

Rasool and ors. Vs. Haji Usman and ors.

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Court : Jammu and Kashmir

Decided On : Jan-23-2001

Judge : Syed Bashir-Ud-Din, J.

Acts : Code of Civil Procedure (CPC), Svt. 1977 (1920 AD) - Order 6, Rule 17

Appeal No. : C. Rev. 37/1996

Appellant : Rasool and ors.

Respondent : Haji Usman and ors.

Advocate for Def. : Nemo

Advocate for Pet/Ap. : Z.A. Qureshi, Adv.

Judgement :

1. Sub Judge (CJM) Kargil vide his order of May 15, 1996 allowed amendment of plaint in civil suit titled Mohammad and Ors v. Rustum and others No.13 of 1986 on the file of Sub-Judge (CJM's) court Kargil, so as to correctly describe the alleged source water flow to Plaintiff's land from spring Yakus instead of spring Dasus and further to mention survey Nos. of such land irrigated from flowing water of Yakus spring, besides describing on spot lands of defendants being allegedly irrigated by flowing water of Nala Khurboo(as shown in Bundaubaste Vasil Apashie.)

2. Respondents' counsel failed to appear on the last date on 13.12.2000 when the counsel for the petitioner was heard. The impugned order is under challenge, as given in the revision memo and canvased by the counsel on the grounds that by allowing the application and the proposed amendment, nature of suit and cause of action therefor is changed. The rights of defendants to use water from Yakus Cheshma is taken away. It is not the case of typographical error and in fact under the garb of the amendment. fresh suit is allowed.

3. Respondents to this revision and plaintiff before the trial court have filed the suit for declaration and injunction in respect of their pleaded right to use water of the spring by prescription and under custom, to the exclusion of all others including the defendants and to restrain the defendants from taking and using the water of the spring and for a further declaration that the orders passed in conflict with the above prayed relief for declaration and injunction are, non est. The plaintiff had filed a suit earlier which was permitted to be withdrawn with liberty to file fresh suit. The amendment prayed for stands allowed by the trial court on the ground that instead of mentioning Yakus Cheshma due to clerical mistake the spring has been described as Dasus Cheshma. The reason there for being conflicting and confusing revenue extracts issued by the revenue authorities and neglect and erroneous descriptions by their counsel. The trial court has also found that the lands alleged to be irrigated by the water of the cheshma are sought to be described by reference to correct survey Nos. irrespective of vasila Apashie entries from Yakus spring on spot. The other ground pressed in service for amendment is that the proforma defendants have made admission of plaintiffs suit, therefore, the plaintiffs are within their rights to rely on and plead this admission. The defendants/revision petitioners resisted the motion on the ground that the application for amendment is misconceived belated and filed with malafides with a view to defeat the rights of the defendants. If the amendment is allowed, it would change the nature of the suit and introduce a new case. Even, nature of the suit is likely to be altered.

4. The learned trial judge has examined the matter within conspectus of order VI Rule 17 C.P.C and in its discretion allowed the amendment after noting that the amendment is not to change nature of the suit and instead the real controversy

between the parties is focused by the amendment. By mentioning the survey Nos. of the lands dependent on the Cheshma for irrigation. The erroneous description of the property would be rectified. Merely because the amendment has been made at a late stage. Same cannot be a ground perse to throw away the proposed amendment and turn down the prayer. Neither the cause of action nor the nature of the suit is changed. By the proposed amendment property is correctly described.

5. Order VI Rule 17 C.P.C reads as under :-

'Amendment of pleadings :- The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.'

6. The amendment of the pleadings can be allowed at any stage of the proceedings provided the manner and terms thereof are just. The all important requirement is that the amendment is necessary for determining the real questions in controversy between the parties.

7. Ordinarily, the amendments have to be allowed for determining the real question in controversy, interse the parties, unless the parties seeking amendment acts with malice or by allowing the amendment otherside would be prejudiced to an extent that he/she cannot be compensated with costs. After all the rules of procedure are handmaid of justice. Party cannot be refused relief due to some mistake, negligence, inadvertance or even infraction of rules of procedure. However negligent or careless may have been the omission and however the late the proposed amendment be, the amendment has to be allowed so long it does not cause injustice to the other side. If a party is unaware of the existing state-of-affairs to make the averments, which he lateron seeks to incorporate by amendment so as to bring the fact and circumstances inaccord with truely prevailing facts and circumstances relateable to the real questions of controversy between the parties, the amendment cannot be refused merely because the otherside opposes it.

8. In this case what it prayed for by way of amendment is to correctly describe and identify the spring when Vasil Apashie wrongly named this spring as cheshma Dasus and further to correctly identify and describe land irrigated and fed water by chesma Yakus with reference to relevant Khasra Nos. and other revenue record. The reason given for wrongly describing this land in plaint is the conflicting revenue extracts issued by the authorities. The wrong description of Cheshma as Dasus instead of its correct description as Yakus is alleged to be primarily due to typographical error or clerical mistake and negligence and inadvertance of the counsel.

9. In C.M Vereekutty v. C.M. Mathukutty (AIR 1981 SC 1533), their lordships in the matter of an amendment to the plaint in the context of order VI Rule 17 CPC. observed :-

'.....The plaintiff claimed that some properties had not been fully and correctly described in the original plaint schedule and that due to ignorance some properties had been omitted. The High Court allowed the application for amendment of the plaint and we do not see any justification for interfering with the decision of the High Court allowing the amendment of the plaint.....instead of the parties continuing to wilfully agitate the question of the identity of every item of property in the final decree proceedings. We think that it is desirable that the plaintiff should be permitted to amend the plaint now itself so that the defendant may raise whatever objections he may seek to raise in the written statement to be filed by him.....'

10. The amendment targeted as it is at correction of clerical mistake and description and identification of the subject of suit cannot be said to change the nature of suit or to introduce a new cause of action. If a mistake in describing the subject matter of the suit is due to negligence or misunderstanding of a counsel and the amendment allowed ratifies such mistake same would not effect the merits of the case so as to introduce a fresh case or cause of action or change the nature of the suit. By the amendment mis-description of the subject matter of the suit has been allowed to be corrected in order to focus on the real issues interse the parties, for determination, on adjudication. With benefit reference can be made to

M/s Jesh Behari Patel case (AIR 1974 Patna 18 and Achhuta Malick v. Magu Mallick AIR 1974 of Orissa 183).

11. The contention of the learned counsel that by allowing the amendment defendants' rights to irrigate the lands from the water of cheshma Yakus are taken away and their case is prejudiced, cannot be countenanced. The court cannot go into and give a final decision on the merits of the pleas incorporated in plaint by amendment at any interim stage of the suit proceedings. Whether the plea(s) put forth in the amendment can succeed ultimately or not, is a matter of proof on inquiry pursued under codal provisions. Court is to judge the proposed amendment, for limited purpose. It is to look at it as well from the stand-point of malafide or over-reaching the court. Similarly the submission of the counsel that instead of allowing amendment to the suit, the respondents should file a fresh suit to agitate their rights, cannot be entertained. After all one of the purpose to allowing amendment(s) is to avoid the multiplicity of suit/proceedings. In the facts and circumstances of the case, , allowing the amendment for the purpose indicated falls within the conspectus of law laid down in permitting amendment of plaint.

12. In Nichhalbhai Vallabhai and Ors v. Jaswantlal Zinabhai and other (AIR 1966 SC 997) Shri Ramaswi J. speaking for the court observed :

'..... and it was therefore, a proper case in which the court allowed the plaint to be amended. The reason is that if the amendment is refused the plaintiff may have to bring another suit and the object of the rule for allowing amendments to the plaint is to avoid multiplicity of suits. The present case falls within the principle laid down by this court in C. J. Leach and Co. Ltd. v. Jardine Skinner and Co. 1957 SCR 438:(S) AIR 1957 SC 357)...

13. In result the impugned order of allowing the amendment by Sub-Judge (CJM) Kargil in his discretion is not found to suffer from any jurisdictional error or legal infirmity. The order is just and necessiated to determine the real question in controversy, inerse the parties to the suit. The revision petition is accordingly dismissed. Inform the court below of this order and despatch record to the trial court.

