(2006) 01 AHC CK 0247

Allahabad High Court

Case No: C.M.W.P. No. 40500 of 1999

Rama Shanker Kesari alias Patali	APPELLANT
Vs	
Ist A.D.J. and Others	RESPONDENT

Date of Decision: Jan. 13, 2006

Acts Referred:

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

Citation: (2006) 2 AWC 2103

Hon'ble Judges: Shishir Kumar, J

Bench: Single Bench

Advocate: S.D. Pathak, Dinesh Pathak and M.B. Mishra, for the Appellant; H.N. Singh, S.C., for the Respondent

Final Decision: Allowed

Judgement

Shishir Kumar, J.
This writ petition has been filed for quashing the order dated 16.8.1999 passed by 1st Additional District Judge, Sonebhadra, Annexuire-5 to the writ petition by which the amendment application filed on behalf of plaintiff-respondents No. 3 to 5 has been allowed.

2. The facts arising out of the present writ petition is that respondent no 2 filed a suit for permanent injunction impleading therein the petitioner-respondent No. 3 Jawahar Singh husband of Smt. Gulab Patti Devi, respondent No. 4 and respondent No. 5 alleging therein that the petitioner is residing in the house shown by letters Ka Kha Ga Gha in the sketch map attached to the plaint. It has been stated that towards the south of the letters Kha Ga, a gali exists which has been shown by letters A B. The plaintiff wants to raise some construction in the aforesaid portion but the defendants are causing obstructions, hence the suit. The written statement was filed on behalf of the defendants alleging therein that the plaintiff is intending to get staircase constructed in the gali shown in the letters, which is a land of public utility.

It is a public path and nali containing dirty water flowing from there. The aforesaid public land along with nali exists for the last 32-35 years. It is the only way by which the dirty water of the locality flows. In case any construction is permitted, it will cause nuisance. Various issues were framed and the parties led their evidence and the trial court after considering the evidence on record, was pleased to dismiss the suit vide its judgment and decree dated 19.8.1996. Respondent No. 2 aggrieved by the aforesaid judgment and decree filed an appeal. Before the appellate court an application for amendment for changing the total nature and relief of the plaint claimed before the trial court was filed. In spite of the objection by the petitioner to this effect that the present application for amendment is not maintainable as the plaintiff-respondent has already admitted and claimed the easementary right upon the lane in dispute and now by way of amendment he wants to withdraw his admission, therefore, this will amount to total changing the nature of the suit but the appellate authority without considering the aforesaid fact has allowed the revision, vide its judgment and order dated 16.8.1999. Aggrieved by the aforesaid order the petitioner has filed the present writ petition.

3. It has been submitted on behalf of the petitioner that it is not in dispute that the amendment can be allowed at any stage but a person cannot resile from the admission, which has already been made. The counsel for the petitioner has brought it to the notice of the Court regarding the plaint which was filed before the trial court and has submitted that the relief sought in the plaint was for easementary right only to the effect that the defendant-respondents may be restrained from interfering in the peaceful use of the said gait. It was never pleaded in the plaint that he is the owner of the said land in dispute. By the amendment, which he wants to bring before the appellate court, he is claiming that he is the owner in possession of the land, which has been shown as A B. The said amendment changes the total nature of the suit and the same is not permissible and the appellate authority has clearly erred in law in allowing '' the said amendment application vide its order dated 16.8.1999.

4. It has further been submitted on behalf of the petitioner that the amendment is an afterthought as the trial court has already non-suited the plaintiff-respondent and when the plaintiff came to know that on the basis of the pleadings submitted in the plaint, he will not be able to succeed as such he has totally changed the nature of the suit by way of the present application for amendment. Reliance has been placed on the case in Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co., , and paragraph 6 of the said judgment has been referred which is quoted below:

6. Rahim was examined as a witness on behalf of the defendants in the trial court as D.W. 1 on the 12th of October, 1955 and after examining a few more witnesses the evidence of the parties was closed on that very date. Rahim made some strange and peculiar statements in his deposition in support of the defendants and introduced

some entirely new facts which were never disclosed to the plaintiff in any of the letters written during the course of the business or in reply to the lawyer''s notice or in their written statement. He introduced a story of some kind of partnership between him and one of the partners of the plaintiff and Manavi. Even then no prayer was made by the appellants in the trial court for amending their written statement or for permission to adduce any further evidence. About three years later, as stated above, they filed their applications in the High Court for the purposes aforesaid. In our judgment the High Court has rightly refused the prayers of the appellants. The amendment of the written statement sought was on such facts which, if permitted to be introduced by way of amendment, would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken up either at the time of the dealings between the parties or 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 those petitions and we need not mention in any detail the reasons thereof.

Reliance has also been placed on the case in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., and paragraphs 8, 9 and 10 of the said judgment have been referred which are reproduce below:

8. The High Court on revision affirmed the judgment of the trial court and said that by means of amendment the defendants wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side.

9. The decision of the trial court is correct. 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.

10. It is true that inconsistent pleas can be made in pleadings but the eject 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. The High Court rightly rejected the application for amendment and agreed with the trial court.

Further reliance has been placed on the case in Heeralal v. Kalvan Mal and Ors. 1998 RD 140 , and following observations of the Apex Court has been referred:

...This decision of a Bench of three learned Judges of this Court is a clear authority for the proposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the

notice of the Bench of two learned Judges that decided the case in Akshaya Restaurant (supra). In the latter case it was observed by the Bench of two learned Judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in Akshaya Restaurant (supra) proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However, the aforesaid decision of the three member Bench of this Court in Modi Spinning (supra) is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiffs case and cause him irretrievable prejudice.

Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiffs case it could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incurium being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view.

5. On the other hand the counsel for the respondents submits that the present case is prior to the amendment of 2002 of Order VI, Rule 17 by which proviso has been added. Prior to that an amendment can be allowed at any stage. The plaintiff-respondent submits that the amendment sought will not change the nature of the suit, therefore, the Court below has rightly allowed the amendment and now the matter will be decided after hearing both the parties and the defendant-petitioner will also be afforded opportunity to lead the evidence and if ultimately it is found that in spite of the amendment allowed, the plaintiff-respondent is not able to prove his case, the appeal filed by the respondent will be dismissed.

6. I have heard the learned Counsel for the parties and have perused the record. Admittedly originally the suit, which was filed that was simplicitor for injunction and right of easement. In paras 5 and 8 of the plaint the plaintiff-respondent has clearly stated that he has been using the said lane for a long period and the defendants may be restrained from interfering and to raise any construction. The trial court after affording an opportunity to the petitioner has come to the conclusion that it is a public lane and is being used by the residents of the locality and the plaintiff has failed to prove that the defendants are in any way interfering in use of the said rasta and for the purpose of dirty water the nali is there and the dirty water is being flowed through that gali which has been shown in the map. I have perused the amendment, which is being sought by the plaintiff-respondent. By the said amendment now the plaintiff has come out with a case that when the plaintiff was

constructing the house, due to the request of the defendants and other persons who were living in the locality in the west, some land was left which belonged to the plaintiff-respondent. He has also prayed in the amendment application that he is owner in possession of the said land, in my view, the appellate authority ought to have considered the fact that the plaintiff-respondent has already admitted and claimed easernentary right and he was not suited and now he is claiming the right over the property which has been shown in the map. In my opinion this is not permissible as it clearly changes the nature of the suit. Order VI, Rule 17 provides amendment of the pleadings. It is provided that generally amendment be allowed at any stage but the Court must be satisfied as to why the pleading could not be brought in, unless it was based on subsequent developments.

7. The issue involved herein is being considered by the Courts every day. Amendment in the pleadings may generally be allowed and the amendment may also be allowed at a belated stage. However, it should not cause injustice or prejudice to the other side. The amendment sought should be necessary for the purpose of determining the real question in controversy between the parties. Application for amendment may be rejected if the other party cannot be placed in the same position as if the pleadings had been originally correct, but the amendment would cause him injury which could not be compensated in terms of cost or changes the nature of the suit itself as it cannot be permitted to create an entirely new case by amendment. A right accrued in favour of a party by lapse of time cannot be permitted to be taken away by amendment. Amendment can also be allowed at appellate stage. Introduction of an entirely new case, displacing even admission by a party is not permissible (Vide Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, Nanduri Yogananda Lakshminarasimhachari and Others Vs. Sri Agastheswaraswamivaru, ; Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., ; Ishwardas v. State of M.P. AIR 1979 SC 551 and Mulk Raj Batra and Others Vs. District Judge, Dehra Dun and Others,

8. Similar view has been reiterated in G. Nagamma and Another Vs. Siromenamma and Another, and B.K.N. Narayana Pillai Vs. P. Pillai and Another, However, a party cannot be permitted to move an application under Order VI, Rule 17 of the Code after the judgment has been reserved. (Vide Arjun Singh Vs. Mohindra Kumar and Others, .

9. A Constitution Bench of the Hon''ble Supreme Court in Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, observed that even the Court itself can suggest the amendment to the parties for the reason that main purpose of the Court is to do justice, and therefore, it may invite the attention of the parties to the defects in the pleadings, so that same can be remedied and the real issue between the parties may be tried. However, it should not give rise to entirely a new case.

10. In Jagdish Singh Vs. Natthu Singh, the Hon''ble Supreme Court held that the Court may allow to certain extent even the conversion of the nature of the suit, provided it does not give rise to entirely a new cause of action. An amendment sought in a plaint filed for specific performance may be allowed to be done without abandoning the said relief but amendment seeking for damages for breach of contract may be permitted.

11. In Union of India (UOI) Vs. Surjit Singh Atwal, the Apex Court held that in case of gross delay, application for amendment must be rejected.

12. It is settled legal proposition that if a right accrued in favour of a party, as the order impugned has not been challenged in time, the said right cannot be taken away by seeking amendment in pleadings. (Vide Radhika Devi Vs. Bajrangi Singh and others, and Dondapati Narayan Reddy Vs. Duggirddey Venkatanarayana Reddy and Others,

13. In G. Nagamma and Another Vs. Siromenamma and Another, the Hon''ble Apex Court held that in an application under Order VI, Rule 17, even an alternative relief can be sought; however, it should not change the cause of action or materially affect the relief claimed earlier.

14. In Vineet Kumar Vs. Mangal Sain Wadhera, the Hon''ble Supreme Court held that normally amendment is not allowed if it changes the cause of action, but where the amendment does not constitute the addition of a new cause of action, or raises a new case, but amounts to not more than adding to the facts already on record, the amendment should be allowed even after the statutory period of limitation.

15. In Fritiz T.M. Clement and Another Vs. Sudhakaran Nadar and Another, , the Hon''ble Supreme Court held that in case the original plaint is cryptic and amendment sought to incorporate about some undisputed facts elaborating plaintiffs claim is based on the said admitted facts, amendment should be allowed as it would place the defendant in a better position to defend and would certainly not prejudice his cause. More so, if the claim does not challenge the nature of the relief and rate of fee etc. Is challenged without challenging the total amount claimed such amendment may be allowed even at a belated stage.

16. In Gurdial Singh and Others Vs. Raj Kumar Aneja and Others, , the Hon''ble Supreme Court deprecated the practice adopted by the Courts entertaining the application under Order VI, Rule 17 of the Code containing very vague and general statements of facts without having necessary details in amendment application enabling the Court to discern whether the amendment involves withdrawal of an admission made earlier or attempts to introduce a time-barred plea or claim or is intended to prevent the opposite party from getting the benefit of a right accrued by lapse of time, as amendment cannot be permitted to achieve the said purpose.

17. In Salem Advocate Bar Association v. Union of India 2005 (3) AWC 2996 : 2005 AIR SCW 3827, the Apex Court has held that if the nature of the suit is going to be changed and it has not been proved on the basis of pleadings that the plaintiff was not aware regarding the fact or development which was to be amended by amendment application the amendment is not permissible.

18. In view of the aforesaid fact, in my opinion the appellate court has clearly erred in law in allowing the application for amendment. In view of the settled principle of law as it changes the total nature of the suit and the admission of the plaintiff-respondent. In view of above the order dated 16.8.1999, passed by 1st Additional District Judge, Sonebhadra, Annexure-5 to the writ petition is hereby quashed.

19. In the result, the writ petition is allowed. There shall be no order as to costs.