

(2001) 05 CAL CK 0043
Calcutta High Court
Case No: Civil Order No. 2498 of 1997

Aktar Hossain

APPELLANT

Vs

Susama Rani Sahoo

RESPONDENT

Date of Decision: May 22, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 15, Order 6 Rule 17, 115, 153

Citation: (2001) 2 ILR (Cal) 101

Hon'ble Judges: Subhro Kamal Mukherjee, J

Bench: Single Bench

Advocate: Sudhis Dasgupta and Asit Baran Rout, for the Appellant; Jahar Chakraborty and Arindam Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Subhro Kamal Mukherjee, J.

This is a revisional application by the Defendants against an order passed by the learned trial judge allowing an application for amendment of the plaint filed by the Plaintiffs/opposite parties in a suit, inter alia, for dissolution of partnership business and accounts.

2. On or about September 16, 1968 Sudhir Ranjan Sahoo, since deceased, as the Plaintiff, instituted Title Suit No. 608 of 1968 in the City Civil Court at Calcutta, inter alia, for dissolution of partnership and accounts against Mehadir Hossain, since deceased. In the plaint it was alleged that the said Plaintiff and the said Defendant were carrying on joint business under the name and style "Bina Electric Stores" at stall No. 48, S.S. Hogge Market, Calcutta on the basis of registered deed of partnership dated January 15, 1961, but disputes and differences arose between the parties making it impossible to carry on the business in partnership any longer.

3. By judgment and decree dated January 30, 1979 the learned Judge, Ninth Bench, City Civil Court at Calcutta decreed the suit on contest in preliminary form and it was

declared that the firm stood dissolved on the death of the original Plaintiff and the parties were directed to render accounts of the business to each other within ninety days from the date of the decree. In default, however, liberty was granted to the substituted Plaintiffs to settle the accounts through appointment of a commissioner or receiver.

4. The Defendant preferred F.A. No. 352 of 1979 before this Court, but did not proceed with the said appeal. By order dated August 31, 1981 a Division Bench of this Court comprising of Chittatosh Mookherjee (as His Lordship then was) and Ram Krishna Sharma, JJ. dismissed the appeal for non-prosecution without cost.

5. It is regrettable that till today the proceeding for drawing up of final decree has not been completed, although the Plaintiffs applied for drawing of final decree on or about April 20, 1982.

6. The Plaintiffs/opposite parties, in the aforesaid background, filed an application for amendment of the plaint under Order 6, Rule 17 of the CPC ; the said application was filed on or about February 26, 1990. In the said application for amendment of the plaint, the opposite parties sought to incorporate the allegations that, in view of the preliminary decree passed in the present suit, the Defendants were liable to vacate the municipal stall in respect of which the Plaintiffs are the recorded licences and they sought to incorporate prayers for recovery of possession in respect of said stall and for permanent injunction against the Defendants to restrain the Defendants from causing any obstruction to Plaintiffs and their agents in the user and enjoyment of the stalls.

7. The Defendants contested the application by filing a written objection.

8. By Order No. 72 dated December 7, 1994 the learned Judge, Ninth Bench, City Civil Court at Calcutta rejected the said application.

9. The Plaintiffs being aggrieved moved a revisional application u/s 115 of the CPC before this Court, which was registered as Civil Order Nos. 521 of 1995. Debi Prasad Sarkar-II J. by order dated August 30, 1996 allowed the revisional application and the application for amendment of the plaint was remitted back to the learned trial judge for deciding afresh in the light of the observations recorded in the said judgment. The said order was passed ex parte.

10. An application for recalling of the said ex parte order was filed by the Defendants/Petitioners, but Debi Prasad Sarkar-II J. by order dated January 15, 1998 rejected the said application for recalling as it was held that no disputed essential point was decided, neither in preliminary form nor in final form, in the order dated August 30, 1996 and, therefore, the said order in no way could cause prejudiced to the Defendants/Petitioners.

11. In the meantime, however, by the order impugned the learned trial judge allowed the application for amendment of the plaint holding, inter alia, that

although the nature and character of the suit would be changed and by the proposed amendment additional cause of action would be introduced, but in exceptional cases such amendment could be granted to avoid multiplicity of the suit or proceedings.

12. Being aggrieved the Defendants have come up with this revisional application.

13. Mr. Sudhis Dasgupta, learned Senior Advocate, for the Petitioners, argued that the present suit is, inter alia, for dissolution of partnership and accounts and the relief for recovery of possession in respect of stall-in-question has got nothing to do with the said suit as the concept is completely alone. Mr. Dasgupta elaborated that a suit for dissolution of partnership and account is guided by chapter-vi of the Indian Partnership Act, 1932 where the various modes for dissolution of partnership and for settlement of accounts have been provided. Mr. Dasgupta, also, invited my attention to the forms for drawing up of preliminary decree, final decree and decree in a suit for recovery of possession as mentioned in the Code of Civil Procedure. Mr. Dasgupta drew my attention to the provision of Order 20, Rule 15 of the CPC which provides that where a suit is for the dissolution of a partnership, or taking of partnership accounts, the court, before passing a final decree, may pass a preliminary decree declaring the proportionate share of the parties, fixing a day on which the partnership shall stand dissolve or be deemed to have been dissolved, and directing such accounts to be taken, and other accounts to be done, as it thinks fit. Mr. Dasgupta argued that the concept of passing a decree for recovery of possession is completely unknown in a suit for dissolution of partnership and accounts. Mr. Dasgupta drew my attention to the provision of Order 6, Rule 17 of the CPC and submitted that under the aforesaid provision the court is authorised to allow either party to alter or amend his pleadings when such amendments are necessary for the purpose of determining the real questions in controversy between the parties. Mr. Dasgupta argued that in a suit for dissolution of partnership and accounts a preliminary decree has been passed and the suit is pending only for passing a final decree and as such the proposed amendment is not necessary for the purpose of determining the real questions in controversy between the parties in the present suit. Mr. Dasgupta cited the decision in the case of *Kanda and Ors. v. Waghu* AIR 1950 P.C. 68 where the judicial committee observed that the powers of amendment conferred by the CPC are very wide, but they must be exercised in accordance with legal principles and no amendment can be allowed which would involve the setting up of a new case. The privy council in the said case relied upon the decision in the case of *Ma Shwe Mya v. Maung Mo Hnaung* 48 I.A. 214 as it was observed in the said decision that it was not open to a court either u/s 153 or under Order 6, Rule 17 of the CPC to allow an amendment which altered the real matter in controversy between the parties. Mr. Dasgupta, also, cited the case of [A.K. Gupta and Sons Vs. Damodar Valley Corporation](#), where the Supreme Court of India has held that in the matter of allowing amendment of pleading the general rule is that a party is not allowed, by amendment, to set up a new case or a new cause of action.

The case of AIR 1927 18 (Privy Council) was cited to argue that it is not permissible by amendment to change the nature of the suit as framed. The reported decision in the case of [Sadhu Sharan Singh and Another Vs. Deonath Saran Rai @ Bacha Babu and Others](#), was relied upon to contend that it is neither permissible in law nor desirable in equity to allow amendment of plaint which would change cause of action for the suit and would mean a retrial of the whole case on a new footing at a late stage. Mr. Dasgupta cited the case of [Phoolchand and Another Vs. Gopal Lal](#), to contend that in partition suit even after the preliminary decree an amendment is permissible till the passing of the final decree on account of subsequent events leading to variation in shares. The decision in the case of Sohanlal Serowgie v. Gambhirmull Serowgie and Ors. 67 C.W.N. 417 was relied on to contend that a party may be added to the suit after preliminary decree and the manner in which the legal representative has to be brought on record should be by amending the cause title in the plaint and, also, by inserting in the body of the plaint, if necessary, the character in which he is brought and the liability which he has or the rights which he asserts. On the basis of the preliminary decree and the order allowing amendment of the plaint, further proceedings would be proceeded with which will result in the final decree. There is no occasion to amend the preliminary decree nor there is any occasion to amend the certified copy of the preliminary decree.

14. Mr. Jahar Chakraborty, learned Advocate, appearing for the Plaintiffs/opposite parties, however, supported the order impugned and contended that the order granting amendment of the plaint was rightly passed by the court below in order to avoid multiplicity of the proceedings inasmuch as his client, in absence of the present order of amendment, will have to initiate proceedings to recover possession in respect of stall-in-question from the Defendants in some other forum which will cause unnecessary delay.

15. From the discussions of the aforesaid authorities, it appears to me that no amendment can be allowed which would mean a retrial of the whole case on a new footing at a late stage and, further, it is not permissible by amendment to change the nature and character of the suit as framed which would involve filing of fresh written statements and a fresh trial.

16. In the case in hand, it appears that a simple suit for dissolution of partnership and accounts was filed which has been decreed in preliminary form. The suit is pending only for drawing a final decree. At the stage if the order, allowing amendment of the plaint to incorporate prayer for recovery of possession, is allowed to stand the same would occasion a failure of justice and cause irreparable injury to the Defendants inasmuch as a new trial has to be started at this stage requiring adjudication of the right, title and interest of the parties in respect of stall-in-question. The learned Judge himself, while allowing the application for amendment, was not unmindful that by the proposed amendment the nature and character of the suit would be changed and the proposed amendment would, also,

introduce an additional cause of action. However, the learned Judge allowed the same on the ground that in exceptional cases the court has power to grant such amendment to avoid multiplicity suit or proceedings.

17. In my view, the learned Judge in court below did not apply the proper legal tests in deciding the application for amendment of the plaint and exceeded his jurisdiction in allowing the same.

18, I, however, make it clear that I have not gone into the question of the respective rights of the parties in the stall-in-question and it will be open to the plain-tiffs to initiate proceedings to recover possession of the sail-in-question from the Defendants before appropriate forum.

19. The order impugned is, therefore, set aside.

20. The revisional application is, thus, allowed.

21. I peremptorily direct the learned trial judge to dispose of the proceedings for drawing of final decree positively by November 30, 2001 and to report compliance thereof to the learned Registrar General of this Court by December 3, 2001. I am passing this order as the suit was decreed in preliminary form on January 30, 1979 and the application for drawing up of the final decree has been filed on April 20, 1982, that is, after dismissal of the appeal against the preliminary decree by this Court.

22. There will be no order as to costs.

23. Let Xerox certified copy of this order be supplied to the applicants on urgent basis.