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Court : Delhi

Decided On : Aug-28-1985

Reported in : 1986(10)DRJ157

Judge : J.D. Jain, J.

Acts : Code of Civil Procedure (CPC), 1908 - Order 6, Rule 17

Appeal No. : Second Appeal No. 316 of 1983

Appellant : Swami Ram Kishore Mahant

Respondent : Ram Kishan

Advocate for Pet/Ap. : Maehswar Dayal and; M.S. Sharma, Advs

Judgement :

J.D. Jain, J.

(1) The facts giving rise to this appeal against two orders of even date viz. 15th July 1983 of an Additional District Judge, Delhi, succinctly are that way-back, in January 1971 the appellant describing himself as Swami Ram Kishore, Head Mahant, Shahpura (Rajasthan) instituted a suit against the respondent for mandatory and perpetual injunction on the allegations that a portion of property bearing municipal No. 4 situated in Commissioner's Lane, Civil Lines. Delhi, commonly known as 'Ram Dwara' was let out to the respondent. The demised

premises consisted of two rooms and an open verandah in front thereof. The monthly rent of the premises was Rs. 20.00 only. Sometime before the institution of the suit the respondent unlawfully converted the aforesaid open verandah into a regular room by enclosing it from all sides and fixing doors and windows in the walls. The Said construction, according to the plaintiff/appellant, had been made unauthorisedly without his permission. So, he prayed that the defendant/respondent be directed to remove the unauthorised structural changes and construction and in the event of his failure to do so, the same be got removed through court process. He also averred that on coming to know of the aforesaid illegal and unauthorised construction, he served a notice dated 25th March 1970 on the respondent calling upon him to restore the premises to its original shape and pull down the structural changes but the defendant failed to remove the unauthorised structure. The said suit was instituted by one Devi Pershad as General Attorney of the plaintiff/appellant.

(2) In the written statement filed by t he defendant/respondent, a preliminary objection was raised that the suit had not been properly presented by a duly authorised person. Of facts he admired his tenancy but denied having made any addition or alteration in the demised premises, as alleged, as according to him the demised premises included two rooms and a covered verandah. He asserted that the only purpose to institute the suit was to harass him and to pressurise him into increasing the rent. He pointed out that the plaintiff had refused to accept rent from him when tendered through money order and by means of cheques.

(3) Following issues were framed by the trial Court on the pleadings of the parties: (1) Whether the plaintiff is entitled to the injunction claimed ; and (2) Whether the suit is filed by a duly authorised person.

(4) The trial Court found both the issues in favor of the appellant and vide judgment dated 30th November 1974 decreed the suit for mandatory injunction directing the respondent to remove the unauthorised structural changes and construction whereby he had covered the verandah.

(5) Feeling dis-satisfied with the judgment/decree of the court, the despondent-tenant went in appeal being Rca No. 47/75 (re-numbered subsequently as Rca

No. 54/80). During the pendency of the said appeal the respondent moved an application dated 14th January 1981 under Order Xli Rule 27 read with Section 151, Code of Civil Procedure (for short 'the Code'), for permission to adduce additional evidence, namely, (i) trust deed of Shahpura Sri Ram Sanehi Sampradaya, Shahpura (Rajasthan) under which he claimed to be the tenant in respect of the property in question ; and (ii) certified copy of the statement made by one Ram Niwas, attorney of the appellant in a case titled as Swami Ram Kishore v. Gian Chand, still later he moved an application dated 3rd February 1981 under Order Vi Rule 17 read with Section 151 of the Code for permission to amend the written statement. He sought to add para 2 below the existing para I of the preliminary objections as under:

'THAT the plaintiff has no right or authority to file the suit against the defendant as the defendant is a tenant under Shahpura Shri Ram Sanehi Sampardaya, Shahpura, Rajasthan, which is a Trust and in case of filing any suit by the Trust, the suit is to be filed in the name of the Trust through the Trustees as per the Trust Deed executed and registered in respect of the property in dipute. Hence the present suit filed by the plaintiff is not maintainable in law and is false, malicious and without jurisdiction having no locus standi. The plaintiff was only a rent collector (Karinda) of the aforesaid Trust and the Trust had been changing the Karindas from time to time for collecting rent only and hence this suit requires dismissal with heavy costs.'

(6) The reason assigned for the inordinate delay in seeking amendment was that he had no knowledge of the aforesaid trust deed at the time of filing of the written statement in the trial Court and, thereforee, he could not take the aforesaid plea.

(7) The amendment was naturally opposed by the plaintiff/appellant who contended that the amendment sought by the defendant/respondent was absolutely contrary to his original written statement and the ain of the defendant in amending the written statement was to withdraw the admissions made therein. Thus, according to him, the amendment sought has changed the nature of the defense totally and as such it would be highly prejudicial to the plaintiff/appellant. He also averred that the defendant/respondent was estopped from denying the

title of his landlord.

(8) Vide order dated 15th July 1983 the learned Additional District Judge allowed the proposed amendment subject to the defendant paying Rs. 150.00 as cost. Consequently by another order of even date the learned Additional District Judge allowed the appeal and remanded the case to the trial Court with the direction to frame an issue on the plea incorporated in the amended written statement and then decide the case afresh after allowing the parties to lead evidence on the said issue. Feeling aggrieved, the plaintiff/appellant has come up in this appeal.

(9) The learned counsel for the appellant has canvassed with considerable force that the learned Additional District Judge has made the impugned order granting leave to amend the written statement to the respondent without applying his judicial mind to she drastic consequences which would flow there from at this late stage. Indeed, as pointed out by him, the learned Additional District Judge has been very much swayed by the existence of a deed of trust sought to be produced by the respondent and a photostat copy of which was placed by him on record, in allowing the proposed amendment without even considering the other consequences which may flow there from. It is, no doubt, true that power to grant leave to amend should be liberally exercised and the amendment should be allowed if it can be made without injustice to the other side, however negligent or careless may have been the first omission and however late the proposed amendment. The idea underlying this principle is that there is no injustice if the other side can be compensated for by costs. However, the judicial discretion vesting in the court in allowing amendment of pleadings has to be exercised judicially on well-recognised principles. In the words of Krishna Iyer, J. 'judicial discretion is not wild humour'. In Suraj Prakash Bhasin v. Smt. Raj Rani Bhasin and Ors. : AIR 1981 SC485 , the learned Judge quoted with approval the principles governing judicial discretion exquisitely expressed by Justice Cardozo : The nature of the Judicial Process Yal University Press (1921):

'the Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a (discretion) disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains,'

(10) One of the well-established principles is that leave to amend should be refused where the plaintiff's suit would be wholly displaced by the proposed amendment. In Steward v The North Metropolitan Tramways Company, (1885) 16 Qbd 178 a tramway company were sued for damages caused by their negligence in allowing their tramway to be in an unsafe and defective condition. The defendants denied negligence. More than six months after the delivery of the defends the defendants applied for an order to amend it, by adding an allegation that under an agreement the liability to maintain the roadway had previously to the cause of action been transferred to the local authority of the district and that the company had ceased to be responsible for the roadway. The amendment was refused. 'The test as to whether the amendment should be allowed' said Pollock, B., 'is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise. Here the action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed. No doubt, in saying so we take away from the defendants the right to defend themselves by this particular plea. But that is only one of many cases in which the Courts have said that if a defendant chooses to conduct his defense to a certain point on certain lines, and lead the plaintiff on into a certain position, the defendant has no right to change his front. That is only acting on the well known doctrine of estoppel, and I think, in common fairness and equity, the defendants are estopped from saying they are not the proper defendants.' Needless to say that originally it was no part of the defense that the company were not the proper parly to be sued and the company had simply denied negligence.

(11) Reference in this context to also made to Pironda Hongonda Patil v. Kalgonda Shidgonda Patil and Ors. : [1957]1SCR595 , in which the observations of Batchelor. J. in Kisandas Rupchand v. Rachappa Vithoba, 33 Bom. 644 were quoted with approval :

'ALL amendments ought to be allowed which satisfy the two conditions (a) of 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......but I refrain from citing further......authorities, as. in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment 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.'

(12) Applying this test to the case in hand it is manifest that if the amendment were allowed the fresh suit which may be instituted by the trustees of the trust known as 'Shahpura Sri Ram Snehi Sampardaya' might fail as being barred by time. Further the plaintiff runs the hazard of the amendment to the existing plaint being disallowed. That would certainly be an injury to the plaintiff such as cannot be compensated for by costs.

(13) That apart it may be noticed that the defendant/respondent did not deny the status of the plaintiff/appellant as his landlord in the written statement filed by him as far back as 24th March 1971 and the only preliminary objection raised by him was that the suit was not properly presented by a duly authorised person. This attack was obviously aimed at signing and presentation of the plaint by one Devi Pershad describing himself as general attorney of the plaintiff-Swami Ram Kishore. In para 4 of the written statement the defendant, inter alia, averred that :

'THE only view to file the present suit of the plaintiff is to harass the defendant and to force him to increase the rent. Further more, the plaintiff has refused to accept the rent from the defendant which was tendered through money order and cheques. The plaintiff has also failed to honour the commitments made by the former Karinda for repairs and when the defendant requested the plaintiff became irritated and filed the present suit.'

(14) It is thus abundantly clear that far from denying the status of the appellant as his landlord, the defendant admitted it in terms. Significantly, however, he came forth with somewhat different version when he stepped in the witness-box as DW4. He then stated that he had taken the premises in question on rent from Swami

Mohan Dass in 1952, who was then attorney of Sri Ram Snehi Sampardaya. In 1956 Swami Ram Mohan Dass was replaced by the plaintiff as Karinda and the latter started issuing rent receipts to him for and on behalf of Ram Si.ehi Sampardaya. He asserted that the plaintiff did not issue any rent receipt in his own name and he placed one such like receipt on record, it being Ex. DW4/1. He Further deposed that after-wades the plaintiff was replaced by one Nanu Ram as Karinda. Still later, Nanu Ram was replaced by Devi Pershad to look after the estate of the aforesaid Sampardaya. Obviously all this is beyond the pleading as embodied in his written statement Of course, a glance at the rent receipt Ex. DW4/1 would show that it was issued on behalf of Shahpura Sri Ram Snehi Sampardaya but it is not indicated in what capacity he issued it. The receipt is dated 4th March 1956 i.e. much before the alleged trust deed came into existence.

(15) The expression 'landlord' has been defined in Section 2 of the Delhi Rent Control Act as meaning a person who, for the time being is receiving, or is entitled to receive, the rent of any premises, whether on his own account or on account of or on behalf of. or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant. On its plain reading the definition is of wide amplitude and includes not only the person who is entitled to receive rent as owner or trustee of the property but also the person who is receiving rent or is entitled to receive rent of the premises for and on behalf of any other person. Looked at the matter from this angle too, the plaintiff/appellant would still be a landlord, it not being the case of the defendant/respondent that be had ceased to be so at any subsequent time. Certainly his evidence to this effect cannot be looked into, it being well settled that no amount of evidence can be let in on a point not pleaded by a party.

(16) In M/s. Modi Spinning & Weaving Mills Co. Ltd. and another v. M/s. Ladha Ram & Co. : [1977]1SCR728 , the plea raised by the tenant in the written statement was that the agreement dated 7th April 1967 was applicable to the transactions in which the plaintiff worked as stockiest-cum-distributor of the defendants. The defendants further alleged that the agreement was not applicable to the transactions in which the plaintiff acted as a principal. Subsequently,

approximately three years after the filing of the written statement the defendants/appellants sought amendment of the written statement by deletion of paragraphs 25 & 26 and substitution of the same by two new paragraphs 25 & 26 The proposed amendment in para 25 was that by virtue of the aforesaid agreement the plaintiff was appointed a mercantile agent and the plaintiff acted in that capacity in placing orders on the defendants. They further denied the allegation of the plaintiff that the plaintiff had placed orders with the defendants in the plaintiff's capacity as a purchaser. The proposed amendments were disallowed by the trial court. The order was upheld by the High Court. The Supreme Court re-affirmed the same with the observation that :

'THE defendants cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of ' extracting the admission from the defendants.'

(17) Likewise it was held in Haji Mohammed Is haw Wd. S.K. Mohammed & others v. Mohamed Iqbal and Mohamed Ali & Co. : [1978]3SCR571 :

'THE amendment of the written statement sought in appeal was on such facts which, if permitted to be introduced by way of amendment. would have completely changed the nature of their original defense. It would have brought about an entirely new plea which was never taken in the original pleadings. The additional evidence sought to be adduced was in respect of the facts stated in the amendment petition. The High Court rightly rejected all these petitions.'

(18) These observations, to my mind, and quite opposite to the case in hand inasmuch as the proposed amendment is tendentious enough to displace/non-suit the plaintiff/appellant wholly and as stated above, a fresh suit if now instituted by the trustees of the aforesaid trust may well be barred by limitation. Hence, the order of the learned Additional District Judge granting permission to amend the

written statement being ill-advised cannot be sustained As a necessary corollary the further order setting aside the judgment and decree of the trial Court and remanding the suit for fresh decision must also fall to the ground.

(19) To sum up, thereforee, I allow this appeal, set aside the impugned orders and remand the case to the District Judge for deciding the appeal afresh on merits after affording an opportunity to the parties to be heard. The District Judge may make over the appeal to an Additional District Judge if he so deems fit. The parties are directed to appear before the District Judge on 3rd September 1985. The parties are left to bear their own costs.

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