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Court : Patna

Decided On : Feb-28-2007

Judge : Ramesh Kumar Datta, J.

Acts : [Arbitration Act, 1940](#) - Sections 20; Code of Civil Procedure (CPC) - Order 6 Rule 17

Appeal No. : C.R.No. 1068 of 2004

Appellant : Gopal Kumar Modi and anr.

Respondent : Lalan Prasad Keshri @ Sushil Prasad Keshri and ors.

Advocate for Pet/Ap. : Mr. Harshwardhan Sahay

Disposition : Application allowed

Judgement :

Ramesh Kumar Datta, J.

1. Heard, Mr. Harshwardhan Sahay, learned Counsel for the petitioners and Mr. Ashok Kumar Keshari, learned Counsel for the opposite parties.

2. The petitioners have filed the civil revision application against the order dated 19.7.2004 passed by the Subordinate Judge-I, Munger in Title Suit No. 67 of 2001, by which he has rejected the petition filed on 20.3.2004 under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred as the 'Code') by the plaintiff-petitioners.

3. The plaintiffs had originally filed the said Title suit praying for bifurcation of Schedule-II suit property from Schedule-I detailed in the plaint on the basis of sale deed dated 19.3.2001 executed by defendant-second party in favour of plaintiff No. 2 and to confirm the possession of plaintiff No. 2 over the said property. The case, as alleged in the plaint, was that there was a family arrangement in the family of the defendants and defendant second party was allotted the land of Schedule-II property and came in possession of the same and subsequently by the sale deed in question transferred the same to plaintiff No. 2 who was, at that time, one of the tenants in the property and had also directed the other tenants orally to pay monthly rent to the plaintiffs from the month next to the execution of the sale deed.

4. In the written statement filed by the defendants 1st party the oral partition was denied. Subsequently, the issues were framed and the matter was fixed for evidence of the plaintiffs on several dates when the application under Order 6 Rule 17 was filed praying for as many as 19 amendments out of which 14 are said to be of a formal and typographical nature and only amendment Nos. 2, 15 and 17 are said to be substantive. By amendment No. 2, it is sought to add two daughters of Satya Narayan Pd. Keshari as defendant Nos. 5 and 6. By amendment No. 15, it was sought to amend paragraph 19(A) by inserting the words 'declare the title of the plaintiff No. 2 over the suit property described in Schedule II of the plaint and pass a decree for bifurcation of suit property through the process of the Court' after striking off the word 'bifurcate the Schedule II suit property' appearing in the first and second line of paragraph 19(A). By amendment No. 17, it was proposed to insert a relief as paragraph 'C' after the existing sub paragraph (B) in Paragraph-19 of the plaint that if the plaintiffs are not found entitled to the relief of declaration of title of plaintiff No. 2 over the suit property and for bifurcation of the same then in that events preliminary decree for partition of the property described in Schedule

1 of the plaint to the extent of the share of the defendant second party be passed in favour of plaintiff No. 2 on the basis of the sale deed dated 19.3.2001 executed by the defendant second party in favour of plaintiff No. 2 and for consequential relief of partition by metes and bounds after passing the preliminary decree in favour of plaintiff No. 2.

5. After hearing the parties by the impugned order dated 19.7.2004, the amendment petition of the plaintiff petitioners was rejected stating that it is not at all possible that as many as 18 amendments in various paragraphs would arise due to typographical mistake and further that through the proposed amendment the plaintiffs have tried to deviate from their earlier relief and have wished to change the nature of the suit by making the same as partition suit in place of declaratory without showing any cause for the same.

6. Learned Counsel for the petitioners submits that the said amendment does not change the nature of the suit and the same has only been sought in order to avoid multiplicity of litigation in the matter. It is further submitted that in view of denial of oral partition by the other defendants, the said amendments have become necessary since if the issue regarding the oral partition is not accepted then the plaintiffs-petitioners would have no option but to file another suit for partition of their share as received on the basis of the sale deed executed by the defendant second set. It is further submitted that the court has wide power to allow the amendment and the same can be exercised at any stage of the proceedings in the interest of justice and while considering the issue of amendment a hypertechnical view should not be taken. It is submitted that there has been no change in the nature of the suit since the relief claimed by the plaintiff is solely on the basis of the sale deed dated 19.3.2001 executed by defendant second set in favour of plaintiff No. 2 and the same continues to be the basis even for the alternate relief that has been prayed for by the plaintiff-petitioners by way of amendment. It is submitted that it is open to the petitioners to have claimed such alternate relief in the suit originally filed and only on account of failure of the counsel to correctly advise in the matter, the plaintiffs should not be non-suited by rejecting the amendment. Thus, it is submitted that there is neither any change in the nature of the suit nor in the cause of action. It continues to be based on the sale deed and

only the rights of the plaintiffs have to be adjudicated either by accepting the oral partition in the family of the vendor or in case the same is not accepted by putting the plaintiffs-petitioners in the share of defendant 2nd set, which share of the defendant-vendor has not been denied in the written statement.

7. In support of his aforesaid contentions, learned Counsel for the petitioners relies upon several decisions of the Supreme Court and of this Court. Learned Counsel firstly cites the case of Ragu Thilak D. John. v. S. Rayappan and Ors. v. (2001) 2 SCC 472, specially on paragraph Nos. 5 and 6 there of which are as follows:

5. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigations.

6. If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject - matter of the issue after allowing the amendment prayed for.

8. It is submitted on the basis of the law laid down by the Apex Court as aforesaid that the dominant purpose of allowing the amendment is to minimise the litigation; the said purpose will be served in the present matter by allowing the amendment

rather than refusing the same and the court should not take a hypertechnical view in the matter when otherwise there is no change in the basic facts of the case.

9. Learned Counsel also relies upon the case of *Rajesh Kumar Aggarwal and Ors. v. K.K. Modi* : AIR 2006 SC1647 , in paragraph Nos. 16 to 19 of which the object of the rule has been laid down in the following words:

16. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

17. Order VI Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part 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.

18. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

19. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice,

equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

10. From the above statement of the law, it is evident that all amendments that may be necessary for determining the real question in controversy between the parties should be permitted provided it does not cause any injustice or prejudice to the other side. Further it has been clearly laid down that if it is permissible for a party to file independent suit than there is no reason why the same relief which could be prayed for in a new suit can not be permitted to be incorporated in the pending suit. It has further been clarified in the said judgment that the basic or cardinal test is as to whether such amendment is necessary to decide the real dispute between the parties and it is on that test that the amendment should either be allowed or refused.

11. Learned Counsel also relies upon a decision of the Supreme Court in the case of G. Nagamma and Anr. v. Siromanamma and Anr. : (1996)2SCC25 , in paragraph No. 3 of which it is held as follows:

3. We called upon the appellant to produce original agreement of reconveyance. We have seen the original document which contains the recitals in support of the contention raised by the appellants. It is settled law that the plaintiff is entitled to plead even inconsistent pleas. In this case, they are seeking alternative reliefs. The application was for amendment of the plaint whereby neither cause of action could change nor the relief could be materially affected, we allow the same.

12. From the said decision, it is evident that it is open to the plaintiffs to take even inconsistent plea not to speak of seeking alternate relief alone, which is definitely permissible when neither the cause of action is changed nor is it materially affected.

13. Learned Counsel for the petitioners also relies upon the judgment of the Supreme Court in the case of Gautam Paul v. Debi Rani Paul and Ors. A.I.R 2001 SC 61 for the proposition that it is open to the purchaser to initiate a proceeding for partition or even to claim partition in execution. The said decision of the Apex court has been followed by this Court in the case of Bimla Devi and Ors. v. Radheshyam

Patwa and Ors. A.I.R. 2006 Patna 112, in paragraph No. 12 of which it has been laid down that it is true that the transferee's right was restricted in many ways, but he has a right to seek partition.

14. Learned Counsel for the opposite party, on the other hand, has strongly opposed the contention raised by learned Counsel for the petitioners and in this regard submits that the prayer for amendment is hit by the Proviso to Order 6 Rule 17 of the Code as inserted by the recent amendment. It is submitted by learned Counsel that once the trial has commenced then no application for amendment can be allowed and further that it can only be permitted if the applicant shows due diligence before the commencement of the trial. It is submitted that the issues have already been framed in the case and as many as 5 to 6 dates had been given to the plaintiffs-petitioners for bringing their evidence and only thereafter, the application for amendment has been filed. It is submitted that it is evident that the trial of the suit has already commenced and thus no amendment is permissible, unless, the petitioners could have shown due diligence, which is not the position in the present matter. So far as the addition of the parties is concerned with respect to the same specific averments have been made in paragraph Nos. 3 and 11 if the plaintiff and despite the knowledge of such party, being necessary party in the matter, they had not been so impleaded. With respect to the other amendments also, it is submitted that by speaking of oral partition, certain admissions have been made by the plaintiff-petitioners and they cannot be permitted to go back as right has accrued to the defendants-opposite parties on the basis of the said admission, and it is not permissible to permit the petitioner to withdraw the same. It is further submitted that it is not open to bring by amendment a new case, that too an inconsistent case, on the basis of a new cause of action. It is further submitted by learned Counsel for the opposite parties that the present relief as claimed in the amendment application drastically changes the nature of the suit since the original suit is for bifurcation of title and, therefore, such drastic change in the nature of dispute is not permissible and for the said reason, the court below has rightly rejected the amendment application.

15. Learned Counsel further submits that proviso is the soul of the section and it lays down the parameter and scope of the section and thus, it is inseparable from

it and is mandatory in nature; that being so, once the trial of the suit has commenced then in terms of the proviso to Order 6 Rule 17 it is not open to permit the said amendment.

16. In support of his aforesaid contention, learned Counsel relies upon several decisions of the Supreme Court as well as of this Court. Firstly, he relies upon a decision of the Supreme Court in the case of *Bharat Coking Coal Ltd. v. Rajkishore Singh and Anr.* A.I.R. 2000 SC 3577 (1), in paragraph No. 3 of which it has been laid down as follows:

3. The short question is whether in an application moved by respondent No. 1 under Section 20 of the [Arbitration Act, 1940](#), amendment under Order 6 Rule 17 of the Code of Civil Procedure could have been allowed and the nature of the dispute could have been changed drastically. Such a claim cannot be well-sustained in view of the decision of this Court in C.A. No. 63 of 1990 decided on 17.8.1999. Only on this short ground, the appeals are allowed. The order granting amendment of the application under Section 20 of the [Arbitration Act, 1940](#) by the trial court and as confirmed by the High Court by the impugned order are set aside.

17. On the basis of the said decision, it is submitted that the present amendment drastically changes the nature of the dispute and it cannot be permitted.

18. Learned Counsel also relies upon a decision of the Supreme Court in the case of *B.K.N. Pillai v. P. Pillai and Anr.* : AIR 2000 SC614 , in paragraph 4 of which various earlier decisions of the Supreme Court have been considered and it has been held that the general rule is that a party is not allowed the amendment for setting up a new case or a new cause of action, particularly when a suit or new case or cause of action is barred. It is further stated therein that it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation. The expression cause of action has been held to be for the purpose of an amendment a new claim made on new basis constituted by new facts. It is also laid down therein that the power to allow

an amendment is undoubtedly wide and may at any stage be exercised in the interest of justice, law of limitation notwithstanding, but the same must be done with care and circumspection on the part of the Court. It is further stated in the said judgment that all amendments of the pleadings should be allowed, which are necessary for determination of the real controversy in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken and inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings and the proposed amendment should not cause such prejudice to the other side which cannot be compensated by cost. Relying upon the said decision, learned Counsel submits that in the present matter also by the proposed amendment, it is intended to substitute or to alter a new cause of action and thus, it should not be permitted.

19. Learned Counsel also relies upon a decision of the Division Bench of the Calcutta High Court in the case of Kanailal Das and Anr. v. Jiban Kanai Das and Anr. : AIR1977 Cal189 , in paragraph No. 5 of which the principles with respect to the amendment of the plaint have been laid down in the following words:

5. The principles established by judicial decisions in respect of amendment of plaint are as follows:

(i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit.

(ii) All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject matter or controversy in the suit is not permissible.

(iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment.

(iv) In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs.

(v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is outweighed by the special circumstances of the case.

20. Relying upon sub paragraphs (ii) and (iii) of the aforesaid decision it is submitted that substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject matter of controversy in the suit is not permissible and further inconsistent or contradictory allegations in negation of the admitted position on facts or mutually, destructive allegations of facts are also impermissible.

21. Learned Counsel relies upon a decision of the Himachal Pradesh High Court in the case of J.S. Tins Fabricators and Ors. v. UCO Bank , in the last part of paragraph 24, of which it is stated that the amendment sought for should not be inconsistent with the plea taken in original written statement and the right of the plaintiffs should not get defeated. However, it has also been laid down in the said paragraph that object of Order 6 Rule 17 of the Code is that the Courts should get and try the merits of the case that comes before them and should consequently allow the amendments that may be necessary for determining the real question in controversy between the parties without causing injustice to the other side and as a general rule, liberal view is taken by the Court in the matter of amendment.

22. Learned Counsel lastly relies upon a decision of the Supreme Court in the case of Baldev Singh and Ors. v. Manohar Singh and Anr. etc. : AIR 2006 SC2832 , in paragraph No. 17 of which it has been held as follows:

17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC, provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit.

From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filling of documents and addressing of arguments. As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings.

23. On the basis of the law laid down, learned Counsel submits that the amendment or pleadings should not be allowed when the trial of the suit has already commenced and the same is the situation in the present case.

24. On a consideration of the rival submissions, this Court is of the view that there is merit in the stand taken by the learned Counsel for the petitioner. From the various decisions cited at the bar by both the sides it is evident that the general principle laid down by the courts in this regard is that all amendments are generally permissible if they are necessary for determination of real controversy between the parties in the suit. The second principle to be kept in mind is that multiplicity of litigations ought to be avoided. It has repeatedly been held that under the provisions of Order 6 Rule 17 of the Code, including after the recent amendments, it cannot be doubted that wide power and unfettered discretion has been conferred upon the court to allow amendment of the pleadings in such manner and on such terms as appears to the court to be just and proper. It is true that one cause of action or nature of the claim as made in the original plaint cannot be permitted to be substituted and no change can be made in the subject-matter or controversy in the suit. Moreover, inconsistent and contradictory allegations in negation of admitted position of facts should also not be permissible, though it has clearly been laid down that inconsistent pleas or alternate reliefs on the admitted position can be introduced by way of amendment. The important aspect to be kept in mind is that the amendment should not cause prejudice to the other side, which cannot be compensated by cost. With respect to the proviso newly introduced, it

has been so held in the case of Baldev Singh (supra) that the commencement of the trial as used in proviso in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. In the said decision, the Supreme Court noted the fact that the suit was not on the verge of conclusion as found by the High Court and the trial court since from the record it appears that the parties had yet to file their documentary evidence in the suit. In the present matter also only the issues have been framed at present and nothing more has happened in the said suit. Therefore, for the same reasons as was held by the Apex Court, it will not be proper to reject the application for amendment of the plaint in view of proviso to Order 6 Rule 17 of the Code, which confers wide power and unfettered discretion to the court to allow an amendment of pleadings at any stage of the proceedings.

25. So far as the question of change of the nature of suit and the cause of action is concerned, this Court is of the view that the same is not involved in the present case. It is clear even from the amendment sought that the basis of the claim of the plaintiffs-petitioners continues to be the sale deed dated 19.3.2001 and they are only claiming a relief on the basis of the said sale deed, which they could have claimed in the original plaint itself, but for certain reasons the same was not done.

26. As seen above, from the above cited decision of the Supreme Court, it is open to the plaintiffs to take even inconsistent pleas on the same facts or make a prayer for alternate relief. What the petitioners seek in the present case is that if a finding is reached that there is no oral partition then under the law of the land since they are entitled to claim for partition by filing a suit or even during the execution proceedings, therefore, a partition should be made, so far as the share of the defendant 2nd set is concerned, in favour of the plaintiff No. 2 on the basis of sale deed concerned.

27. This Court will not enter into the merit of the matter whether the claim should ultimately be allowed or not; but it must be held that it was open to the plaintiffs-petitioners to have taken such a plea in the original suit if they had so thought fit and, therefore, allowing such an amendment at this stage when even the evidence

of the parties has not commenced does not appear in any case to prejudice the defendants. It goes without saying that even after the said amendment is allowed it is open to the defendants to file their additional or amended written statement with respect to the fresh pleadings. Similarly if the entire matter is to be gone into, it would be necessary for avoiding delay and multiplicity of litigation that all the parties who may be necessary party in the suit for partition should be brought on the record and thus, there is nothing wrong in the impalement of the said two persons as defendant Nos. 5 and 6.

28. In view of the aforesaid discussions, this civil revision application is allowed, the impugned order dated 19.7.2004 passed in Title Suit No. 67 of 2001 by the Subordinate Judge-I, Munger is set aside and the proposed amendments are allowed. However, it will be open to the defendants to file additional/amended written statement (s) in view of the amendments prayed for having been allowed. Since the plaintiffs-petitioners have approached the court for amendment after the filing of the written statements, which has caused some inconvenience to the defendants in the matter, it is directed that the petitioners shall pay a cost of Rs. 2000/- to the defendants.