

Sayed Ali Mallick and Others Vs. Ramjan Ali and Others

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Court : Kolkata

Decided On : May-10-2012

Judge : Joymalya Bagchi

Appeal No. : C.O. No.3036 of 2010

Appellant : Sayed Ali Mallick and Others

Respondent : Ramjan Ali and Others

Advocate for Pet/Ap. : Mr. Bhattacharya

Judgement :

None appears for the opposite parties in spite of service of notice. Affidavit of service filed in Court today be kept with the record.

The petitioners have challenged the impugned order dated 16.7.2010 passed by the Learned Civil Judge (Junior Division) 7th Court at Howrah in Title Suit No.113 of 2008.

The petitioners have filed a suit, inter alia, praying for declaration of title and permanent injunction against the opposite parties. During the pendency of the suit, the opposite parties entered appearance and filed their written statement. Thereafter, by order dated 12.11.2009 issues were framed and date was fixed for documents inspection and peremptory hearing. However, it appears that no date has been fixed in case for filing of affidavit?evidence under Order 18, Rule 4 of the

Code of Civil Procedure. At this juncture, the petitioners filed an application of amendment of the plaint under Order 6, Rule 17 of the Code of Civil Procedure read with Section 151 thereof.

The contentions of the petitioners in the said amendment application were to correct a typographical error and also to make certain additions in the body of the plaint with regard to certain facts relating to the cause of action already pleaded in the plaint.

The said application was objected to the opposite parties. Upon hearing the parties, the learned trial Judge by the impugned order rejected such prayer for amendment on the ground that permitting the same would change the nature and character of the suit.

Mr. Bhattacharya, learned counsel for the petitioners strongly argued that mere elaboration of facts relating to a cause of action already pleaded in the plaint does not change the nature and character of the suit. In support of his contention Mr. Bhattacharya has relied on the decision reported in 2006 (6) S.C.C. 498.

With regard to the issue as to the stage of proceeding at which the amendment has been sought for, Mr. Bhattacharya submitted that the trial in the instant case has not commenced, therefore, the proviso to Order VI, Rule 17 of the Code of Civil Procedure does not get attracted. He submitted that it is only upon the filing of affidavit-evidence that the trial in a civil case commences for the purpose of the aforesaid proviso. In support of his contention he relies the following decisions (i) 2006(6) S.C.C. 498; (ii) 2009(2) S.C.C. 409, (iii) 2011(12) S.C.C. 268 and (iv) AIR 2007 Del 48.

The first issue which falls for consideration is whether the prayer for amendment of the plaint for correcting a typographical error and for providing a more elaborate description of the plaintiff's claim would amount to changing the nature and character of the suit.

I am in agreement with the submissions of Mr. Bhattacharya that correction of a typographical error in the body of the plaint or a more elaborate and detailed

description as to how the plaintiff acquired title to the property in a suit for declaration of title is not an attempt to change the nature and character of the suit. In the case of Baldev Singh and others Vs. Manohar Singh and another reported in 2006 (6) SCC 498 the Supreme Court permitted amendment of a written statement by incorporating an alternative plea of ownership which, according to the Apex Court, was in fact elaboration of the defence case. Further, in the case of Fritiz T.M. Clement and another Vs. Sudhakaran Nadar and another reported in 2002 (3) SCC 605 the Apex Court permitted amendment of the plaint on the ground that elaboration and clarification of the plaintiff's claim does not amount to changing the nature and character of the suit.

In view of the aforesaid discussion, I am of the opinion that the amendments prayed for in the instant case by the petitioners are merely clarificatory in nature and did not change the nature and character of the suit.

This brings us to the next issue as to the stage at which such amendment was sought for. The Code of Civil Procedure (Amendment) Act added a proviso to Order 6 Rule 17 of the Civil Procedure Code, which reads as follows :

17. 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 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 :

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

The said proviso restricted the power of the Court to permit an amendment after the trial has commenced unless the Court comes to the conclusion that inspite of due diligence the party seeking such amendment could not have raised the matter before commencement of such trial. This restrictive embargo on the power of the Court to permit amendment of pleadings necessitates me to examine the stage at which such prayer has been made in the instant case. It is true that this issue had

not been raised by the opposite party before the trial Court, as has been argued by Mr. Bhattacharya, but since it goes to the very jurisdiction of the Court to allow such prayer, I propose to examine the same.

In the course of hearing Mr. Bhattacharya submitted the order?sheet in the aforesaid case. It appears therefrom that by order dated 12.11.2009 the trial Court had framed issues in the instant case and had fixed 30.11.2009 for document inspection and peremptory hearing. At that stage, on 25.06.2010 the petitioners had made the instant prayer for amendment of their plaint. It further appears that till date document inspection had not taken place and the case has again been posted on 22.05.2012 for filing documents by the parties.

It is therefore clear that in the instant case, amendment was prayed for when issues had been framed and date had only been fixed for document inspection.

In the aforesaid factual matrix let me proceed to examine whether the trial had commenced in the instant case so as to restrict the power of the Court to permit amendment of pleadings therein as provided in the proviso to Order 6 Rule 17 of the Civil Procedure Code.

To do so, one must make an endeavour to find out when 'trial' commences in a civil case. The word 'trial' has not been defined in the Civil Procedure Code. The expression 'commencement of trial' in the proviso to Order 6 Rule 17 of Civil Procedure Code, therefore, requires an interpretation which is relevant to the context in which the said provision is used.

In the Harish Chandra Bajpai and another Vs. Triloki Singh and another reported in AIR 1957 SC 444 the Supreme Court sought to define the word 'trial' in the light of the Representation of People Act, 1951. In the said case the Apex Court opined that the expression 'trial' is susceptible to both narrow and wider interpretation and the interpretation which is textually relevant has to be adopted. The Supreme Court, inter alia, held as follows :

“.....While the word 'trial' standing by itself is susceptible of both the narrow and the wider senses indicated above, the question is, what meaning

attaches to it in s. 90(2), and to decide that, we must have regard to the context and the setting of the enactment”.

It is, therefore, evident from the aforesaid decision that the word ‘trial’ may be given a wider or narrower interpretation depending on the context and the setting of the provision in which such expression is used.

The aforesaid ratio of the Supreme Court was again quoted with approval by a Three Judge Bench of the Supreme Court in the case of Union of India and others Vs. Major General Madan Lal Yadav (Retd.) reported in 1996 (4) SCC 127 wherein the Apex Court was called upon to decide the expression ‘commencement of trial’ in the light of the provisions of the Army Act.

In this perspective let me examine the legislative context in which the proviso was added to Order 6 Rule 17 of the Civil Procedure Code.

In the case of Salem Advocate Bar Association, T.N. Vs. Union of India, reported in 2005 (6) SCC 344 the Supreme Court culled out the legislative intent to incorporate the aforesaid proviso in Order 6 Rule 17 in the following words :

“.....The object is to prevent frivolous applications which are filed to delay the trial.”

In the case of Kailash Vs. Nanhku and other reported in 2005 (4) SCC 480 the Supreme Court while dealing with the issue as to when trial commences in election petitions, inter alia, held as follows :

“.....In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial.”

From the ratio of the aforesaid judgements it appears that ‘trial’ in a civil suit would begin when issues are framed and the case is set down for recording of evidence. All proceedings before that stage would be treated as proceedings preliminary to trial for making the case ready for trial. It is therefore clear that only after framing of issues when the case is set down for recording of evidence the trial in a civil

case is said to begin. If issues are only framed but no date has been set by the trial Court for recording of evidence or for filing of affidavit evidence under Order 18 Rule 4 of the Civil Procedure Code it cannot be said that all the preliminary steps to trial are complete and the trial has commenced in the light of the ratio of the aforesaid cases.

In the case of Baldev Singh and others Vs. Manohar Singh and another reported in 2006 (6) SCC 498 the Supreme Court again made an endeavour to deal with the legislative intent of Order 6 Rule 17 in order to test as to whether a narrow interpretation to the expression 'commencement of trial' would be commensurate to the interest of justice. In the said decision the Supreme Court held as follows :

"It is well settled by various decisions of this Court as well as the High Courts in India that courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side."

In the light of such legislative intent the Apex Court interpreted the expression 'commencement of trial' in the following manner :

"Before we part with this order, we may also notice that proviso to Order 6 Rule 17 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, filing of documents and addressing of arguments. As noted hereinbefore, 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 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."

The factual matrix of the instant case is exactly the same as in the present one, inasmuch, as the case has not been set for recording of evidence or for filing of affidavit evidence and the parties have not even proceeded for inspection of documents, for which date has been fixed on 22.05.2012.

Similarly, in the case of Usha Devi Vs. Rijwan Ahamd and others reported in 2008 (3) SCC 717, in the facts of that case, the Apex Court permitted amendment after settlement of issues, inter alia, holding that such proposed amendment ought to be allowed to bring to the fore real questions in controversy between the parties and refusal to permit such amendment would create innumerable complications in the future. It is however apposite to mention that in the said decision the Supreme Court did not make any pronouncement on the issue as to the stage which would mark the commencement of trial of a suit.

In the case of Vidyabai and others Vs. Padmalatha and another reported in 2009 (2) SCC 409 the stage at which the amendment of the pleadings sought for was when date has been fixed for cross-examination of witnesses and, hence, the prayer for amendment was disallowed on the avail of the proviso to Order 6 Rule 17 of Civil Procedure Code.

However on the issue of 'commencement of trial' the Apex Court held as follows :

“.....The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to “commencement of proceeding”.

In the case of State of Madhya Pradesh Vs. Union of India and another reported in 2011 (12) SCC 268 the prayer for amendment of the plaint filed on behalf of the plaintiff, State of Madhya Pradesh seeking to challenge the validity of Central Laws in the pending civil suit by way of amendment was turned down, inter alia, on the ground that when such laws can be challenged before the High Court under Article 226 of the Constitution of India or before the Apex Court under Article 32 no litigant ought to be permitted to challenge the validity of such law in a suit pending

under Article 131 of the Constitution of India.

From the aforesaid discussion it is clear that the expression 'commencement of trial' in the aforesaid proviso in Order 6 Rule 17 of the Civil Procedure Code has to be interpreted in the light of the legislative intent of the said provision. The purpose for amendment of pleadings is to ensure that substantive adjudication of real controversies on merits are not ignored by unartistic or inarticulate pleadings and ends of justice are not defeated by multiplicity of proceedings. However, the liberal approach to permit amendments was curtailed by 2002 Amendment of Civil Procedure Code, inter alia, to weed out frivolous applications for amendment filed at the post-trial stage to protract proceedings. To balance the twin requirements of effective adjudication of real controversies and to avoid multiplicity of proceeding on one hand and to prevent such process from being misused by unscrupulous litigants on the other, one requires to give restrictive meaning to the expression 'commencement of trial' so that the starting point for restricting amendments to pleadings may commence when the proceedings have reached a matured stage and the stage is set to adjudicate issues on the basis of the evidence filed/led by the parties.

Judged from this angle, the expression 'commencement of trial' ought to be given a restrictive meaning so as to regulate the amendment of pleadings from the stage when the case is set for recording evidence and not prior to the same when dates are fixed for inspection of documents and/or for complying with other preliminary steps to the commencement of trial.

Hence when after framing of issues dates have been fixed for inspection of documents and parties have not even filed their respective documents, as in the instant case, it cannot be said that trial has commenced.

I, therefore, hold that the trial in the instant case has not commenced for the purposes of Order 6 Rule 17 of Civil Procedure Code, as amended, and the power of the Court to permit amendment as prayed for has not been whittled down by the aforesaid proviso.

In the light of the aforesaid discussion, I allow the instant revisional application and set aside the impugned order dated 16.7.2010 passed by the Learned Civil Judge (Junior Division), 7th Court at Howrah in Title Suit No.113 of 2008.

The trial Court is directed to permit the petitioners to incorporate the amendments, as prayed for by him, to the original plaint and also permit the opposite party to file additional written statement thereto in accordance with law.

With the aforesaid observations, the instant revisional application is disposed of.

There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

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