Srirama Murthy, the learned Counsel for the respondents, on the other hand, submits that Order II Rule 2 C.P.C. has got no application and that the nuisance caused by the defendants by constructing a channel was a continuing one and as such, there was no limitation as it was a continuing wrong.

6. On the premise that the channel was existing as on the date of the institution of the suit and the plea of mandatory injunction was available as on that date, but was not sought for, it is true that it cannot be claimed later. But, such a waiver applies only when a second suit is instituted for the said relief and only second suit is barred under the provisions of Order II Rule 2 C.P.C. But, when amendment is sought for in the same suit seeking the relief which was not sought for at the time of the presentation of the suit, the principles under Order II Rule 2 of C.P.C. have got no application. To avoid the disability of Order II Rule 2 C.P.C. for filing the subsequent suit, in the existing suit, amendment can be sought for and as such, Order II Rule 2 C.P.C. cannot be a bar for invocation of Order VI Rule 17 C.P.C.

7. In so far as the second submission is concerned that the application for amendment was belated and that even while holding that the relief was time barred and also application as belated, the action of the lower Court in all owing the amendment in a casual and routine manner stating that the same can be compensated by awarding costs of Rs. 50/- has got to be deprecated. A Court of law has to judge the things in accordance with law and not by whims and fancies stating something and deciding contra to it. The Court below has clearly stated that the relief sought for is time barred even computing the limitation from the date of the Advocate-Commissioner's inspection or report.

8. Advocate-Commissioner's report was filed in the year 1984 and 3 years have elapsed in the year 1987. Petition for amendment seeking the relief of mandatory injunction for removing the channel was filed in the year 1992. Application of limitation is dependent upon the vital factor as to whether a wrong

complained of has already been committed once for all by a particular date or is it a continuing wrong. In the first case, the limitation is 3 years from the date of the wrong committed, while in the second case the limitation is alive as it is a continuing wrong and from the date of the last of the continuing wrongs, the limitation has to be computed. If the first instance is applicable, clearly the amendment is barred by limitation, while it is otherwise if it is the second instance. The legal provision to which the limitation is traceable is Article 120 of Limitation Act, 1908 corresponding to Article 113 of Limitation Act, 1963.

9. Distinction between a wrong and a continuing wrong came up for consideration in the decisions rendered in Nur Mohammad v. Gauri Shankar AIR 1920 Lah 195 Lal Singh v. Hira Singh AIR 1921 Lah 242, Musammatt Kokla Kunar Vs. Kalian Mal, , Haru Ram v. Kaliyana Ram AIR 1929 Lah 88, Khair Mohd. Khan v. Mt. Jannat AIR 1940 Lah 459, Sarba Singh v. Mibarik Singh AIR 1961 J & K 53 and Raja Ram v. Bahadur AIR 1989 All. 115. Allahabad High Court in Raja Ram v. Bahadur did not lay down any proposition of its own and by making a reference to the decisions in Bhag Singh v. Sewa Singh AIR 1953 Papsu 150, Meghu Mian v. Kishun Ram AIR 1954 Pat 477 and Pabia and Others Vs. Badia and Others, the said judgment was rendered. In the said case, the relief sought for was mandatory injunction for closing doors, ventilators and windows opened by the defendants in their houses affecting the rights of the plaintiffs.

10. In Sarba Singh v. Mibarik Singh AIR 1961 J & K 53 the Jammu and Kashmir High Court also did not lay down a proposition of law by its own, but relied upon the proposition laid down in Nur Mohammad v. Gauri Shankar AIR 1920 Lah. In the said case, it was held that each time the defendants discharged water through their parnala, there was a fresh cause of action as it was a continuing wrong. Same is the case in Haru Ram v. Kaliyana Ram AIR 1929 Lah 88. The said judgment simply followed the decision in Nur Mohammad AIR 1920 Lah.

11. In the judgments referred to above, parnalas (channels) for flowing water were constructed by the defendants in their properties and from time to time they were discharging water through the said parnalas into the properties of the plaintiffs and as such, each time when the water was being discharged, there was injury caused to the plaintiff and in that sense it was a continuing injury. But, in the instant case, there is a clear cut distinction as the channel was already constructed by the defendants in the land claimed by the plaintiffs as their own and the injury was complete when the channel was constructed. It is not that there is series of encroachments and illegal action of construction of channels time and again. The channel was constructed at a time and by a particular period. It is the existence of the channel, which is complained of and that is the dominating factor constituting a wrong, which is sought to be remedied and not the discharge of water therefrom. The relief is to remove the channel and the act. complained of was complete as on the date of the construction of the channel, which was found to be existing on the date of the Advocate-Commissioner's inspection in the year 1984. My above view is fortified

by the Full Bench Judgment of the Lahore High Court rendered in *Khair Mohd. Khan v. Mt. Jannat* (5 supra), in which it was authoritatively held that if the injury was complete on a particular date, the same cannot be termed as a continuing wrong even though the damage caused by that injury might continue and that in such a case/ the cause of action to the person injured arises once and for all at the time when the injury is inflicted and the fact that the effects of injury are felt by the aggrieved person on subsequent occasions does not make the injury a continuing wrong so as to give him cause of action on each such occasion.

12. In *Lal Singh v. Hira Singh* (2 supra), the Lahore High Court held that for removing the thatched sheds, the suit for mandatory injunction was to be laid within 6 years under Article 120 of Indian Limitation Act, 1908 (corresponding to Article 113 of Indian Limitation Act, 1963, where the limitation is reduced to 3 years).

13. In *Mf. Kokla v. Kalia Mal* (3 supra) it was held by Allahabad High Court that the limitation for mandatory injunction runs from the date of construction of Chabutara (Platform). The said two decisions also lend support to my view.

14. Learned Counsel for the respondent then cites the decision in *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, to support his argument that limitation is not an aspect to be considered in application for amendment of the pleadings and seeking relief thereon. In the said judgment, it was held that in the matter of allowing amendment of pleadings, the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred and that where, however, the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to merely a different or additional approach to the same facts, the amendment is to be allowed even after expiry of the statutory period of limitation. But, in the said case, the suit was on the contract seeking only interpretation of the clause for a decision of rights of the parties under it and for no other purpose and the cause of action was the contract itself on which the suit was based and that the amendment sought to introduce a claim based on the same cause of action, namely the same contract and introduced no new case or facts. In that case, a contract of work contained a clause to the effect that in case of an increase in prevailing labour rate of more than 10%, the contractor shall be entitled to charge proportionate increase rates subsequent to the making of the contract. There was increase in the labour rate by 20% and a dispute arose between the parties as to whether under the clause, the contractor was entitled to whole amount or only part of it. As the sole difference between the parties was about interpretation, the contractor filed a suit against respondents only claiming declaration that on a proper interpretation of the clause, he was entitled to enhancement of the 20% above the tendered rates. Contractor's interpretation of the clause was challenged though no material fact was disputed. The suit was decreed, but was reversed on appeal in view of Section 42 of the Specific Relief Act. The plaintiff then sought the leave of the

High Court to amend the plaint by adding extra relief for a decree for contract money or such other money as was to be found due on proper account being taken. But the amendment was disallowed and as such, the plaintiff appealed to the Supreme Court. But, the said judgment of the Supreme Court is distinguishable from this case as in the Supreme Court, the cause of action was the contract and the interpretation was involved and further relief by amendment sought for was Only based on the said cause of action without introducing any new cause of action and in that context, the Supreme Court held that amendment be allowed without reference to the limitation aspect. But, in the instant case, the cause of action is construction of a channel, which was never questioned in the suit and for the first time after 8 years of the institution of the suit, a mandatory injunction is sought for removing the said channel. Construction of the said channel was over at a particular point of time and it was existing as on the date of the Commissioner's report. Merely because water used to be discharged into the said channel does not mean to say that there was a continuing wrong.

15. In this view of the matter, the relief by amendment was dearly time barred and the lower Court having held so, ought not to have allowed the amendment. That apart, when amendment petition has to be filed within a reasonable period, by no stretch of imagination can it be said that 8 years period is a reasonable period for filing amendment petition. While considering the plea for amendment of pleadings, the delay plays important role and if there is unreasonable and unexplained delay, certainly it is a ground for refusing amendment and in the instant case, such a delay is there and that too accepted by the lower Court. But, the lower Court still allowed the amendment petition without proper application of mind and casually thinking that the illegality can be cured by imposition of costs of Rs. 50/-, which is a wrong approach. The lower Court ought to have realised that it was exercising a common law Court jurisdiction and not extraordinary jurisdiction, which is the prerogative of the Courts of Record.

16. In the result, the Civil Revision Petition is allowed. But, in the circumstances, with no order as to costs.