

Om Rice Mill and ors. Vs. Banaras State Bank Ltd. and anr.

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Court : Allahabad

Decided On : Sep-27-1999

Reported in : [2001]107CompCas278(All)

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : Civil Revision No. 359 of 1999

Appellant : Om Rice Mill and ors.

Respondent : Banaras State Bank Ltd. and anr.

Advocate for Pet/Ap. : V.P. Varshney, Adv.

Disposition : Petition dismissed

Judgement :

D.K Seth, J.

1. The opposite party has filed C. S. No. 88 of 1992 against the petitioners for recovery of a sum of Rs. 5,97,112.23. In the plaint, it was alleged that the opposite party-plaintiff bank sanctioned an application dated October 20, 1984, of defendant No. 1 and granted credit facility--cash credit (pledge) of Rs. 4.5 lakhs and cash credit (Hyp.) of Rs. 4 lakhs on the terms and conditions as pleaded in the

plaint against mortgage of the properties and execution of various documents mentioned in paragraphs 5 and 7. The arguments were over and the suit was fixed for order and judgment. At that stage the plaintiff filed an application for amendment on August 30, 1998, together with a prayer for deferring the delivery of the judgment till disposal of the application for amendment. The said application for deferring the date was allowed. The defendant thereafter, had filed an objection to the application for amendment. After considering the same, the application for amendment was allowed by an order dated August 20, 1999. It is this order against which the present civil revision has been filed.

2. V.P. Varshney, learned counsel for the revisionist contends that on the date when the matter was fixed for delivery of the judgment after the hearing is concluded, the court has no alternative but to deliver the judgment and no application could be entertained on the said date. In support of his contention, he relies on the decision in the case of Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993, He then contends that originally the suit was instituted in respect of recovery of money due with regard to two accounts mentioned in the plaint. By means of amendment two more accounts have been sought to be included within the scope and ambit of the suit. According to him, the recovery of the amount in respect of the said two accounts which were not originally included in the plaint had become time-barred and thus a legal right has accrued by operation of law which cannot be taken away by amendment In support of his contention, he relies on the decision in the case of T.L. Muddukrishna v. Smt. Lalitha Ramachandra Rao [1997] 1 JT 540. He then contends that by reason of amendment, the nature and character of the suit has since been changed and that it had introduced a new cause of action. It has also purported to join altogether different causes of action which cannot be joined together and therefore by reason of such amendment, there has been a misjoinder of cause of action. He also contends that the plaintiff was not diligent and was guilty of delay and laches and as such, the amendment could not have been allowed. In support of this contention Mr. Varshney had relied upon various decisions, namely, Radhika Devi v. Bajranji Singh [1996] 2 AWC 724 ; Bashir Ahmad v. Third Addl. District Judge [1992] 1 AWC 154 ; Monika Banerjee v. Biswabikash Sengupta, AIR 1986 Cal 113 and Kumaraswami Gounder v. D.R. Nanjappa Gounder, AIR 1978 Mad 285 [FB]. On these grounds, he contends that

the order dated August 20, 1999, passed by the learned District judge, Udham Singh Nagar cannot be sustained.

3. I have heard Mr. V.P. Varshney, learned counsel for the revisionist at length.

4. It appears from the plaint that the plaintiff-bank has instituted a suit for recovery of certain amounts pursuant to loan sanctioned on the basis of the application dated October 20, 1984, of defendant No. 1 by opening two cash credit account of Cash Credit (Pledge) for Rs. 4.50 lakhs and Cash Credit (Hyp.) of Rs. 4 lakhs. Though different accounts appear to have been opened it was in respect of sanction of credit facilities pursuant to one application made by the defendant No. 1 on October 20, 1984. Thus even if there are two accounts the same is in respect of one transaction arising out of the application dated October 20, 1984, of defendant No. 1. Therefore, these two accounts are related to one and the same transaction. These accounts appear to have been secured by mortgage of the respective properties which were executed on November 26, 1984. Whereas the loan was disbursed on November 2, 1984. Against the said loan of Rs. 8.5 lakhs various documents were executed on October 29, 1984 as mentioned in paragraph 7 of the plaint. The money sought to be recovered was Rs. 5,97,112.23. A perusal of the application for amendment shows that it sought to introduce the expression 'Cash Credit (Pledge) Account and Cash Credit (Hypo)' in paragraph 6 after the word 'their'. This amendment thus neither changes the nature and character of the suit, nor does it introduce a new cause of action and it mentions the same two accounts as is mentioned in paragraph 5 of the plaint. Mr. Varshney had raised certain objections with regard to the amendment that was sought to be made in paragraph 2 of the amendment application seeking to insert paragraphs 2, 3 and 5 and to insert paragraphs 7A, 8A and 13A respectively. In paragraph 6 only certain addition was sought to be incorporated in paragraph 14. It appears that no relief other than the relief already claimed in the plaint was sought to be amended or added. It appears that two more accounts were sought to be incorporated in paragraph 7A which reads as follows :

'That in the month of December, 1985, the aforementioned two accounts of defendants Nos. 1 to 4, as per instructions of the RBI were maintained as--(i) Cash

Credit (Hypo) Levy Account ; (ii) Cash Credit (Hypo) Non-Levy Account; (iii) Cash Credit (Pledge) Non-Levy Account and (iv) Cash Credit (Pledge) Levy Account. These accounts were operated by defendants Nos. 2 to 4 on behalf of defendant No. 1 from time to time. The above-mentioned accounts were adjusted every year at the end of the rice season and were renewed at the beginning of the season of rice.'

5. In paragraphs 8A and 13A, certain details of the transaction in the respective accounts were mentioned and there also the total dues have again, been mentioned as Rs. 5,97,112.23. In paragraph 14 certain deposits of amount by the defendant were mentioned in respect of the different accounts. It is also mentioned that those two accounts were also liquidated. Thus it appears that the plaintiff has not claimed any other relief nor has it sought to introduce any new cause of action nor has there been any change in the nature and character of the suit. Inasmuch as the suit remains a suit for recovery of the money due. No relief having been claimed, it cannot be said that a new cause of action has been introduced having regard to the facts and circumstances of the case. In the present case, the cause of action related to the transaction that emerged from the sanction of credit facility pursuant to the application dated October 20, 1984 made by defendant No. 1 and disbursement of the loan secured through the mortgage and the execution of documents mentioned in paragraphs 5 and 7 respectively. No change of mortgage or the documents of security has been sought to be introduced. Thus the cause of action cannot be said to be altered. The introduction of two more new accounts which is alleged to be liquidated, does not seek to introduce any new cause of action, inasmuch as, it appears from paragraph 7A that the said two accounts mentioned in paragraph 4 were maintained by the bank according to instruction of the Reserve Bank of India as, (i) Cash Credit (Hypo) Levy Account; (ii) Cash Credit (Hypo) Non-Levy Account; (iii) Cash Credit (Pledge) Non-Levy Account and (iv) Cash Credit (Pledge) Levy Account. Thus, it appears that no new account is being introduced. On the other hand, the principal two accounts were maintained in two sub-heads of levy account and non-levy account which related to the same transaction that emerged from the application dated October 20, 1984, made by defendant No. 1. Thus it is an elucidation of the two accounts mentioned in paragraph 4 and not altogether a separate new account.

6. The defendant is a rice mill. Admittedly, in respect of the rice there used to be a system of levy imposed by the Government and every rice mill is to sell a part of its production as levy rice to the Government in terms of the relevant Government orders and the rest could be sold in the open market by such rice mills as non-levy rice. Thus there was distinction in respect of the bank account of a rice mill in respect of its production one under the levy account and the other under the non-levy account.

7. Therefore, the Cash Credit (Pledge) or Cash Credit (Hypo) is related to levy and non-levy account and it is maintained in sub-heads in that event it cannot be said that the said two accounts are accounts other than the accounts maintained pursuant to the sanction on the basis of the application dated, October 20, 1984, made by defendant No. 1. Having flowed from the same transaction, it cannot be said that incorporation of the said two accounts would in any way introduce a new cause of action particularly, when no relief has been claimed on the basis thereof.

8. Thus the question on the ground that the amendment could not have been allowed because it changes the nature and character of the suit and introduce a new cause of action or that there has been a misjoinder of cause of action cannot be sustained.

9. The decision in the case of Kumaraswami Gounder v. D.R. Nanjappa Gounder, AIR 1978 Mad 285, by the Full Bench of the Madras High Court cannot be attracted in the present case since in the said decision it was held that setting up of a totally different cause of action which ex facie cannot stand on a line with the original pleading, cannot be allowed. In the present case as discussed above, it does not appear that the said amendment cannot stand on the line with the original pleading. On the other hand, it is elucidation of the pleadings already existed and elaboration of the details of the accounts already mentioned by referring to the sub-heads.

10. The reliance on the decision in the case of Monika Banerjee v. Biswabikash Sengupta, AIR 1986 Cal 113, wherein a suit for specific performance seeking to amend the pleadings by incorporating the facts that the plaintiff was ready and willing to perform his part of the contract was held to be an alternative case and

therefore, it could not be allowed. But the ratio decided in the said decision cannot be attracted in the facts and circumstances of the present case. Inasmuch as here the amendment does not introduce any alternative pleading nor any new cause of action. That apart, in *Byomkesh Banerjee v. Nani Gopal Banik*, AIR 1987 Cal 92, amendment seeking to incorporate readiness and willingness in a suit for specific performance of contract as is required under Section 16 of the Specific Relief Act and prescribed in Model Forms Nos. 47 and 48 in Appendix A of the Schedule to the Code, was allowed to be incorporated in the first appeal in the facts and circumstances of the case. In *Diwali Lal v. Sardar Baldev Singh*, AIR 1985 Patna 344 and *Barnik Ray alias Harekrishna Roy v. West Bengal Housing Board*, AIR 1985 Cal 362, such amendment was allowed on the ground that a defective pleading may be cured by amendment when the cause of action is not ab initio completely absent. A similar view was taken by the Orissa High Court in *Cudise Trinath Rao v. Sudhansu Prasad Padni*, AIR 1992 Orissa 168 and *United Pioneer Society v. Chand Bibi* [1986] 1 ALT 572 by the Andhra Pradesh High Court relying on *Ganesh Trading Co. v. Moji Ram*, AIR 1978 SC 484.

11. Mr. Varshney has contended that the application is mala fide and was made with a design to delay the proceedings. In the present case, the suit is filed by the plaintiff itself and it is delaying its own process and it cannot be conceived that the bank will gain anything by delaying the process. The amendment that has been sought for bringing matters on record which might be answered for the purpose of determining the real question without framing any additional issue, the same does not seem to be mala fide. On the other hand, these questions are questions to be gone into by the court exercising the discretion in allowing the amendment. He relied in support of the contention of mala fides, on the decision in the case of *Bashir Ahmad v. Third Addl. District Judge* [1992] 1 AWC 154. In the said case, it was held that before the amendment could be allowed, the court has to satisfy itself that the requirements of Order 6, Rule 17 of the Code of Civil Procedure, 1908, are made out. It is held that no inflexible rule can be spelt out for the purpose of exercising discretionary jurisdiction of the court with regard to its decision in an application under Order 6, Rule 17. Normally, the discretion lies on the court to which the application for amendment is made to allow or reject the same. This court will not interfere with the discretion in exercise of its jurisdiction

under Article 226 of the Constitution of India which in effect was revisional jurisdiction exercised by it. Mr. Varshney had contended that the said decision was related to a petition under Article 226 and the ratio cannot be attracted in a revision under Section 115 of the Code of Civil Procedure.

12. But the fact remains that the jurisdiction under Article 226 of the Constitution related to the issue of writs but no writ can be issued against a court exercising judicial function. In fact Article 226 is being invoked by reason of the decision in the case of *Ganga Saran v. Civil Judge, Hapur*, AIR 1991 All 114 [FB], on the ground that the scope of Section 115 of the Code of Civil Procedure has been confined to the District Judge where the valuation of a suit is below a particular amount which was originally Rs. 20,000 and now Rs. 1 lakh and therefore, there having been no alternative remedy Article 226 was allowed to be invoked though in effect it was a jurisdiction under Article 227 that was supposed to be exercised. Be that as it may, there cannot be any distinction with regard to a proceeding under Articles 226 and 227 and Section 115 of the Civil Procedure Code when it relates to a proceeding arising out of the order of the civil court. Whatever might be the nature of the petition, it remains a revisional jurisdiction. While exercising jurisdiction under Article 226, this court exercises its revisional jurisdiction. Therefore, it cannot be said that the ratio laid down in the case of *Bashir Ahmad v. Third Addl. District Judge* [1992] 1 AWC 154 cannot be attracted in the present case. The same principle would very much apply even in a revision whether under Articles 226 and 227 of the Constitution of India or under Section 115 of the Civil Procedure Code.

13. The decision in the case of *Radhika Devi v. Bajranji Singh* [1996] 2 AWC 724, relates to the question as to whether a right has accrued by operation of law and if it is so in that event the same cannot be taken away by amendment. This is a settled proposition of law. In case a right has accrued by operation of law namely, by expiry of the period of limitation in that event, by way of amendment, the same cannot be taken away since the amendment when allowed, relates back to the date of filing of the suit itself. It is to be examined whether such right has accrued or not. The question will depend on a finding that such right has accrued. In the present case, since the transaction is based on the sanction given on the

application dated October 20, 1984, prima facie it does not appear that any limitation could have set in in respect of the other two accounts which were maintained under the principal two accounts by way of sub-heads particularly, when no additional amount is sought to be recovered from the defendant on the basis of the said two accounts which were alleged to have been liquidated. It was only to show that the operation was related to the whole transaction, no part of which should be overlooked. Thus it does not seem that any right has accrued by operation of law which is being sought to be taken away by the amendment.

14. Be that as it may, this question of limitation shall still remain open to the defendant to urge after it files an additional written statement on the ground that the amendment was sought to be made on October 30, 1998, and the question of such limitation shall be gone into as one of the issues if agitated by the defendant at the time of hearing of the suit. On the same ground, the decision in the case of T.L. Muddukrishna v. Smt Lalitha Ramachandra Rao [1997] JT 1 SC 540 by the apex court cannot be attracted since the question of limitation on the face of it does not surface.

15. The question that the amendment could not be allowed after the matter was fixed for order and judgment. Relying on the decision in the case of Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993, he contends that after the hearing is concluded, the court has nothing to do with it. It has only to deliver the judgment and as such no application could have been made.

16. But the fact remains that after the day was adjourned on the prayer of the plaintiff, the said order was not challenged. On the other hand, the defendant had filed his objection and contested the application for amendment. Be that as it may, the question that such application could not be entertained at that stage was one of the grounds of objection. Therefore, filing of objection cannot take away his right to agitate on the said ground during the hearing of the application for amendment or before this court.

17. In the decision in the case of Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993, the apex court was concerned with the question whether Order 9, Rule 7 could be attracted where after ex parte hearing is over instead of passing the ex

parte decree another date was fixed for passing the ex parte decree. In view of the specific expression used in Order 9, Rule 7 it was held that Rule 13 would be attracted and the matter could not come within Order 9, Rule 7, Inasmuch as Rule 7 deals with the case where the court adjourns the hearing of the suit ex parte and the defendant appears at or before such hearing and shows cause for his non-appearance in that event, the court may permit the defendant to be heard in answer of the suit. Thus Order 9, Rule 7 specifically deals with a situation where the suit is fixed for hearing ex parte. The scope of Order 9, Rule 7 is confined to the extent as indicated therein. While interpreting Rule 7, it was held that it cannot be stretched to a stage where the suit is not fixed for hearing ex parte but is fixed for delivery of ex parte decree. The said proposition is altogether a different question from the question which is involved in the present case. Order 6, Rule 17 provides that amendment can be allowed at any stage of the proceedings in order to decide the real question in controversy between the parties. Order 6, Rule 17 of the Code of Civil Procedure gives a wide discretion to the court. The expression 'at any stage' has been interpreted by various High Courts and the apex court to include all stages. There is nothing to exclude the stage when the judgment is yet to be delivered from the purview of Rule 17 of Order 6. The expression used in Order 9, Rule 7 and those in Order 6, Rule 17 are completely different. No analogy could be drawn in order to interpret at any stage occurring under Order 6, Rule 17 on the basis of an interpretation of Order 9, Rule 7.

18. Order 6, Rule 17 permits amendment at any stage of the proceedings as may be necessary for the purpose of determining the real question in controversy between the parties. The expression 'at any stage of the proceedings' is far more elastic than the stage contemplated in Order 9, Rule 7 which specifies in no uncertain terms as to at what stage it will be attracted. Whereas the expression 'at any stage' used in Order 6, Rule 17 is not circumscribed or limited by any condition, the Legislature in its wisdom had left the same very wide open without imposing any kind of limitation to its elasticity. If it is necessary for the purpose of determining the real question in controversy then it can be allowed before, or at or after the trial or even after judgment or in appeal. It can be allowed even before delivery of judgment.

19. My above view finds support from *Roe v. Davies* [1876] 2 Ch D 729, 733 where it was held that an amendment can be allowed at any stage of the proceedings ; *G.L. Baker Ltd. v. Medway and Building and Supplies Ltd.* [1958] 1 WLR 1216 (CA) wherein it was held that an amendment may be allowed before, or at, or after the trial, or even after judgment or on appeal ; *Badri v. S. Kripal*, AIR 1981 MP 228 ; *B. N. Das v. Bijaya Ketan Mohanty*, AIR 1982 Orissa 145, in which it was held that an amendment can be allowed till delivery of judgment.

20. After having gone through the order and perusing the amendment application as well as the plaint, it seems that in order to determine the real question in controversy, the amendment ought to have been allowed and it could have been allowed even before the judgment is delivered on the date when the matter was fixed for delivery of judgment. Inasmuch as even if it is disallowed, it could have been asked for even in appeal. The apex court in *Ishwar Das v. State of M. P.*, AIR 1979 SC 551, had held that the expression 'at any stage' occurring in Rule 17 of Order 6 includes even in appellate stage. Therefore, what can be allowed after the decree is passed in appeal again requiring the opening up of the proceeding in appeal under Order 41, Rule 27 for which the matter may again be remanded back for giving an opportunity to the defendant to file his written statement and determine the matter on evidence. The matter will in effect delay the process further. On the other hand, if at this stage such amendment is allowed and the matter is gone into in that event, it will rather pre-empt further delay and inconvenience to the parties. The suit is of 1992, therefore, the question of delay does not arise. Therefore, the present situation namely, making of an application on the date when the matter is fixed for delivery of judgment cannot be excluded from the expression 'at any stage' occurring under Order 6, Rule 17. It is not a case that the court had become functuous officio after the hearing is over and the suit was fixed for delivery of judgment. The court is still in seisin of the matter and as such, in my view the proposition adduced by Mr. Varshney relying on the decision in the case of *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993, cannot be sustained.

21. The writ petition therefore, fails and is, accordingly, dismissed. However, there will be no order as to costs.

22. It appears from the order that the defendant was directed to file his written statement on September 10, 1999, which has already expired. As such the date for filing additional written statement may be shifted. Mr. Varshney's clients may file their additional written statement within November 5, 1999. The hearing of the suit may, however, be expedited.

23. The observations made in this order are all tentative for determining the question before this court relating to the grant or refusing the amendment. None of the observations made herein shall be taken note of while deciding the suit on the merits.

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