
(2014) 10 RAJ CK 0024

In the Rajasthan High Court

Case No : Civil Writ Petition No. 11999 of 2013

Shreemat Pandey and Others

APPELLANT

Vs

Pradeep Jain and Others

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Civil Procedure Code Amendment Act, 1999 — Section 16
Civil Procedure Code Amendment Act, 2002 — Section 16(2)(b), 7
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 5, Order 30 Rule 1, Order 30 Rule 2, Order 6 Rule 17
Constitution of India, 1950 — Article 227

Citation : (2015) 2 CDR 663

Hon'ble Judges : Sangeet Lodha, J

Bench : Single Bench

Advocate : M.S. Singhvi, Senior Advocate assisted by Akhilesh Rajpurohit, Advocates for the Appellant; Manish Shishodia, Advocates for the Respondent

Judgement

Sangeet Lodha, J.—This writ petition is directed against order dated 30.5.13 passed by the Civil Judge (J.D.), Udaipur City (North), in Civil Original Suit No. 218/98, whereby an application preferred by the plaintiff, the respondent No. 1 herein, under Order VI Rule 17 CPC seeking amendment of the cause title, stands allowed. The relevant facts are that M/s. G.B. & Sons, a partnership firm, was awarded a contract by Municipal Council, Udaipur, for operation of Bumper Boats and Pedal Boats at Sukhadia Circle, Udaipur, for entertaining the children. An agreement was executed between the parties in this regard on 4.5.92. It is alleged that on 29.5.98, the District Collector-Shri Shreemat Pandey and Additional Collector-Sumati Lal Bohra (the petitioners herein), the Commissioner, Municipal Council, Udaipur and some police officials came to the business premises of the respondents and while dismantling the booking windows, damaged the business of the firm, man handled Mr. Pradeep Jain, the partner of the firm and he was forcibly taken to office of the District Collector.

2. The first respondent filed a suit seeking permanent and mandatory injunction

against the State of Rajasthan and the petitioners herein. The permanent injunction is sought in terms that the defendants may not interfere with the business of the plaintiff and mandatory injunction is sought for restoration of the position of the business premises as was existing on 29.5.98.

3. The suit is being contested by the petitioners and the respondent-State of Rajasthan by filing a written statement thereto. In para No. 1 of joint written statement filed on behalf of the defendants, a categorical objection was taken to the effect that the suit has not been filed in the name and style of the firm and the plaintiff-Pradeep Jain has not explained as to in what capacity he has filed the suit against the defendants and therefore, the same is liable to be dismissed as not maintainable.

4. During the pendency of the petition, the written statement filed was amended and two separate written statements were filed; one by defendant No. 1-the State of Rajasthan and another by the defendant No. 2 & 3, the petitioners herein, taking the objection in similar terms regarding the maintainability of the suit.

5. On the basis of the pleadings of the parties, the trial court framed the issues, however, no specific issue was framed with regard to the objection taken by the defendants in the written statement as indicated above. The evidence of the plaintiff was completed and two witnesses were examined on behalf of the defendants as well.

6. Since no specific issue was framed by the trial court with regard to the objection taken by the defendants in para No. 1 of the written statement, on 20.8.10, an application was preferred on behalf of the defendants under Order XIV Rule 5 CPC for framing additional issues No. 4(a), 4(b) and 4(c) in the manner suggested therein.

7. The plaintiff preferred an application under Order VI Rule 17 seeking amendment of the plaint, stating that due to oversight and inadvertence, the cause title therein has been wrongly mentioned. It was averred that as a matter of fact, the suit was filed on behalf of the firm M/s. G.B. & Sons by its partner Pradeep Jain, which is apparent from bare perusal of the plaint. Accordingly, it was prayed that in the title of the plaint before the existing title, the words may be permitted to be added.

8. The application seeking amendment preferred on behalf of the plaintiff as aforesaid was contested by the defendants by filing a reply thereto. It was contended that a specific objection has been taken on behalf of the defendants that Mr. Pradeep Jain has no right to file the suit on behalf of the firm and since the suit has not been filed in the name and style of the firm, the same is liable to be dismissed and at this belated stage, after a lapse of about 13 years, the plaintiff cannot be permitted to amend the cause title so as to defeat the valuable right accrued to the defendants. It was contended that if the amendment prayed for is allowed, it will amount to addition of a new party to the

suit and it is bound to change the nature of the suit requiring the defendants to file a fresh written statement. That apart, the question with regard to the amendment sought for being barred by limitation, was also raised.

9. After due consideration of the rival submissions, the application preferred on behalf of the plaintiff has been allowed by the court below and the plaintiff has been permitted to incorporate the amendment in the cause title, as prayed for. Hence, this petition.

10. Mr. M.S. Singhvi, Senior Advocate, appearing on behalf of the petitioners submitted that a written statement to the suit filed on 1.6.98, was filed on behalf of the defendants on 29.6.98, wherein a specific objection was raised regarding the maintainability of the suit filed by the plaintiff Pradeep Jain in his individual capacity instead of in the name and style of the firm. Learned counsel submitted that an amended written statement was filed on behalf of the defendant No. 2 & 3, the petitioners herein, on 9.9.03 wherein also the specific objection was taken in this regard. Learned counsel submitted that on 20.8.10, an application was preferred on behalf of the defendants under Order XIV Rule 5 CPC for amendment of the issues and specific issues to be framed in regard to the maintainability of the suit filed by the plaintiff-Pradeep Jain were suggested. Learned counsel submitted that after completion of the evidence of the plaintiff and when the evidence of the defendants is being recorded, the application preferred by the plaintiff seeking amendment of the cause title being highly belated, was required to be dismissed on this count alone. Learned counsel submitted that in view of the specific objection taken on behalf of the defendants while filing the written statement on 29.6.98, the fact regarding the suit having not been filed in the name and style of the firm had come to notice of the plaintiff long back and therefore, the question of entertaining the application seeking leave to amend the cause title at this stage so as to defeat the valuable right accrued to the defendants seeking dismissal of the suit as not maintainable could not have been entertained by the court below. Drawing the attention of this court to Order XXX Rule 1 CPC, learned counsel submitted that an individual partner had no right to maintain the suit on behalf of the firm and therefore, the same was liable to be dismissed at the very threshold. Learned counsel submitted that at this stage, if the amendment as prayed for is allowed and the firm is substituted as plaintiff in place of the individual partner, it will amount to adding new party and thus, many new questions such as the accrual of the cause of action to the firm, the limitation for filing the suit etc. will arise and thus, the nature of the suit shall stand totally changed, which cannot be permitted by the court. Drawing the attention of this court to para No. 8, 9, 10 & 12 of the plaint, learned counsel submitted that the averments therein are not compatible to the suit being filed on behalf of the firm. Learned counsel submitted that by virtue of proviso to Order VI Rule 17, no application for amendment could be allowed after the trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before commencement of the trial. Learned counsel submitted that the principle underlying the proviso

incorporated as aforesaid, has to be applied taking into consideration, the availability of opportunity to the plaintiff to amend the plaint at the very threshold. In support of the contentions, learned counsel has relied upon the decisions of the Hon'ble Supreme Court in the matters of J. Samuel and Others Vs. Gattu Mahesh and Others, and Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, . Learned counsel submitted that on the facts and in the circumstances of the case, the amendment prayed for is apparently after thought and lacks bona fide and therefore, could not have been permitted by the court below. In this regard, learned counsel has relied upon a decision of the Hon'ble Supreme Court in the matter of Mashyak Grihnirman Sahakari Sanstha Maryadit Vs. Usman Habib Dhuka and Others, .

11. On the other hand, the counsel appearing for the respondent-plaintiff submitted that while mentioning the names of all the partners of the firm in para No. 1 of the plaint, it has been specifically averred that Mr. Pradeep Jain being a partner of the firm M/s. G.B. & Sons is entitled to file the suit in the name and style of the firm. Drawing the attention of this court to the averments made in para No. 2, learned counsel submitted that while referring to the agreement dated 4.5.92, it has been specifically mentioned that the plaintiff firm is entertaining the children at Sukhadia Circle by use of the various equipments by charging negligible fee. Learned counsel submitted that in the verification clause, the partner of the firm Mr. Pradeep Jain has verified the pleadings on behalf of the firm and therefore, the contention raised on behalf of the petitioners that the suit is filed by Mr. Pradeep Jain in individual capacity and not in the name and style of the firm, is absolutely incorrect. Learned counsel submitted that as a matter of fact, it is not a case of amendment of the pleading as such rather, it is a case of rectification of the error crept in and therefore, the objections sought to be raised by the petitioners, are absolutely baseless. Learned counsel submitted that a bare perusal of the order impugned reveals that the amendment was allowed subject to payment of costs a sum of Rs. 2,500/- to the defendants rather, the order allowing the amendment was to come into force only after the payment of the costs to the defendants. Learned counsel submitted that the costs offered by the plaintiff was accepted by the defendants on 1.7.13 and thus, the petitioners having accepted the costs cannot be permitted to question the legality thereof by way of filing writ petition before this court. Learned counsel submitted that even the amended written statement has been filed on behalf of the petitioners wherein no objection regarding the maintainability of the suit as contained in the original written statement is incorporated. Accordingly, learned counsel submitted that the order passed by the court below allowing the application seeking amendment having been accepted and acted upon by the defendants, they are estopped from questioning the legality thereof. In this regard, learned counsel has relied upon the decisions of the Hon'ble Supreme Court in the matters of "Bhau Ram v. Baij Nath Singh & Ors.", AIR 1961 SC 1327 and Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, . Learned counsel submitted that the objections with reference to Order

XXX Rule 1 & 2 and regarding the accrued right being defeated were never raised by the petitioners before the court below and therefore, the same cannot be permitted to be raised at this stage. Learned counsel submitted that as a matter of fact, the question with regard to the accrued right being defeated, even does not arise in the present matter. Learned counsel submitted that in case of substitution of the real plaintiff in place of mis-described plaintiff in the suit originally instituted, the question of limitation does not arise inasmuch as, the suit shall be deemed to have been instituted in the name of real plaintiff on the date on which it was originally instituted. In this regard, learned counsel has relied upon a decision of the Hon'ble Supreme Court in the matter of Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, . Learned counsel submitted that the amendment prayed for cannot be disallowed solely on the ground of delay inasmuch as, the delay and inconvenience caused, can always be compensated by payment of costs. Learned counsel submitted that the court below has committed no jurisdictional error in allowing the amendment prayed for, for doing complete justice between the parties and therefore, no interference is warranted by this court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

12. Replying the arguments of the learned counsel appearing for the respondents, Mr. M.S. Singhvi, learned counsel submitted that the costs awarded by the court below while allowing the amendment application is compensatory in nature and therefore, the acceptance thereof by the defendants in no manner precludes them from questioning the legality of order whereby the amendment prayed for was allowed. In this regard, learned counsel has relied upon the para No. 18 & 19 of the decision of the Hon'ble Supreme Court in Bijendra Nath Srivastava's case (supra), relied upon by the counsel for the respondents and a decision of Bombay High Court in the matter of K.R. Singh Vs. Smt. A.G. Thakare and others, . Learned counsel submitted that merely on account of filing of the amended written statement pursuant to the order passed by the court below, the right of the petitioners to question the legality of the order passed by the court below, does not stand extinguished. Learned counsel submitted that the cause title of a case forms part of the pleadings and therefore, the contention raised on behalf of the respondent that it is only a case of rectification of the cause title and not of amendment of the pleadings, is absolutely devoid of any merit.

13. I have considered the rival submissions and perused the material on record.

14. Before proceeding to deal with other contentions of learned counsel appearing for the parties, it will be apposite to consider the ambit and scope of Order VI Rule 17 CPC, governing the amendment of the pleadings.

15. Undoubtedly, Order VI Rule 17 of CPC confers jurisdiction on the court to allow either party to alter or amend its pleadings at any stage of the proceedings and on such terms as may be just. It is guiding principle of amendment that all amendments which are necessary for the purpose of determining the real question in controversy between the parties to any proceedings shall be

generally allowed.

16. In Sampath Kumar Vs. Ayyakannu and Another, , the Hon''ble Supreme Court considering the question of delay in moving an application for amendment, observed as under:--

"9. Order 6, Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment."

(emphasis supplied)

17. In Pankaja and Another Vs. Yellappa (D) by Lrs. and Others, , the Hon''ble Apex Court while dealing with the scope of court's jurisdiction to allow an amendment, observed as under:--

"12. So far as the Court's jurisdiction to allow an amendment of pleadings is concerned, there can be no two opinions that the same is wide enough to permit amendments even in cases where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held that the dominant purpose of allowing the amendment is to minimise the litigation, therefore, if the facts of the case so permit, it is always open to the court to allow applications in spite of the delay and laches in moving such amendment application.

13. But the question for our consideration is whether in cases where the delay has extinguished the right of the party by virtue of expiry of the period of limitation prescribed in law, can the Court in the exercise of its discretion take away the right accrued to another party by allowing such belated amendments.

14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the" case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a

judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserve the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case."

(emphasis added)

18. In *Revajeetu Builders & Developers*'s case (supra) relied upon by the learned counsel for the respondents, the Hon''ble Supreme Court while dealing with the question regarding grant or refusal of the amendments by the court exercising its discretionary power, summarised the basic principles governing the amendment of the pleadings, as under:

"63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments/and should never permit mala fide, worthless and/or dishonest amendments."

19. In *J. Samuel & Others*' case (supra), the Hon''ble Supreme Court observed that the primary aim of the court is to try the case on its merits and ensure that rule of justice prevails and for this, the need is for true facts of the case to be placed before the court so that the court has access to all relevant information in coming to its decision. The court observed that the court''s discretion to grant

permission for a party to amend his pleadings lies on two conditions; firstly, no injustice must be done to other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. While taking into consideration, the proviso to Order VI Rule 17 introduced by CPC (Amendment) Act, 2002, the court observed that it restricts the powers of the court to permit the amendment of the pleadings once the trial has commenced and unless the court is satisfied that there is reasonable cause for allowing the amendment, normally the court has to reject such request.

20. In *Mashyak Grihnirman Sahakari Sanstha Maryadit's case* (supra), the Hon"ble Supreme Court disallowed the amendment sought for by the plaintiff which was found to be not only a belated one but was clearly an afterthought for obvious purpose to avert the inevitable consequence.

21. It is to be noticed that as per the proviso appended to Order VI Rule 17 of CPC by the Act of 2002, no application for amendment of the pleadings shall be allowed after the trial has commenced unless, the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of the trial. But then, a perusal of Section 16(2)(b) of the CPC (Amendment) Act, 2002, goes to show that the proviso to Order VI Rule 17 inserted by the Amendment Act, 2002 shall not apply to the pleadings filed before the commencement of Section 16 of the Code of Civil Procedure(Amendment) Act 1999 and Section 7 of the Amendment Act, 2002.

22. As a matter of fact, in the matter of *State Bank of Hyderabad Vs. Town Municipal Council*, , the Hon"ble Supreme Court specifically held that proviso to Order VI Rule 17 shall not apply to the amendment sought for relating to the suit having been filed in the year 1998.

23. Thus, the legal position settled by the Hon"ble Apex Court as above, makes it abundantly clear that the Order VI Rule 17 as it was existing prior to the amendment of Civil Procedure Code, (Amendment) Act, 2002 empowers the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as deemed fit by the court. Of course, the amendment of the pleadings which alter materially or substitute the cause of the action or the nature of the suit cannot be allowed. The pre trial amendments are allowed more liberally than those which are sought to be made after commencement of the trial or after conclusion thereof. The amendment sought for cannot be rejected solely on the ground of delay and if it is found that for deciding the real controversy between the parties, it is necessary even the amendment prayed for belatedly, can be allowed on payment of costs. Normally, the right to relief must be judged by reference to the date of suit or legal proceedings were instituted. However, the discretion vested in the court to allow the amendment of the pleadings at any stage of the trial or even at the appellate stage has to be exercised judicially. Whether an amendment is to be allowed in a particular case or not has to be decided by the court after examining the facts and circumstances of the case in their entirety.

24. Adverting to the facts of the present case, it is to be noticed that the title of the suit as mentioned in the plaint submitted, does not reflect that the suit has been filed on behalf of the firm but then, in para No. 1, the petitioner while giving the details of the firm of the partners and specifying their share therein, it has been specifically averred that Mr. Pradeep Jain being partner of the firm is entitled to file the suit in the name and style of the firm. Further, in para No. 2, it is mentioned that the plaintiff-firm was awarded the contract dated 4.5.92 for operating the Bumper Boats and Pedal Boats at Sukhadia Circle for entertaining the children. The averments made in the plaint have been verified by Mr. Pradeep Jain in the capacity of the partner of the firm M/s. G.B. & Sons. It is true that in conformity with the averments made in para No. 1 of the plaint, the name of the firm should have been mentioned in the title of the suit but then, a bare reading of the averments made in the plaint, makes it abundantly clear that the suit was intended to be filed on behalf of the firm and not by Mr. Pradeep Jain in his individual capacity as partner of the firm.

25. Learned counsel is justified in contending that the specific objection has been taken by the defendants in the written statement regarding the maintainability of the suit and therefore, if it was only a bona fide error, the petitioner was required to amend the cause title at the earliest available opportunity. But then, the fact remains that the contract was awarded in favour of the firm and the suit has been filed so as to protect the business of the firm. Thus, taking into consideration the averments made in the petition in its entirety, this court is of the considered opinion that the correction of mis-description of the title will not alter the nature of the suit and no prejudice is likely to be caused to the defendants, if the cause title is permitted to be amended, rather, to advance the cause of justice, it is absolutely necessary that the amendment prayed for is allowed. The inordinate delay in making the application seeking amendment and the inconvenience caused to the defendants stands compensated by awarding costs.

26. Coming to the contention of the learned counsel for the respondents that the petitioners having accepted the costs and filed the amended written statement, are estopped from questioning the legality of the order impugned, it is to be noticed that the order allowing the amendment as prayed for has been permitted subject to payment of costs quantified at Rs. 2500/-. As a matter of fact, in terms of the order passed by the court, the leave granted to amend the cause title shall come into effect only after the payment of costs. Suffice it to say that the order passed by the court permitting the amendment is not intended to come into effect unless the condition imposed regarding payment of costs is fulfilled. Thus in the considered opinion of this court, the petitioners while accepting the costs, have acquiesced with the order passed by the court and cannot be permitted to question the legality thereof. This aspect of the matter stands covered by the decision of the Hon'ble Supreme Court in Bhau Ram's case (supra), relied upon by the counsel appearing for the respondent.

27. Even in Bijendra Nath Srivastava (Dead) through L.Rs.'s case (supra), relied upon by the counsel appearing for the parties, it is specifically observed by the Hon''ble Supreme Court that the principle of estoppel which precludes a party from assailing an order allowing the petition subject to payment of costs, applies only in those cases where the order is in the nature of a conditional order and payment of costs is condition precedent to the petition being allowed.

28. Suffice it to say that this court having arrived at the conclusion that the order passed by the court below allowing the amendment is in the nature of conditional order, which shall come into force only after payment of costs, the decision of the Hon''ble Supreme Court in Bijendra Nath Srivastava (Dead) through L.Rs.'s case (supra) also helps the respondent and not the petitioners.

29. Coming to the question of limitation, it is to be noticed that this court has come to the conclusion that from the tenor of the plaint, it is abundantly clear that the suit has been filed on behalf of the firm and therefore, the question of the suit being barred by limitation does not arise in the matter. Moreover, as laid down by the Hon''ble Supreme Court in Pankaja's case (supra), that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. That apart, in Jai Jai Ram Manoharlal's case (supra), where the name in which the action was instituted was merely a mis-description of original plaintiff, the Hon''ble Supreme Court has held that no question of limitation arises and the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted. Thus, the contention raised on behalf of the petitioners regarding suit being barred by limitation, is also devoid of any merit.

30. For the aforementioned reasons, viewed from any angle the order impugned passed by the court below allowing the amendment prayed for, does not suffer from any jurisdictional error so as to warrant interference by this court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. In the result, the petition fails, it is hereby dismissed. No order as to costs.