

(1984) 04 GAU CK 0004

In the Gauhati High Court

Case No : Misc. Case No. 45 of 1984 in F.A. No. 5 of 1984

State of Assam

APPELLANT

Vs

Basanta Burman and Others

RESPONDENT

Date of Decision : 05-04-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Limitation Act, 1963 — Section 21(1)

Citation : AIR 1985 Guw 13

Hon'ble Judges : K. Lahiri, Acting C.J.; K.N. Saikia, J

Bench : Division Bench

Advocate : P. Prasad, for the Appellant; B.C. Sarma and A.C. Sarma, for the Respondent

Final Decision : Allowed

Judgement

Lahiri, C.J. (Acting)

1. Register this application as a separate Misc. Case.
2. The State of Assam has filed this " application under Order I, Rule 10 of the C. P. C. for treating pro forma respondents 4, 5 and 6 as co-appellants. The State has prayed that the aforesaid pro forma respondents may be added as co-appellants instead of pro forma respondents. Respondents 4, 5 and 6 are Inspector of Police; Superintendent of Police and Deputy Superintendent of Police, respectively. The suit was instituted against the State of Assam as well as the three police officers for malicious prosecution. Mr. P. Prasad, the learned Govt. Advocate, submits that the suit was instituted against the State as well as the public servants and the cases of these defendants were conducted by the Govt. Advocate at Tezpur. However, the learned Government Advocate, Tezpur could not file written statement as the prayer for adjournment was rejected. Mr. P. Prasad submits that the decree was rendered on the basis of pleadings and not a single witness was examined. It appears that the trial Court proceeded under Order 8 Rule 10, C. P. C While delivering the impugned judgment the learned

Judge held :

"This is a suit for compensation for malicious prosecution against the State of Assam represented by Defendants 2, 3 and 4 the police officer who was posted at Tezpur at the relevant time".

The learned Assistant District Judge, it appears, held that on 14-8-1979 the defendant 5 lodged an ejahar, police registered a case u/s 147/447, 506/323/427/379, I. P. C arrested plaintiffs 2 and 3, seized some articles belonging to the plaintiffs. However, plaintiffs 2 and 3 being women they were granted bail by the criminal Court, while the plaintiff 1 obtained anticipatory bail. It appears that defendant No. 2 was authorised to investigate the case. It was averred by the plaintiff that Defendant 2 investigated the case notwithstanding his knowledge that the allegations in the ejahar were false and baseless. A charge-sheet was submitted and learned Magistrate held that the allegations against the accused were baseless and discharged them. It may be stated that defendant 2, Wajid Ali was the Inspector of Police serving as Officer-in-charge of Tezpur Police Station. As such, it appears that the learned Assistant District Judge found that Wajid Ali, O. C. of Tezpur Police Station, had investigated the case knowing it to be false and baseless. There is no findings regarding the complicity of defendants 3 and 4 and/or their liabilities. In all probability they were superior officers to defendant 2, Wajid Ali, at the relevant time. The Court below decreed the suit for Rs. 2,04,100.00 with proportionate costs. We extract below the relevant part of the decree :

"It is ordered that the suit is decreed for two lacks and defendants do pay to the plaintiff the sum of Rs. 2,00,000.00 Rupees two lacks) and Rs. 6601"40 paise be paid by the defendants to the plaintiffs for the cost of the suit."

The State of Assam preferred an appeal on 20-9-1983, against the judgment and decree, making the police officers aforesaid as pro forma-respondents 4, 5 and 6. By the present application the State prays that the said police officer be arrayed or transposed as appellants in place of pro forma-respondents. It has been stated in para 7 of the petition that due to inadvertence, at the time of filing the appeal, the said defendants were shown as pro forma-respondents, instead of appellants. Mr. Prasad has shown us that he has the power to represent the police officers. It appears that the State Government took upon themselves the entire responsibility of defending the case of the police officer by engaging Government Advocate as counsel to defend them in the trial Court. Thereafter, the suit was decreed, the State Government got the information and filed the present appeal.

3. In Section 21 of the Limitation Act we find that where a new party is substituted or added, either as plaintiff or defendant, if the Court is satisfied that the omission to include the new plaintiff or defendant was due to mistake in good faith, the Court may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. However, it is not

the case of adding new parties. It is seen that when a new party is added or substituted and the omission to add or substitute, if found to be a mistake done by the party, the Court has power to direct as regards the added plaintiff or defendants that the suit was instituted by or against them on any earlier date. As such, genuine omission or mistake in adding parties is not only excused but the Court may direct that they were parties to the proceedings from the date of the institution of the suit, provided the Court finds mistake done was in good faith. In the instant case counsel for the appellant owned the mistake in wrongly describing the Police Officers as Pro forma Respondents instead of co-appellant. Even accepting the spirit behind Section 21 of the Limitation Act, 1963, there is no dispute that it was a bona fide mistake committed by learned Govt. Advocate. As such we can even add or substitute the Police Officers as co-appellants and direct that the appeal was filed by the substituted appellants from the date of filing of the appeal.

4. That apart, Order 1 Rule 10, C. P. C. provides, inter alia, for adding parties or transposing plaintiff as defendant or defendant as plaintiff for effectually and completely adjudicating the disputes. It appears to us, on perusal of Order 1 Rule 10, that even mistake committed by a Party in arraying Parties may be rectified by the Court, rather it is the duty of the Court to see that parties are properly arrayed. We also find that under Order 41 Rule 4 where a decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

5. Further should we punish the litigants for the mistake committed by the lawyer? This question came up before the Supreme Court under different situations. In *Rafiq and Another Vs. Munshilal and Another*, their Lordships observed :

"The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negativewe cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

In *Goswami Krishna Murarilal Sharma v. Dhan Prakash*, (1981) 4 SCC 574 and in *Smt. Lachi Tewari and Others Vs. Director of Land Records and Others*, their Lordships expressed that if there was mistake committed by the lawyer; the parties should not suffer.

6. The above police officers genuinely believed that in the appeal which was filed by the State Government, they were added as co-appellants. Indeed the Government Advocate conducted their case in the Court below. Under these circumstances it was equally rational for the police officers to remain content that their cases were duly represented in the High Court. In fact the State Government instructed learned Govt. Advocate to file the appeal on their behalf

as well but there was mistake in arraying the parties, committed by the learned Govt. Advocate, which he has very frankly acknowledged in the petition. In the circumstances we cannot penalise the police officers for the inadvertent mistake committed by the Government Advocate. In fact they are parties to the appeal. We feel that in order to effectively and completely adjudicate upon and settle all the questions involved in the appeal the pro forma-respondents 4, 5, and 6 be transposed as appellants 2, 3 and 4, respectively, which we hereby order.

7. In the result the petition is accepted However, we grant liberty to the plaintiff-respondent to come up for modification, alteration or cancellation of this order if so advised.