

**Reeta Kumari Vs. Anish Ranjan**

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**Court :** Patna

**Decided On :** Apr-04-2007

**Judge :** Ramesh Kumar Datta, J.

**Acts :** Code of Civil Procedure (CPC) - Order 6, Rules 2 and 17 - Order 9, Rule 13; Code of Civil Procedure (CPC) (Amendment) Act, 2002

**Appeal No. :** C. R.(sic) No. 1943 of 2005

**Appellant :** Reeta Kumari

**Respondent :** Anish Ranjan

**Disposition :** Application dismissed

**Judgement :**

**Ramesh Kumar Datta, J.**

1. Heard Mr. Sidheshwar Prasad Singh, learned Senior Counsel for the petitioner and Mr. Shashi Shekhar Dwivedi, learned Senior Counsel for the opposite party.
2. The petitioner has filed this civil revision application against the order dated 30.8.2005 passed by the Principal Judge, Family Court, Patna in Misc. Case No. 2 of 2003, by which the amendment petition dated 29.3.2005 for amendment of the rejoinder petition dated 3.1.2004 of the opposite party has been allowed.

3. The present matter has a chequered history. Earlier, Matrimonial Suit No. 207 of 2001 was filed by the opposite party, which was decreed ex parte on 6.9.2002. The petitioner filed Misc. Case No. 2 of 2003 under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. In Misc. case, the claim of the petitioner was that she had learnt about the ex parte decree of divorce on 31.1.2003 from the father of the opposite party, who is a practising Doctor, at his Clinic situated near Panch Mandir, Kankerbagh, Patna. The opposite party appeared in the Misc. case and filed rejoinder/objection petition (Annexure-1) in paragraph No. 9 of which he denied the allegations regarding talk between the father of the opposite party and the father of the petitioner on 31.1.2003 in the Clinic of the father of the opposite party. The petitioner examined four witnesses in the Misc. Case and after close of her evidence, the opposite party filed certain documents showing that his father was treated at Mumbai between 21.1.2003 to 31.1.2003. By order dated 28.2.2004, the learned Principal Judge, Family Court, Patna refused to accept the documents to be taken into evidence. The said order was challenged by the opposite party by filing Civil Revision No. 353 of 2004 in this Court, which was dismissed by order dated 21/9/2004 (Annexure 2). The court below had refused to accept the documents on the ground that the documents had been filed at a belated stage and that the story itself that his father was ill and treated at Mumbai from 21.1.2003 to 31.1.2003 has been introduced on 19.2.2004 after the petitioner had closed her case and the court had come to the conclusion that possibility of concoction and manufacturing of the documents cannot be precluded and thus, at such a belated stage documents filed by the opposite party were not accepted. However, this Court by its order dated 21.9.2004 while rejecting the civil revision application filed by the opposite party dismissed the same on the ground that it was admitted by learned Counsel for the petitioner that there is no pleading to the aforesaid effect that his father had been treated at Mumbai at the relevant time and, thus, without expressing any opinion with respect to the document, it was held that no document can be admitted without any pleadings and the civil revision application was, accordingly, dismissed. Against the said order, the opposite party filed S.L.P. (Civil) No. 1616 of 2005 before the Supreme Court, which was also dismissed by the Apex Court. The Apex Court held that it did not find any ground to interfere with the impugned order by order

dated 31.1.2005.

4. Thereafter, the opposite party filed a petition for amendment of the rejoinder on 29.3.2005, against which the petitioner filed objection. The said application for amendment under Order 6 Rule 17 was allowed by the court below by the impugned order dated 30.8.2005 holding that the petitioner brought her case for setting aside the ex parte decree with averments that she came to know about the ex parte decree on 31.1.2003 from the father of the husband-opposite party during the meeting held between the parties at Patna, which fact was denied by the husband-opposite party and now only claims that his father had gone to Mumbai for treatment and the court came to the conclusion that the proposed amendment is not going to change the nature of the suit and in the ends of justice, it should be allowed so that the party could be fully heard by the court and the petitioner was given liberty to file reply in rebuttal and lead evidence, if so, desired. The same was done on payment (sic) of Rs. 300/- to the petitioner.

5. Learned Counsel for the petitioner submits that the order of the court below is contrary to the earlier decision of this Court and the Supreme Court as well as the decision of the court below in the present matter itself and thus, the impugned order is fit to be set aside. It is submitted by the learned Counsel that no such stand was taken in the pleading dated 3.1.2004 of the Opposite Party which had been sworn by his father that his father was receiving treatment at Mumbai from 21.1.2003 to 31.1.2003. It is further submitted that it is the father of the opposite party, who has not only sworn the affidavit, but also attended the Family court and particularly when the witnesses were being examined; no suggestion was made that they were speaking lie and that as a matter of fact, the father of the opposite party was not even present in Patna on 31.1.2003 when the alleged conversation was supposed to have taken place.

6. In view of the said situation learned Counsel submits that the entire story of treatment of father of the opposite party at Mumbai is after thought and the documents, have been created subsequently with mala fide intention only for the purpose of this case. With respect to acceptance of any document at such a belated stage, learned Counsel for the petitioner argued that it must be seen

whether the attempt to introduce the document at such a belated stage is a designed or fraudulent move. Further it should also be seen whether it is a document that can be created and whether it has been filed with the sole intention to delay or sabotage the proceeding.

7. Learned Counsel submits that none of those ingredients is satisfied in the present matter since the document having been brought at such a belated stage with respect to the facts, which were not at all pleaded originally, but have only been sought to be brought in after closing of petitioner's evidence, which clearly shows that it was a designed and fraudulent move on the part of the opposite party to bring those documents. Learned Counsel sought to raise suspicion about the credibility of the documents stating that the Doctor, who has given the certificates or prescriptions, is not a Doctor of the Hinduja National Hospital & Research Centre at Bombay where the treatment is alleged to have taken place. It is further submitted that this is a part of the strategy of the opposite party to intentionally delay and sabotage the proceeding.

8. Learned Counsel for the petitioner points out to the fact that the document has been sought to be brought on the record after 40 dates in the case and earlier also repeated adjournments have been taken by the opposite party of this case, which go to show that the whole purpose of bringing the document is to delay and sabotage the proceedings.

9. In this regard learned Counsel emphasized on the fact that despite specific order of the court below to pay ad-interim maintenance to the petitioner during the pendency of the litigation, the opposite party has not paid a single farthing till today and amount of Rs. four lacs approximately is in arrears.

10. Learned Counsel for the petitioner also submits that the court below had to see the matter in the light of the amended provisions of Order 6 Rule 17 of the Code, specially the proviso to the same that has been brought by the Code of Civil Procedure (Amendment) Act, 2002 with effect from 1.7.2002, under which no such amendment of the pleadings is permissible 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. It is submitted by

learned Counsel that no such due diligence has been shown by the opposite party nor the same has been taken into consideration by the court below while allowing the amendment application by the impugned order.

11. In support of his aforesaid submissions, learned Counsel relies upon various decisions of the Apex Court as well as of this Court and other courts. Learned Counsel firstly relies upon a decision of the Supreme Court in the case of *Ajendraprasad N. Pandey and Anr. v. Swami Keshavprakeshdasji N. and Ors.* A.I.R. 2007 SCW 513 in paragraph Nos. 40, 51, 52, 54, 56, 57 and 58 of which it has been laid down that under the proviso to Order 6 Rule 17 no application for amendment shall be allowed after the trial has commenced unless inspite of due diligence, the matter could not be raised before the commencement of the trial and it was held by the Apex Court that the trial is deemed to commence when the issues are settled and the case is set down to recording evidence. It was further held in the said case that the proviso should not be so interpreted that part of it becomes (sic) and meaningless and very often a proviso itself is read as a substantive provision, it has to be given full effect.

12. Learned Counsel further relies upon the decision of the Punjab and Haryana High Court in the case of *Rabindra Kaur. v. Raj Birender Singh* 1997 DMC 544 (DB). In paragraph No. 10 it has been held that where an application has been filed in order to linger on proceedings and it being mala fide, it may be dismissed. He further placed reliance upon a decision of this Court in the case of *Most. Singheshwari Devi and Anr. v. Deena Nath Pandey and Ors.* 1997(1) PLJR 637 in which it has been laid down that where after the close of the plaintiff's case the defendant filed an amendment petition seeking leave to amend the written statement, the said amendment amounts to changing the case and cannot be allowed after the close of the plaintiff's case, which is bound to prejudice the case of the plaintiff and such amendment is mala fide and hence, should not be permitted.

13. Learned Counsel also relies upon a decision of this Court in the case of *Shree Narayan and Anr. v. Mahendra Yadav and Ors.* 2006 (2) P.L.J.R. 489 in which it has been laid down that after the newly introduced proviso to Order 6 Rule 17 the

amendment cannot be allowed at a belated stage once the trial has commenced without the Trial Judge noticing a case made out as per the proviso to the said Rule. Learned Counsel also relies upon another decision of this Court in the case of Smt. Lipika Gupta v. Mr. Partho Gupta : 2005 (2) PLJR 644 in which it has been laid down that once the trial has commenced no application for amendment shall be allowed, 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.

14. Further reliance is placed upon a decision of the Bombay High Court in the case of Mrs. Vandana S.P. Salgaonkar v. Bank of India and Anr. : AIR1997 Bom257 in which the amendment of written statement seeking to deny acknowledgment of loan made in the original written statement was rejected on the ground that it shows a mala fide intention of the party. Learned Counsel further relies upon a decision of the Supreme Court in the case of Haji Mohammad Ishaq and Ors. v. Md. Iqbal Mohammad and Ors. A.I.R. 1978 S.C. 796 in which it has been held that application made for amendment of written statement introducing new facts cannot be allowed.

15. Learned Counsel for the opposite party, on the other hand, supports the order on various grounds. It was submitted that so far as the earlier litigation between the parties, which went up to the Supreme Court, is concerned, that was finally decided purely on the issue that there was no pleading on the basis of which the documents could have been introduced and only for the said reason, the rejection of the document has been upheld by this Court, which decision was not interfered with by the Supreme Court. In this regard, learned Counsel submits that in earlier round of litigation it was not clearly pointed out on behalf of the petitioner that as a matter of fact in paragraph No. 9 of the rejoinder/objection petition filed by the opposite party in the Misc. case, the allegation about talk between the father of the opposite party and the petitioner on 31.3.2003 in the Clinic of the father of the opposite party was denied as not true and was further specifically stated that the father of the petitioner had no meeting with the father of the opposite party on 31.3.2003 and, therefore, there was no occasion to disclose to the father of the petitioner that the ex parte decree for divorce has been passed.

16. Learned Counsel submits that the amendment now sought to be made in the pleadings specially with respect to the treatment of the father of the opposite party at Bombay between 21.1.2003 to 31.3.2003, is only for elucidating the particulars that were already given with respect to the specific denial of the meeting between the father of the petitioner and the father of the opposite party on 31.1.2003 held at Patna. Thus, it could not be said that it was any additional fact or any additional ground, which could change the nature of the suit, but was merely elaboration of the fact, which is already on the record.

17. In this regard learned Counsel refers to Order 6 Rule 2 of the Code of Civil Procedure, in which it is provided that any pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. It is submitted by learned Counsel that the earlier pleading as contained in paragraph No. 9 of the rejoinder petition was a concise statement of fact that there had been no meeting held on 31.3.2003 between the parties and what was sought to be brought by the amendment petition was a mere elaboration of the fact that on the said date as a matter of fact, the father of the opposite party was undergoing treatment at Mumbai. Since the basic fact, that there had been no meeting on that date had clearly been mentioned in the earlier rejoinder petition, the present amendment does not change the nature of the suit and the court below has rightly allowed the amendment application.

18. Learned Counsel for the opposite party further submits that in the matter of amendment of the pleadings the general rule is that the court should be liberal in the matter of allowing any elaboration of amendment of pleadings and all such amendments should be permitted which are necessary for the purpose of determining the real question in controversy between the parties. It is further submitted that the said principle is applied more liberally with respect to the amendment of the written statement since it is open to the party to give reply in rebuttal of his defence and the same would not generally change the nature of the suit. In the present matter, it is submitted, on the basis of the facts, that there is no question of changing the nature of the suit since there has been denial even earlier of any meeting on 31.3.2003 on the basis of which knowledge of the decree

of the divorce suit is claimed by the petitioner.

19. In support of his aforesaid submissions, learned Counsel for the opposite party relies upon a decision of the Supreme court in the case of Baldev Singh and Ors. v. Manohar Singh and Anr. : AIR 2006 SC2832 . In paragraph 14 of the said decision, it was held by the apex court that if the application for amendment is, in fact, in elaboration of the defence case then the same must be allowed. It was further held that a mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is caused to the party so as to take away any accrued right.

20. Learned Counsel also relies upon a decision of the learned single Judge of this Court in the case of Most. Sumitra Devi and Ors. v. R.M. Engineering Works 1998(1) PLJR. 631, in paragraph Nos. 7 and 8 of which it has been held that if the amendment is by way of clarification, the same can be added by amendment of the pleadings and that it is well settled that such facts by way of clarification can be added by amendment of the pleadings. It was further held that it is well settled that even if new facts are introduced, but if those facts do not change the character of the suit, the amendment should be allowed and the test is whether new assertion, new cause of action are foreign to the scope of the suit and changes the entire complexion; if it does, then the amendment cannot be allowed.

21. Learned Counsel for the opposite parties also relies upon a decision of the Supreme court in the case of Rajesh Kumar Aggarwal and Ors. v. K.K. Modi and Ors. : AIR 2006 SC1647 . In paragraph No. 15 therein it has been laid down that the object of the rule is that the courts should try the merits of the case that come before them for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. It was held in the said case that the second part of Order 6 Rule 17 is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

22. Reliance is also placed on a decision of the Supreme Court in the case of Prem Bakshi and Ors. v. Dharam Dev and Ors. 2002 (2) PLJR (S.C.) 187 in paragraph No. 6 of which it has been laid down that it is almost inconceivable how

mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. It was further held that the amendment of the pleadings would not amount to decisions on the issues involved and they only would serve advance notice to the other side as to the plea which a party might take up. Hence the said amendment cannot cause failure of justice or irreparable injury to any party.

23. So far as the issue of delay is concerned, that has already been answered in the case of Baldeo Singh (supra) where three years delay in filing the amendment of the written statement was held to be not a ground for rejection of the same. This in the matter of amendment of pleadings the right has been given to the defendant for amendment of the written statement even if there has been some delay.

24. So far as other decisions cited by the learned Counsel regarding the denial of acknowledgment by amendment, that does not appear to be the case at present since from the very beginning the meeting on 31.3.2003 has clearly been denied even in the original rejoinder petition and no new case has been introduced, except as pointed out for elaboration of fact that has already been denied earlier in the rejoinder petition.

25. On a consideration of the aforesaid facts and circumstances and the rival pleadings of the parties, this Court is of the view that the petitioner has not been able to show good reasons for interfering with the order of the court below.

26. So far as the earlier litigations regarding admissibility of documents were concerned, ultimately that had been rejected by this Court on the sole ground that there were no pleadings in that regard and, thus, the documents could not be admitted. Thereafter, when the opposite party filed for amendment of the rejoinder/objection petition, it is evident that the same has to be seen in terms of Order 6 Rule 17 of the Code of Civil Procedure.

27. From a consideration of the amendments sought, I find that even in the original rejoinder there was a specific averment made that no meeting had taken place between the father of the petitioner and the opposite party between 21.1.2003 and 31.3.2003. What is sought to be brought in by the amendment is the fact that the

father of the opposite party was on that day undergoing treatment at Bombay. The said fact does not change the basic case of the party that as a matter of fact, there was no meeting held on 31.3.2003 and merely an elaboration of the said fact that on the aforesaid date the father of opposite party was, in fact, undergoing treatment at Mumbai would not change the nature of the suit. That being the situation, it has to be held that it is a mere clarificatory amendment and the same can not be said to have taken away the accrued right of the petitioner. So far as the issue regarding treatment being at Bombay and no meeting having been held on 31.3.2003 is concerned, the court below has rightly considered the question of any adverse impact on the petitioner and given liberty to the petitioner to file reply in rebuttal and also give evidence, if so desired. Thus, no prejudice is caused to the petitioner by virtue of acceptance of the said amendment petition.

28. So far as reliance placed by the petitioner on the decision of the Supreme Court and of this Court with respect to the proviso of Order 6 Rule 17 is concerned, the main part of said proviso has to be seen which lays down that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. The said main part of the provision cannot be lost sight of while considering the proviso to the same. What has been introduced by the present amendment is not a new fact, which may be hit by the proviso laid down that the court must come to a conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial. In the present case, the basic fact regarding not holding of the meeting had already been given and only the further elaboration regarding the actual presence of the father of the opposite party at Mumbai is sought to be added. Under Order 6 Rule 2 of the Code of Civil Procedure only a concise statement has to be given but not the evidence. It is true that the fact regarding the presence of the father of the opposite party at Mumbai ought to have been given in the original rejoinder itself, but the absence of the same does not change the nature of the suit, since there has been a specific denial of the meeting held on 31.3.2003 in the said rejoinder. Thus the proviso to Order 6 Rule 17 does not *stricto sensu* apply to the present matter.

29. Thus on a consideration of the entire facts and circumstances and the various decisions on this point, it is evident that there is no legal infirmity either in the order of the learned court below or in its exercise of jurisdiction. Hence, I find no merit in the revision application and it is, accordingly, dismissed.

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