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Court : Allahabad

Decided On : Sep-07-2012

Judge : B. Amit Sthalekar

Appeal No. : Writ C No. 5422 of 2000

Appellant : Om Prakash

Respondent : Viiiith Additional Dj

Advocate for Pet/Ap. : Shri. R.B. Gaur

Judgement :

1. This writ petition has been filed by the petitioner challenging the order dated 5.1.2000 passed by the VIII Addl. District Judge, Shahjahanpur in Civil Appeal no. 16 of 1999 Om Prakash and others Vs. Sanjeev Kumar Sharma whereby the court below has rejected the application of the petitioner seeking amendment of his written statement. Brief facts of the case, as stated in the writ petition are that the respondent no.

2. Filed a suit for permanent injunction against the petitioner which was registered as original suit no. 115 of 1995. The case was contested by the petitioners-defendants therein and a written statement was also filed by which a counter claim was set up by the petitioners-defendants against the plaintiff. The trial court framed issues and both the parties led their evidence and ultimately the trial court decreed the suit on 17.12.1998 against the defendants-petitioners. Aggrieved by

the judgment and decree dated 17.12.1998 the petitioner filed civil appeal no. 15 of 1999 Om Prakash and another Vs. Sanjeev Kumar. The defendants-petitioners also filed an application on 8.12.1999 under Order VI Rule 17 C.P.C. before the court below seeking amendment of their written statement. The respondent no. 2 herein filed his objections before the court below on 4.1.2000. The matter was heard by the said court and thereafter by the impugned order dated 5.1.2000 the said court rejected the petitioners' application under Order VI rule 17 C.P.C., seeking amendment of his written statement.

3. The contention of the petitioners is that the sale deed in question relied upon by the plaintiff was denied by him in their written statement and it was stated therein specifically that the sale deed was without any consideration and was not executed by the respondent no. 3 and even if executed by respondent no. 3 the same was not binding upon the defendants-petitioners. The justification for filing the amendment application for amending the written statement is that certain points relating to the sale deed could not find mention in the written statement. Through the amendment application, the petitioners wanted to bring on record certain facts namely, that no sale deed had been executed by the defendant no. 3 in favour of the plaintiff on 27.6.1986 nor was the possession of the land in question given to the plaintiff. It was also stated that the sale deed was a forged and fictitious document submitted with ill motive. It was further stated that the sale deed neither contained any clause of consideration nor was any consideration paid by the plaintiff to the defendant no. 3 which itself goes to show that the sale deed was a fictitious document. It was also contended inter-alia that under the Hindu Mitakshara law applicable to Hindus a male Hindu was not empowered to transfer or alienate the claim or any part of the joint family property and in view of this fact also the sale deed could not have been made by the respondent no. 3 and if made it is wholly fictitious.

I have heard Shri R.B. Gaur, learned counsel for the petitioners and the learned standing counsel appearing for the respondent no. 1. None appears for respondent no. 2. List has been revised. So far as respondent no. 3 is concerned steps were taken by the petitioners for service upon her and as per office report neither acknowledgement nor undelivered cover has been received back. In the

circumstances service upon the respondent no. 3 shall be deemed sufficient. From a perusal of the impugned order dated 5.1.2000 it will be seen that the court below has recorded a clear finding that even in the original suit the appellants (petitioners herein) had in their written statement clearly stated that no such sale deed had ever taken place between the defendant no. 3 and the plaintiff and even if there is such a sale deed, the same has no binding effect upon the defendants-petitioners. Thus from the very finding recorded by the respondent no. 1 it will be seen that throughout in the original suit the case of the petitioners appellants was that there was no sale deed at all and that even if assuming that such a sale deed was executed the same was not binding upon the appellants-petitioners. Infact, from a perusal of the additional pleas taken in the written statement which is filed as Annexure-2 to the writ petition, it is seen that in paragraph 25 thereof the petitioner had questioned the title of the plaintiff and had also specifically stated that the sale deed was wholly fictitious and was manufactured with ill motive and the said sale deed appears to have been the result of a conspiracy between the defendant no. 3 and the plaintiff and was not binding upon the defendants-petitioners.

Thus from a perusal of the amendment application and the grounds taken therein which are sought to be added by way of amendment it does not appear that any new case is being set up by the defendants-petitioners inasmuch as it was always his case even in the original written statement that there was no sale deed and even if one had been produced the same was a fictitious and forged document and the result of a calculated conspiracy between defendant no. 3 and the plaintiff. Through the amendment application the petitioners have only sought to raise a further legal plea that under the Hindu Mitakshara law no individual male member of a joint family is empowered to transfer or alienate the claim of any part of the portion of the Hindu joint family property. This being a pure question of law could be raised at any stage of the proceedings and it cannot be said that by raising said plea a new case was being set up by the appellants- petitioners. The Supreme Court in the case reported in AIR 1979 (SC) 551 Pandit Ishwardas Vs. State of M.P. has held in paragraph 4 as under:

"We are unable to see any substance in any of the submissions. The learned Counsel appeared to argue on the assumption that a new plea could not be

permitted at the appellate stage unless all the material necessary to decide the plea was already before the Court. There is no legal basis for this assumption. There is no impediment or bar against an appellate Court permitting amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the Appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the Appellate stage, the reason why it was not sought in the trial Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an Appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

4. The Supreme Court in the case reported in AIR 1985 (SC) 817 Vineet Kumar Vs. Mangal Sain Wadhera has held as under:

"16. 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. The question in the present case is whether by seeking the benefit of S. 39 of the new Act there is a change in the cause of action. In A.K. Gupta and Sons V. Damodar Valley Corporation, (1966) 1 SCR 796: (AIR 1967 SC 96) this Court dealing with the cause of action observed as follows (at P.98 of AIR) : "The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in Cooke V. Gill (1873) 8 CP 107, 117 in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson V. Unicos Property Corporation Ltd. (1962) 2 All ER 24 and it seems to us to be the only possible view to take. Any other view would make the rule futile."

17. The appellant in the present case only seeks the protection of the new Rent Act which became applicable to the premises in question during the pendency of the litigation. We see no reason why the benefit of the new Rent Act be not given to the appellant. Section 20 of the new Rent Act provides a bar to a suit for eviction of a tenant except on the specified grounds as provided in the section. Sub-section (4) of S.20 stipulated that in any suit for eviction on the grounds mentioned in Cl. (a) to sub-s. (2) viz., the arrears of rent, if at the first hearing of the suit the tenant in default pays all arrears of rent to the landlord or deposits in court the entire amount of rent and damages for use and occupation of the building due from him, such damages for use and occupation being calculated at the same rate as rent together with interest thereon at the rate of nine per cent per annum and the landlord's cost of the suit in respect thereof after deducting therefrom any amount already deposited by the tenant under sub-s.(1) of S.30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground. Section 39 and 40 of the new Rent Act also indicate that the benefit of the new Act will be given to the tenant if the conditions contemplated in those sections are satisfied. Section 39 also indicates that the parties are entitled to make necessary amendment in their pleadings and to adduce additional evidence where necessary."

The Supreme Court in the case reported in (1990)1 SCC 166 Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar has held in paragraph 4 as under:

"4. In the leading case of Pirgonda Hongonda Patil V. Kalgonda Shidgonda Patil, a bench comprising three learned Judges of this Court laid down the principles which should govern the question of granting or disallowing amendments. It was held by this Court that all amendments ought to be allowed which satisfy the two conditions:

(a) not working injustice to the other side, and

(b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not

be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim."

5. In view of the above legal principles and the circumstances of the case I find that the impugned order dated 5.1.2000 is wholly illegal and without jurisdiction and passed without any application of mind and is accordingly set aside. At the time of admission of this writ petition, this Court has been pleased to stay the further proceedings of civil appeal no. 15 of 1999 (Om Prakash Vs. Sanjeev Kumar). The interim order reads as follows:

"After hearing the learned counsel for the petitioner, I am of the view that respondents be also heard at the time of admission. Issue notice to respondents fixing first week of March 2000. Till further orders, the further proceedings in Civil Appeal No. 15 of 1999 (Om Prakash Vs. Sanjeev Kumar) pending before respondent no. 1 shall remain stayed."

However, since the impugned order dated 5.1.2000 is being set aside, it is directed that the court below shall now proceed with the said civil appeal and decide the same expeditiously preferably within a period of four months, if possible, from the date a certified copy of this order is received by the concerned court. It is further provided that in addition to the steps which may be taken by the petitioners, the Registry of this Court shall also communicate a certified copy of this order to the court below within fifteen days hereof. With the aforesaid observations this petition is allowed.

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