

(2003) 07 KAR CK 0046
In the Karnataka High Court
Case No : C.R.P. No. 587 of 2003

Shiva Rama Upadyaya

APPELLANT

Vs

Raja Satyanarayana Setty

RESPONDENT

Date of Decision : 18-07-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Karnataka Rent Control Act, 1961 — Section 21 (1) (j)

Citation : (2003) ILR (Kar) 4815

Hon'ble Judges : Ajit J. Gunjal, J

Bench : Single Bench

Advocate : S. Shaker Setty, for the Appellant; V.B. Shivakumar, for the Respondent

Judgement

Ajith J. Gunjal, J.—This revision is by the defendant in the suit. The petitioner is challenging the order passed by the learned trial Judge on the application, I.A.2 under Order 6 Rule 17 of the Code of Civil Procedure, filed by him seeking permission to amend the written statement to incorporate paras 7(a) and (b) as stated in the said application.

2. The material facts for the disposal of the revision petition can be stated briefly as under:

The plaintiff-respondent laid the present suit for ejectment on the ground that the defendant was in occupation of the suit schedule property on a monthly rent of Rs. 250/-. The suit schedule property was taken on lease by the defendant for non-residential purpose of running a restaurant. The plaint averments further disclose that in the initial stage the plaintiff had filed an eviction petition against the defendant in the year 1981 seeking eviction of the ground that the suit schedule property in the occupation of the defendant is reasonably and bonafide required for the immediate purpose of demolition and for reconstruction of a building so as to augment income by construction of flats. The eviction petition came to be dismissed. As against the said dismissal of the eviction petition, a

rent revision was filed in HRRP 2498/98. This Court granted an order of eviction u/s 21(1)(j) of the Karnataka Rent Control Act. Against the said order a civil petition also was filed in CP 157/97 for modification of the order and the said order was modified. It is significant to note that during these proceedings the consistent stand of the defendant - petitioner was that he was a tenant of the schedule premises. In the mean time the Karnataka Rent Act, 1999 came into force and the proceedings stood abated. Under these circumstances, the present ejectment suit was filed. The present proceedings have been contested by the defendant-petitioner. In para 3 of his written statement, he clearly admitted that he was a tenant in respect of the schedule property of a monthly rent of Rs. 250/- and he was running a restaurant therein. When the matter stood thus, the defendant-petitioner filed an application for amendment of the written statement, inter alia, contending that he wanted to incorporate the following by way of amendment to the written statement.

"7(a) It is submitted that the plaintiff had borrowed a sum of Rs. 2000/- from the defendant in the year 1961. Consequently, he delivered the possession of the schedule property to the defendant and executed and registered mortgage deed dated 22.7.1961. The defendant has occupied the premises as a mortgagee and the status of the defendant continues to be that of a mortgagee. Hence the above suit is not maintainable and the plaintiff is not entitled to recovery of possession in the present suit.

7(b) It is submitted that the plaintiff began demanding payment for the occupation of the property even though he had not repaid the mortgage consideration nor redeemed the mortgage. Due to the ignorance and innocence of the defendant, he agreed to pay for the occupation of the property. It is relevant to submit that the plaintiff initially collected two separate sums of Rs. 150/- and Rs. 50/- respectively in respect of the two portions of the schedule property. Even if the same is considered the plaintiff has no locus standi to maintain a single suit. It is submitted that the legal status of the mortgagee will not be altered unless the mortgage is redeemed. Hence the suit is liable to be dismissed if considered from any angle."

By such amendment he wanted to resile from his earlier stand that he was a tenant, but wanted to contend that he had occupied the premises as mortgagee and the status of the defendant continues to be that of a mortgagee. Consequently, the above suit for recovery of possession was not maintainable. Further by way of amendment the defendant wanted to state that the plaintiff had not repaid the mortgage consideration nor redeemed the mortgage and due to inadvertence and ignorance the defendant had agreed to pay a sum of Rs. 250/- towards use and occupation of the two portions of the schedule property. The defendant sought for amendment in the above terms.

3. The learned Trial Judge on hearing the said application declined to grant the relief as sought for in I.A.2 mainly on two grounds: One is that the admission already made cannot be taken away by way of amendment and further the

application for amendment of the written statement was filed after the plaintiff had concluded his evidence. Another ground on which the Trial Judge declined to grant the said application was that after a lapse of nearly 32 years the present defence was taken up and there was no difficulty for the defendant to take such a plea either in the earlier proceeding or at filing of the present written statement. In view of this, the Learned Trial Judge rejected the said application. Aggrieved by the said rejection, the defendant is before this Court.

4. The Learned Counsel for the petitioner Sri Shekhar Shetty strongly urged that the said amendment was only by way of clarification and the said amendment did not change the cause of action nor did it cause any prejudice to the plaintiff. He further submitted that in order to resolve the controversy inter se between the parties, it was necessary that the present application for amendment is required. In support of his contention the learned Counsel relied on two decisions of the Hon"ble Supreme Court i.e. B.K.N. Narayana Pillai Vs. P. Pillai and Another, and AKSHAYA RESTAURANT v. P. ANJANAPPA AND ANOTHER J.T. 1995 (6) 269. Reiterating his contentions, the learned Counsel submitted that at the stage of granting the application for amendment the cause as such cannot be looked into. The learned Counsel for the plaintiff-respondent submitted that the said application for amendment was not maintainable and further that he having made an admission that he was a tenant of the schedule premises cannot wriggle out of the said statement by way of an amendment retracting the stand taken earlier. He further submitted that such an amendment will irretrievably prejudice his cause as his evidence has already been concluded and at that stage the application having been filed and such a belated application can not be entertained. In support of his contention he relied on the judgment of the Hon"ble Supreme Court in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., .

5. The moot question in the above petition is whether the application for amendment at this stage could be granted? It is not in dispute that when the original HRC proceeding were initiated way back in the year 1981 the definite stand of the defendant petitioner was that he was a tenant of the suit schedule property and further he had admitted his tenancy on a monthly rent of Rs. 250/- Even when the matter stood concluded in the revision petition in this Court, there is no whisper by the defendant-petitioner that he was mortgagee at any point of time. It is very strange that when the quit notice was issued to the defendant, the defendant once again reiterated his stand that he was a tenant of the suit schedule property and he was not liable to be evicted. Even in the written statement he made an admission that he was a tenant of the suit schedule property. It is significant to note that the alleged mortgage deed is stated to have been executed in the year 1961. Even as on 2003 till the application for amendment was made, so such plea, that he was a mortgagee in possession was taken as defence at any point of time. Indeed, that once an admission is made in respect of certain status, it is not open to the other party to wriggle out of such a situation by retracting or withdrawing from the said

admission which would be detrimental to the interest of the other side. The question would be whether the defendant should be allowed to amend the written statement in such circumstance. The statement admitting in the earlier proceedings as well as in the reply to the said notice and in the written statement that he was tenant of the suit schedule property and now taking a round about turn that he was a mortgagee in possession is impermissible. It is significant that if the plaintiff-respondent were to be made aware of the proposed amendment at the earliest point of time when the eviction petition was filed he could have certainly maintained an action against the defendant-petitioner for recovery of possession on the basis of the said deed. But the fact remains that such a defence is taken after a lapse of nearly 40 years. This situation, in my opinion, would put the plaintiff-respondent into a very difficult position which he could not have supposed to have contemplated when he commenced the eviction proceedings way back in the year 1981. The test is whether an amendment could be allowed and the defendant can amend without placing the plaintiff in such a position that he cannot be recouped by allowance of costs or otherwise. The present proceeding would be wholly displaced by the proposed amendment. This is another reason why the amendment cannot be granted. Now so far as the decision in B.K.N. Narayana Pillai Vs. P. Pillai and Another, relied on by the learned Counsel appearing for the defendant-petitioner, the Hon''ble Supreme Court while dealing with the scope of Order 6 Rule 17 regarding amendment of the pleadings, held that amendment should be permitted where it would result in solution of real controversy between parties, without altering original cause of action. But, however, such liberal approach is always subject to qualification as has been observed by the Hon''ble Supreme Court in the said decision which is to the effect that (i) a proposed amendment should not result in injustice to the other side; (ii) any admission made in favour of plaintiff should not be withdrawn; and (iii) inconsistent and contradictory allegations which negate admitted facts should not be raised. The Hon''ble Supreme Court while granting the said application for amendment in the said decision, however, has qualified that such an amendment can be made only if the three conditions are not violated.

6. In so far as the second decision relied on by the learned Counsel in Akshaya Restaurant Vs. P. Anjanappa and Another, . This judgment fell for consideration before the Hon''ble Supreme Court in Heeralal Vs. Kalyan Mal and Others, , wherein the Hon''ble Supreme Court has observed that the decision was per incuriam in view of the fact that it had not noticed the earlier decision rendered by the Hon''ble Supreme Court in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., . The Hon''ble Supreme Court has observed in paragraphs 9 & 10 as follows:

"Even that apart the said decision of two learned Judges of this Court runs counter to a decision of a Bench of three learned Judges of this Court in the case of Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., . In that case Ray, C.J., speaking for the Bench had to consider the question

whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admissions from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000/- against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7th April, 1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under Order VI, Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent-cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockist-cum-distributor. Such amendment was rejected by the Trial Court and the said rejection was affirmed by the High Court in revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned Judges of this Court is a clear authority for the proposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the notice of the Bench of two learned Judges that decided the case in *Akshaya Restaurant* (supra). In the latter case it was observed by the Bench of two learned Judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in *Akshaya Restaurant* (AIR 1995 SCW 2277) (supra) proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However, the aforesaid decision of the three-member Bench of this Court in *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff's case and cause him irretrievable prejudice.

Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiff's case it could not be allowed as ruled by a three-member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view."

7. In the circumstances, the decision relied on by the learned Counsel for the plaintiff-respondent in *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, squarely applies to the facts of this case. When this question fell for consideration before this Hon''ble Supreme Court, the Hon''ble Supreme Court had observed that whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff and if such amendments are allowed in the written statement the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admissions from the defendant. The Hon''ble Supreme Court has observed that while granting the amendments to the written statement no inconsistency can be allowed which would displace the plaintiff's case and cause him irretrievable prejudice. This question fell for consideration in another decision of Hon''ble Supreme Court in *Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others*, reads as follows:

"The application had been contested in which it had been admitted that the earlier petition for eviction was filed but according to the respondent it was not properly instituted and the same was withdrawn. It was denied that the application was not maintainable. The Tribunal on an analysis of the matter came to the conclusion that belated amendment could not be permitted. It was emphasised that the tenant had admitted in the written statement that he was a tenant in the property in question. He could not subsequently be allowed to wriggle out of this situation and withdraw the admission. If the amendment was allowed, they would take valuable right of the other side and altogether a new plea would be taken, it was held. This cannot be permitted. In this connection, the Rent Tribunal relied upon the observation of the Assam High Court in *Subashini Majumdar v. Krishna Prasad Mahatoo* (AIR 1956 Gau 79). The same view was reiterated by this Court in *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, , where the proposed amendment introduced an entirely new case seeking to displace the other side completely from the admission made then. It was held that such an amendment could not be allowed. We are of the opinion that the Rent Tribunal was therefore right in refusing the amendment on the basis of the aforesaid principle."

8. The Hon''ble Supreme Court in *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, ; has held thus:

"The High Court on revision affirmed the judgment of the Trial Court and said that by means of amendment the defendants wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side.

That decision of the Trial Court is correct. The defendant cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case.

It is true that inconsistent pleas can be made in pleadings but the effect of

substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application (or amendment and agreed with the Trial Court."

9. Following the dictum laid down in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., I feel the amendment sought by the defendant-petitioner cannot be permitted. Consequently, the said revision petition stands dismissed, confirming the order passed by the learned Trial Judge rejecting the application for amendment. No order as to costs.