

(1989) 07 OHC CK 0027
In the Orissa High Court
Case No : A.M.O. No. 27 of 1989

S.M.M. Abdi

APPELLANT

Vs

Janaki Ballav Patnaik and Others

RESPONDENT

Date of Decision : 12-07-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : AIR 1989 Ori 265 : (1990) 69 CLT 400

Hon'ble Judges : J.M. Mohapatra, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : P. Palit, B.B. Mohanty and S. Mohanty, for the Appellant; B.M. Patnaik, K.N. Jena, P.K. Choudhury and S.K. Sangnaria, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—This appeal under Clause 10 of the Letters Patent of the Orissa High Court was filed by defendant 3 in O.S. No. 1 of 1987 which is being tried by a learned single Judge of this Court. The appeal is directed against the order passed on 7th April, 1989 in Misc. Case No. 11 of 1989 by the learned trial Judge permitting the respondent 1 to amend his plaint.

2. The aforementioned suit was initially filed in the Court of the Subordinate Judge, Bhubaneswer by the respondent 1 against the appellant and respondents 2, 3 and 4 praying for a decree for Rs. 1,0000000/- (one crore) to be paid by the defendants jointly and severally and to injunct the defendants permanently from publishing further libellous and defamatory statements during pendency of the suit and thereafter. The plaintiff claimed damages from the defendants for publishing the article in the magazine "The Illustrated weekly of India" in its issue dt. May, 18-24, 1986 in which, as alleged by the plaintiff, libellous allegations, insinuations and innuendoes were written against him. The appellant as the Special Correspondent of the Magazine was impleaded as defendant in the suit; similarly the respondent 3, the proprietor of the Magazine was impleaded as defendant No. 1; respondent No. 4, the Editor and Publisher of the Magazine was

impleaded as defendant 2 and respondent 2 whose statements made to the appellant in course of an interview were published in the article in question was impleaded as defendant 4 in the suit. Hearing of the suit has commenced and the plaintiffs evidence has been recorded At that stage the plaintiff filed the application to amend the plaint seeking to introduce para. 26-A in the plaint. The said paragraph is set out hereinbelow :

"Defendants 1 and 2 set in motion the circulation of the said Illustrated Weekly dt. 18-24 May, 1986 containing defamatory matters specified in paras. 22-B and 22-C of the plaint in the Article therein under the caption "The Strange Escapades of J. B. Patnaik" resulting in the circulation and publication throughout India including Bhubaneswar and Orissa. The plaintiff further states that defendants 1 and 2 distributed/circulated/published the same in Orissa including Bhubaneswar. The plaintiff further states that the defendants 3 and 4 are joint tortfeasors along with defendants 1 and 2 in respect of such distribution/circulation/publication and that they connived with defendants 1 and 2 with such distribution/circulation/publication by writing the said defamatory article and by stating at the interview what is reported to have been stated in the Illustrated Weekly of India respectively."

It was stated in the petition under Order 6, Rule 17, C.P.C., inter alia, that though the essence of the facts sought to be introduced by amendment is already existing in the plaint, for the purpose of elucidation of essential facts in a more explicit manner it was necessary to amend the plaint.

3. Defendant 3 in his objection to the petition for amendment stated, inter alia, that the amendment sought, if allowed, will change the nature and character of the suit and it will seriously affect the case of the defendant 3 against when in the plaint no case has been made out. The defendant 3 further submitted that the plea of want of territorial jurisdiction of the Court raised by him will be lost if the amendment is allowed.

4. The learned trial Judge on consideration of the case of the parties stated in their respective pleadings held that the rudiments or the seeds or the essence of the facts ought to be introduced by the proposed amendment are already in existence in the plaint; the facts are not new sought to be introduced for the first time; they will not change the nature, character and the cause of action of the suit nor will prejudice the defence of the defendants; it shall have no effect on the defence of lack of territorial jurisdiction or bar by limitation and therefore the amendment is permissible. Accordingly the learned Judge allowed the application under Order 6, Rule 17, C.P.C. and permitted the plaintiff to amend the plaint. As noticed earlier, defendant 3 alone has challenged the said order in this appeal.

5. Shri P. Palit, learned counsel for the appellant, raised two contentions : (1) There was no specific averment in the plaint that the appellant was responsible for circulation and distribution of the alleged offending article and without such averment no cause of action for the suit was made out against the appellant in

the plaint; by introducing the facts by amendment, a cause of action is sought to be added against the appellant. This is not permissible, (ii) The amendment which seeks to introduce a cause of action against the appellant is barred by limitation under An. 75 of the Limitation Act As a corollary of the first point Shri Palit submitted that in the plaint as it stood before amendment there was no allegation that the publication of the article, its distribution and circulation were made by the defendants, particularly defendants (appellant) inside Orissa and therefore the Subordinate Judge, Bhubanaswar before whom the suit was initially filed had no territorial jurisdiction to entertain the suit.

6. Shri B.M. Patnaik, learned counsel appearing for the plaintiff-respondent 1, supporting the impugned order submitted that the amendment in question did not come within any of the well recognised legal principles for rejecting the prayer for amendment of pleadings. According to the learned counsel the amendment has been rightly allowed since it is necessary for proper adjudication of the controversy in the suit and does not cause serious prejudice to the opp. party.

7. The two contentions raised by Shri Palit are linked with each other inasmuch as if his first contention that by amendment a new cause of action is introduced in the suit is accepted, then alone the second contention relating to limitation will arise for consideration. The other submission relating to lack of territorial jurisdiction of the Court to entertain the suit against the appellant is also dependant on the first submission. If it is held that the plaint prior to the present amendment made out a cause of action against the appellant and it could be entertained by the Court in which it was presented, then the submission of Shri Palit must fail.

8. Therefore, the core question that falls for determination is whether by the amendment a new cause of action based on a new case has been introduced for the first time as contended on behalf of the appellant or the plaint as it stood prior to the present amendment contained the essence of the facts and by the present amendment the facts" are only made more explicit and specific as submitted on behalf of the respondent 1. Determination of this question will depend mainly on scrutiny and interpretation of the averments made in the plaint as it stood prior to the present amendment The paragraphs of the plaint to which reference was made by the learned counsel for respondent 1 are paras. 4, 5, 6, 11, 12, 13, 20, 24, 25 and 26, The relevant portions of these paragraphs have been quoted by the learned trial Judge in the order under challenge. It will be sufficient for the present purpose to state the gist of the averments contained in these paragraphs. In para. 5 the plaintiff stated that "the Illustrated Weekly of India" is a reputed weekly magazine published from Bombay and has a very wide circulation throughout India including Orissa In para. 6 of the plaint it was stated by the plaintiff that he came across a copy of "The Weekly" dt. May 18-24, 1986 on 23rd May, 1986 at Bhubaneswar and found that the magazine on its front page had printed an enlarged photograph of the plaintiff with the caption

"Shocking, the Strange Escapades of J. B. Patnaik, Orissa Chief Minister" printed in bold letters under the picture. In paragraph 12 of the plaint the plaintiff averred that it is apparent that all the defendants have entered into a conspiracy to malign the plaintiff in the dirtiest hue. In para. 13 it is stated that having failed in his continuous endeavour to dislodge the plaintiff from the office of Chief Minister, some disgruntled political opponents like Shri S.S. Mohapatra defendant 4, have utilised the defendants 1 to 3 for publication of dirty and scandalous allegations and canards to present a debased and degraded picture of the plaintiff before his party, before his supporters and the public at large so that the plaintiff may be thrown out of the public office on the grounds of sex scandals. In the same paragraph it is further stated that "The Weekly", its Editor and the Special Correspondent, defendants 1 to 3 respectively, have acted hand-in-glove with S.S. Mohapatra (defendant 4) and other political opponents. In para 20 of the plaint, the plaintiff stated that it is apparent that the defendants have entered into a deep-rooted conspiracy with the political opponents of the plaintiff for the purpose of maligning and disgracing him. It is stated in para. 24 that the defendants are joint tortfeasors and are jointly and severally liable to pay the damages. In para, 25 it is specifically averred that this Hon"ble Court has jurisdiction to try the suit as "The Weekly" dt. 18-24 May, 1986 was also published and circulated at Bhubaneswar and elsewhere during the 3rd week of May, 1986. Stating the cause of action the plaintiff averred in para 26 of the plaint that the cause of action arose on 23rd May, 1986 at Bhubaneswar when the plaintiff came across a copy of "The Illustrated Weekly" dt. 18-24 May, 1986 and during third week of May, 1986 when the Weekly was published and emulated in Bhubaneswar and elsewhere.

9. From the statements in the plaint discussed above, it is clear that the plaintiff sought to make all the defendants jointly and severally liable for the damages as joint tortfeasors. He specifically alleged that they entered into a conspiracy to malign him and to dislodge him from his present office of Chief Minister and the offending article written by defendant 3 (appellant) was an outcome of this conspiracy. It was also clearly stated in the plaint that "The Illustrated Weekly" was published and circulated at Bhubaneswar as well as other places and the plaintiff saw a copy of the magazine at Bhubaneswar.

10. On perusal of para 26-A which has been introduced by amendment it is clear that all that is attempted to be done by the amendment is to introduce certain statements making averments already existing in the plaint more explicit. What was stated in different paragraphs in the plaint has been attempted to be put in a concise manner at one place in para 26-A. It is therefore manifest that the amendment neither introduces a new case nor a new cause of action against the appellant. The first contention raised by Shri Palit is therefore without substance.

11. Coming to the second point raised by Shri Palit, in my view, on the discussions made and the findings arrived at in the preceding paragraphs, the point loses much of its relevance. As discussed earlier, the submission that by

amendment the plaintiff sought to introduce a new cause of action based on a new act of facts so far as the appellant (defendant 3) is concerned, cannot be accepted. It therefore follows that the gist of the case against the appellant was there in the plaint before the amendment. In such position, amendment of the plaint is permissible. If any decision is necessary in support of this proposition, we may refer to a few decisions of the Supreme Court.

12. The Supreme Court in the case of A.K. Gupta and Sons Vs. Damodar Valley Corporation, ruled as follows:

"a party is not allowed to set up a new case or a new cause of action by amendment, but it is well recognised that where the amendment does not constitute the addition of a new cause of action or raise a new case, but amounts to no more than a different or additional approach to the facts already on record, the amendment will be allowed even after expiry of the statutory period of limitation. The expression "new cause of action" in this context means, a new claim made on a new basis constituted by new facts, and "new case" means a new set of ideas."

(Quoted from placitum)

The Court in the case of Ganesh Trading Co. Vs. Moji Ram, explaining the position observed (at p. 486):

" It is true that if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But mere failure to set out even an essential fact does not by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which cured of its shortcomings, has really become a good cause of action. This however is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional court-fees, which may be payable, or of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings."

The same view was reiterated by the Court in the case of Vineet Kumar Vs. Mangal Sain Wadhera, wherein it was observed that normally amendment is not allowed if it changes the cause of action. But it is well recognised that where the amendment does not constitute an addition of a new cause of action, or raise a new case, but amounts to no more than adding to the facts already on the record, the amendment would be allowed even after the statutory period of limitation.

13. In view of the clear position of law, there can be no manner of doubt that the prayer for amendment of the plaint in the present case came well within the permissible limit as laid down by the Supreme Court in the aforementioned decided cases. As discussed earlier, this is not a case where the facts making out the case against the appellant and the cause of action against him was altogether absent ab initio in the plaint. The essence of the case making out the cause of action for the suit against the appellant was stated in the plaint, though in a defective manner. In such a case, as ruled by the Supreme Court the defect may be permitted to be corrected if the Court finds it necessary for proper adjudication of the matter in controversy and subject to the conditions regarding court-fees and costs etc. which the Court may impose. The question of the defendant being deprived of any right vested in him in the event of the amendment being allowed does not arise. Therefore, it cannot be said that the learned trial Judge, in the facts and circumstances of the case, committed serious error or illegality in exercising his discretion to allow the prayer for amendment of the plaint.

14. Before parting with the case, I would like to notice two decisions on which Shri Palit, learned Counsel for the appellant, laid great stress. In the case of Pandit Rudranath Mishir and Others Vs. Pandit Sheo Shankar Missir and Others, , a Division Bench of the Court considering the question of amendment of pleadings under Order 6, Rule 17 observed that the granting of an amendment postulates an authority of the Court to entertain the suit. But where there is inherent lack of jurisdiction in the Court to entertain the suit itself, it cannot make any order for amendment of the plaint to bring the suit within its jurisdiction. In such a case the Court would be exercising its jurisdiction which is not vested in it and, therefore, passing of any order would amount to usurping a jurisdiction not vested in it. In such a case the Court is bound to return the plaint to be represented to the proper Court in which the suit ought to have been instituted. After the plaint is returned for presentation to the proper court, the plaintiff can amend the plaint and represent it to the same Court.

15. I have carefully perused the decision. In my view it has no application at all to the present case. In that case the suit in question was filed in the first Court of the Subordinate Judge, Arrah for partition of certain joint family properties; undisputedly all the immovable properties sought to be partitioned were situated in the district of Balia in Uttar Pradesh, barring a savings bank account in the State Bank of India at Arrah Branch; when the question of maintainability of the

suit was raised by the office, the plaintiff filed the petition for amendment which was allowed. The question of jurisdiction was then taken up by the Court and it was observed that the plaintiff amended the plaint by including a building situated within the Arrah town which lay within the jurisdiction of the Court. The plaint was therefore admitted. Subsequently defendant 6 raised the question of jurisdiction and maintainability of the suit, which was taken up as a preliminary issue. The Court upheld the objection regarding maintainability of the suit and jurisdiction of the Court. The High Court considering the provisions in Order 7, Rule 10, C.P.C held that the only course open to the trial Court was to return the plaint for presentation in proper Court since the plaint as it stood prior to amendment was not at all entertainable by it.

16. This case clearly falls within the impermissible zone demarcated in the decisions of the Supreme Court discussed earlier. Since the suit was ab initio not maintainable in the Court in which the plaint was filed the question of that Court exercising any further jurisdiction in relation to the suit to consider the application for amendment of the plaint did not arise. Such is not the situation in the present case. In view of the findings arrived at in the earlier paragraphs, the principle laid down by the Patna High Court has no application to this case.

17. Shri Palit also placed reliance on the decision of the Rajasthan High Court in the case of Chiranjilal Agrawal Vs. Rikhabdass, wherein the principle was laid down that the declaration that a certain person is the editor, printer and publisher of a particular newspaper to be issued from a particular place, only raises a presumption of publication at that particular place and does not extend to the publication of any issue of newspaper at any other place. Unless there is evidence that any issue of the newspaper emanated either from the office of the newspaper or under instructions of the publisher, the publication at the place where it reaches is not attributable to the publisher defendant. Therefore the conclusion of the Court at the other place, in the absence of such evidence, that it has jurisdiction to try the suit for damages is incorrect.

At the outset it is to be noticed that the revision petition before the High Court arose from the impugned order passed in the suit in which issues had been framed and evidence had been led by the parties. On consideration of the evidence in the case the trial Court decided the issue whether the cause of action arose at Hindaun, and the Court of Munsif, Hindaun had jurisdiction, in the affirmative. The question of amendment of the pleading was, not specifically considered in that case. The case decides the point relating to the extent of the presumption arising from the declaration in the newspaper regarding the place of publication and the evidence necessary to establish the case in suit for damages for defamation against the defendant. In the present case we are not concerned directly with the question whether the trial Court has jurisdiction to entertain the suit. The decision on that point will depend on consideration of the evidence which may be placed before the Court by the parties. As such, in my view, this decision is of little assistance for us in the present proceeding.

18. On the discussions in the foregoing paragraphs we find no scope to interfere with the impugned order. The appeal is therefore dismissed, but in the circumstances of the case without any order for cost.

J.M. Mohapatra, J.

19. I agree.