

(1988) 10 CAL CK 0015
In the Calcutta High Court

Case No : Appeal No. Nil of 1988 (Extraordinary Suit No. 6 of 1987)

Tara Properties Pvt. Ltd.

APPELLANT

Vs

Allied Resins and Chemicals Ltd.

RESPONDENT

Date of Decision : 11-10-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 6 Rule 17

Citation : AIR 1989 Cal 192

Hon'ble Judges : K.M. Yusuf, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : R. Pal, for the Appellant; Bose, for the Respondent

Final Decision : Allowed

Judgement

K.M. Yusuf, J.—The appeal and the application for stay are taken up together for hearing. The plaintiff-appellant, M/s. Tara Properties Pvt. Ltd., instituted a Title Suit No. 1583 of 1981 in the City Civil court at Calcutta against the defendant-respondent for a decree of recovery of khas possession of the suit premises and for other reliefs. The fact of the case, in short, is that the appellant by an Indenture of lease dt". 29th Sept, 1963 granted lease to the respondent in respect of the suit premises at 13, Camac Street, Calcutta, at a monthly rent of Rs. 3,851/-including service charges for a period of 21 years, the said lease was to expire on 31st Dec. 1984. In the meantime the respondent failed to pay the enhanced share of Corporation taxes with effect from 1st April, 1973 in violation of the terms of lease and also defaulted in payment of rents and service charges for the month of June 1980, Oct. 1980 and from Jan 1981 onwards. The plaintiff by its Advocate's letter dt. 21st April, 1981 determined the lease and asked the respondent to quit, vacate and deliver the peaceful possession of the suit premises. In the meantime the lease also expired on 31st Dec. 1984 and as per terms and conditions of the said deed of lease the respondent failed and neglected to vacate the suit premises in spite of the termination of the lease by efflux of time and remained in illegal occupation of the suit premises. In February

1985 the appellant filed a suit being Suit No. 82 of 1986 against the respondent in the High Court claiming mesne profits and other reliefs. In July 1986 the respondent made an application before the High Court for transfer of the Title Suit No. 1583 of 1981 from the City Civil Court to the High Court under Clause 13 of the Letters Patent and by an order dt. 24th Nov. 1986 Pratibha Bonnerjea, J. directed the transfer of suit from the City Civil Court to High Court and further directed that the Title Suit No. 1583 of 1981 and the Suit No. 82 of 1986 be heard together. Now the said Title Suit of City Civil Court transferred to the High Court has been numbered as Extraordinary Suit No. 6 of 1987. Subsequent to the filing of the title suit in the City Civil Court the respondent carried out certain addition and alteration in the suit premises which damaged the main outer wall of the suit premises and also sublet a portion of the suit premises, both in gross violation of the terms and conditions of the said lease. In Sept. 1987 the appellant made an application in the Hon"ble High Court for amendment of plaint as follows : --

"9A. The defendant has carried out additions and alterations in the suit premises without the consent of the plaintiff and in breach of the terms and conditions of the said lease dt. 29th Sept. 1963.

9B. By virtue of the said addition and alteration in the suit premises by the defendant, the main outer wall of the suit premises has been damaged.

9C. The defendant has sublet and continues to sublet a portion of the suit premises in breach of the terms and conditions of the said lease dt. 29th Sept. 1963."

After hearing the parties Mr. Justice Umesh Chandra Banerjee by his order dt. 8th Dec. 1987 allowed the amendments so far those related to additions and alterations and damage to the wall as contained in paras 9A and 9B of the amendment petition but disallowed the amendment as contained in para 9C on the ground of subletting. Being aggrieved by the said order the instant appeal has been preferred.

2. The respondent by an Affidavit-in-Opposition has taken the preliminary point that the order under appeal is not an appealable order, and further strongly refuted the allegations of the appellant as regards the additions and alterations of the suit premises and the damage of the wall as well as the allegation of subletting. With the said Affidavit-in-Opposition the cross-objection being Annexure "A" has also been annexed against the two amendments allowed by the learned Trial Judge. It is contended in the Affidavit-in-Opposition that the amendment is designed to introduce totally a different, new and inconsistent case and cause of action and such amendment is not necessary for the purpose of determining the real question in the two suits. It is further contended in the said Affidavit that the main issue in two suits is whether the respondent is a tenant within the meaning of the Premises Tenancy Act, 1956 or not. The Affidavit also denies all other statements made in the application.

3. Mrs. Pal, the learned Counsel appearing for the appellant, submitted that the

Court below was wrong in not allowing the amendment of subletting as contained in para 9C of the amendment petition. Such addition of new ground of eviction in no way changes the nature of the suit for eviction nor induces any cause of action. More so amendment relating to addition and alteration of the suit premises was allowed by the Court of first instance. She has referred to few cases in support of her contention, namely, (i) Dwarka Prosad Mahawar Vs. Gopal Das Mahawar and Others, ; (ii) Akhil Ranjan Das Gupta Vs. B.N. Biswas, (iii) Jitendra Nath Das Vs. Dr. Kalyan Kr. Banerjee and Another, ; (iv) Tinkari Das Vs. Jamuna Bala Dasi, and (v) Nil Kantha Roy v. D. N. Mullick reported in (1975) 2 Cal LJ 396 and also some cases of other High Courts.

4. Mr. Bose, the learned Counsel appearing for the respondent, during his argument has taken the point that the appeal under Order 43 of the Civil P.C. is not maintainable as the Order under appeal is not an appealable order under the Code and does not come under the purview of Clause 15 of the Letters Patent, He submitted that the proposed amendments in the plaint have been made under Order 6 Rule 17 of C. P. C. and Order 43 Rule 1 of C.P.C. lays down the list of appealable orders and it is clear that no appeal lies from an order made under Order 6 Rule 17. He relied very much upon a decision reported in AIR 1956 Raj 43 . He also relied upon a decision of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, and he drew conclusion from the judgment that an Order allowing amendment is an appealable order but the order by which amendment is refused is not an appealable order. His other submission on the point related to what has been stated in the Affidavit-in-Opposition and centred round the point that the amendments proposed by the appellant are totally new and different and inducts new cause of action which would give a new dimension to the suit and that the proposed amendments failed to satisfy the requirements of Order 6 Rule 17 of C. P. C. He also submitted that under the general principle of amendment of pleadings there is no scope to introduce a totally new, different and inconsistent case which would make the suit multifarious in nature.

5. Mrs. Pal while replying to the respondents on preliminary point submitted that the order under appeal is not an appealable order and heavily relied on the decision of Shah Babulal Khimji (supra) which has, in fact, been the main defence of the respondent in support of its contention. On the basis of this Supreme Court decision Mrs. Pal submitted that the order under appeal is an appealable order within the meaning of Clause 15 of the Letters Patent as held by the Supreme Court. She further relied upon a decision reported in Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York, where the Supreme Court expressly held that an order allowing or disallowing the amendment is appealable if it is a Judgment within the meaning of Clause 15 of Letters Patent She further submitted that the decision of Rajasthan High Court reported in AIR 1956 Raj 43 in no way help the contention advanced on behalf of the respondent.

6. Having considered the facts and circumstances of the case and the arguments advanced by learned Counsel for the parties, so far the preliminary point whether

the order under appeal is not an appealable order is concerned, we are inclined to hold against the respondent for the reason stated hereunder.

7. The relevant portion of Clause 15 of the Letters Patent runs thus : "And We do further order that an appeal shall lie to the said High Court of judicature at Fort William in Bengal from the Judgment..... of one Judge of the said High Court or one Judge of any Division Court, pursuant to..... And that an appeal shall tie to the said High Court from a Judgment of one Judge of the said High Court or one Judge of any Division Court..... on or after the first day of February on One thousand nine hundred and twenty nine....."

The judgment has been defined by Couch, C. J. in the leading case of *Justices of the Peace v. Oriental Gas Company* (1872 8 C LR 433) as "a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between these being that a final judgment determines the whole cause or suit and a preliminary or interlocutory Judgment remains only a part of it, leaving other matters to be determined" (vide 8 CLR 433 : 17 Suth WR 364). This definition has been generally accepted in a number of decisions of various High Courts. In the case of *The Secretary of State for India Vs. Mansey Lakhmsey*, , it was held that the finding on a preliminary issue which does not involve the practical determination of a suit may still amount to a judgment if the issue raised does not imply its final determination. In a Calcutta Full Bench decision reported in *Nurul Hoda and Others Vs. Amir Hasan and Another*, one of the criteria laid down is whether the order in question puts an end to the proceeding so far as the Code dealing with it is concerned, in which the order is sought to be made.

8. The learned Counsel for the respondent has relied very much upon a decision of the Rajasthan High Court in the case of *Punja and Another Vs. Ramlal*, , but this case is of no help to the respondent as the High Court did not consider the appealability of an order of amendment nor the question whether an order of amendment can be a judgment within the meaning of Cl 15 of the Letters Patent. In *Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York*, the Supreme Court held as under : "In finding out whether the order is a judgment within Clause 15 it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability."

9. The preliminary objection of the learned Counsel for the respondent against the maintainability of the appeal sets at rest with the observation of the Supreme Court in the case of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, which runs thus "Having regard to the nature of the orders contemplated in the various Clauses of Order 43 Rule 1, there can be no doubt these orders purport to decide valuable rights of the parties in an ancillary proceedings even though

the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgment within the meaning of Clause 15 of the Letters Patent and hence appealable to a larger Bench." The Supreme Court further observed that "Whenever a Trial Judge decides the controversy which affects valuable rights of one of the parties, it must be treated to be a judgment within the meaning of Letters Patent. Every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or fact vital or a valuable rights of the parties and which works serious injustice to the party concerned." Their Lordships of the Supreme Court went on to add that "the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceedings or in the suit itself or in a part of the proceedings."

10. In our view there is no doubt that the denial of amendment so far it is related to the issue of subletting affects the valuable right of the appellants and contains the traits and trappings of finality and must be treated to be a judgment within the meaning of the Letters Patent. As such the preliminary objection taken by the respondent is overruled and is answered in favour of the appellant. We hold that the order under appeal is an appealable order.

11. Now we come to the main question of amendment of the plaint relating to subletting which was disallowed by the learned Trial Judge on the ground that it was a totally new cause of action and a ground of ejectment which was not originally pleaded, and that its introduction would change the structure of the suit. This particular point has now been well settled in three decisions of this Court, namely, (a) in the case of Dwarka Prosad Mahawar Vs. Gopal Das Mahawar and Others, ; (b) in the case of Jitendra Nath Das Vs. Dr. Kalyan Kr. Banerjee and Another, which is a Division Bench decision confirming the decision reported in Dwarka Prosad Mahawar Vs. Gopal Das Mahawar and Others, ; and (c) in the case of Pronati Mitra Vs. Sachindra Nath Chatterjee, . In Dwarka Prosad Mahawar's case (supra) the plaintiff instituted a suit for the eviction of a tenant on the ground of default in the payment of rent under West Bengal Premises Tenancy Act, 1956 and it was alleged that during the pendency of the suit the tenant defendant had made certain unauthorised constructions in the premises and the plaintiff made an application for amendment of the plaint by adding another ground for eviction, viz., the construction of the unauthorised structures. This amendment was allowed by the Trial Court and the High Court held that the amendment was rightly allowed. In the case of Jitendra Nath Das (supra) the landlord applied for the amendment of the plaint by the introduction of his reasonable requirement of the suit premises as an additional ground of relief. The question arose before the High Court whether the amendment allowed by the Court below was permissible. The Division Bench held that the suit is one for ejectment of a tenant and the amendment, if allowed, will not change the nature and the character of the suit, inasmuch as it will nevertheless remain the suit for eviction of a tenant. It was further held that the cause of action is the

determination of the tenancy by a notice to quit. Their Lordships further observed: "We are concerned with the question whether the application for amendment should be allowed or not. Whether the Court will decide in favour of the plaintiff or not insofar as the new ground is concerned is a question which is to be considered at the hearing of the suit and not at this stage." In the case of *Pronati Mitra (supra)* it was held in connection with the amendment of plaint under the W. B. Premises Tenancy Act that if any ground is added subsequently that cannot change the cause of action or the nature of the suit. The suit remains one for eviction as it was at the date of commencement of the suit.

12. Whether the suit is under the Transfer of Property Act or the West Bengal Premises Tenancy Act, the principle discussed above is equally applicable in all the cases so far as the amendment of plaint is concerned and where ejectment of the defendant is the ultimate object. Such amendment, if allowed, in no way changes the nature of suit or interferes with the cause of action which remains unaltered. This principle has further been elucidated in the case of *Akhil Ranjan Das Gupta Vs. B.N. Biswas*, where it was held that the amendment should be allowed since it does not alter the nature of the case at all which remained a suit for ejectment nor does it alter the cause of action which was and is the termination of the tenancy. In another decision reported in (1975) 2 Cal LJ 396 (*Nil Kantha Roy v. D. N. Mullick*) it was held that seeking additional ground in support of ejectment does not alter the nature of the suit. In *Zainab Bai v. Narayug Chitrapat Co. Ltd.* the Bombay High Court held that where a suit for the ejectment of tenant is filed on certain ground, subsequent addition of fresh ground in the plaint does not change the nature of the suit *Zainab Bai and Others Vs. Navayug Chitrapat Co. Ltd.*, . A Full Bench of the Delhi High Court also took a similar view in the case of *Abnash Kaur Vs. Avinash Nayyar and Others*, .

13. In the light of aforesaid discussion in our view the amendment prayed by the appellant on the ground of subletting as contained in para 9C of the amendment petition in no way changes the character or nature of the ejectment suit nor makes out any new cause of action. Even if the subletting was done before the filing of ejectment suit then even then the respondent will suffer no prejudice at all if such an amendment is allowed because merely allowing the amendment does not give any relief to the appellant but the appellant will have to prove its case of ejectment before the trial Court. The Court of first instance wrongly disallowed the amendment on the ground of subletting.

14. In that view of the matter we allow the appeal and dispose of the stay application accordingly and the cross-objection filed by the respondent is dismissed. The amendment to the plaint as appears in para 9C of the amendment petition relating to subletting is hereby allowed and such amendment be incorporated in the plaint within two weeks after the Long Vacation.

15. Leave is granted to the plaintiff to reverify the plaint. The plaintiff-appellant is directed to serve a copy of the amended plaint incorporating all the

amendments to the defendant-respondent within two weeks after the Long Vacation. Additional written statement, if any, is to be filed within 4 weeks after the incorporation of the amendment in the plaint.

16. Cost costs in the cause. All undertakings stand vacated and the filing of the paper book dispensed with.

17. All parties including the department to act on signed copy of the minutes on usual undertaking.

A.K. Sengupta, J.

18. I agree.