

(2016) 08 CAL CK 0054

CALCUTTA HIGH COURT

Case No: APO 157 of 2016 with C.S. No. 66 of 2008 G.A. No. 1240 of 2014.

The Kolkata Municipal
Corporation and Another -
Appellants @HASH Sri
Sankarshan Pvt. Ltd.

APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 16, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11, Order 43 Rule 1, Section 104

Citation: (2017) 170 AIC 452 : (2016) 3 CalJ 264 : (2016) 4 CalLT 247 : (2017) 1 ICC 212 :
(2017) 1 WBLR 160

Hon'ble Judges: Soumitra Pal and Mir Dara Sheko, JJ.

Bench: Division Bench

Advocate: P.S. Bose, Sr. Advocate, G.C. Das and Alope Ghosh, Advocates, for the
Appellant; Ranjan Deb and Mr. Samrat Sen, Sr. Advocates, Mr. R.L. Mitra, Ms. P. Dhar and
Mr. S. Bose, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Mir Dara Sheko, J. - This appeal is preferred against the order dated 13th August, 2015 allowing amendment of plaint sought for by the plaintiff/respondent. The operative part of the order passed by the Learned Trial Judge, allowing amendment of the plaint, is set out hereunder :

"Accordingly, there will be an order in terms of prayers (a) and (b) of the amendment petition. However, the amendment that will be incorporated is as indicated in red ink in the copy of the plaint annexed to the supplementary affidavit affirmed on behalf of the plaintiff on 21st June, 2014. The department to carry out the amendment within a fortnight from date. Leave granted to the plaintiff to reverify the plaint thereafter.

The plaintiff shall serve an amended copy of the plaint on the defendants after incorporation of the amendment by 3rd September, 2015. The defendants will be entitled to file an additional written statement by 24th September, 2015. There will be cross order discovery of documents within ten days thereafter. Inspection forthwith. Liberty to mention for early hearing once the suit is ready for hearing.

This order is passed without prejudice to the contention of the defendants that the plaintiff has no locus standi to maintain the suit."

2. Mr. Bose, learned Senior Advocate, being assisted by Mr. Alope Kumar Ghosh, learned advocate for the Kolkata Municipal Corporation submitted that the cardinal principle is whether amendment is necessary for adjudication of the real issue in controversy and whether in absence of the proposed amendment the suit can proceed. Submission is if amendment is allowed it would result in enlarging the scope of the cause of action in the suit.

3. Mr. Bose referring to the provisions contained in sections 179 to 190 of the Kolkata Municipal Corporation Act, 1980 submitted that had there been any grievance against any valuation or assessment, the respondent/plaintiff should have raised the issue before the appropriate forum of the Municipal Corporation in accordance with the provisions of the Act. Therefore, in fact the reliefs which cannot be sought for directly have been prayed for indirectly. Hence, by the impugned order allowing amendment of the plaint, the Municipal Corporation has been prejudiced.

According to him the suit itself is not maintainable.

4. Relying on the judgements of the Supreme Court and the grounds contained in the Memorandum of appeal submission is nowhere it has been held that appeal against interlocutory order allowing amendment is not appellable. Mr. Bose relied on the following decisions :

1. **Vineet Kumar v. Mangal Sain Wadhera: AIR 1985 Supreme Court 817.**

2. **Rajesh Kumar Aggarwal and Others v. K. K. Modi and Others: (2006) 4 SCC 385.**

3. **Andhra Bank v. ABN Amro Bank N. V. and Others: (2007) 6 SCC 167.**

4. **Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others: (2009) 10 SCC 84.**

5. **Nurul Hoda and Others v. Amir Hasan and Another: 1972 Calcutta 449.**

5. Mr. Deb learned Senior Advocate appearing on behalf of for the plaintiff-respondent being assisted by Mr. Samrat Sen, learned Senior Advocate submitted that in the Code of Civil Procedure there is no provision of appeal against an order allowing an amendment. Moreover, as the impugned order is not a

"Judgement" within the meaning of Letters Patent, the appeal is not maintainable. The suit for declaration is in respect of assessment of the premises between October 1976 and December 2007. Since the impugned Letters of Intimation, relatable up to December 2007, have been issued during the pendency of the suit and if those Letters of Intimation are not brought within the subject-matter of the suit and kept out of its purview, then the respondent-plaintiff would have to file a separate suit, which would give rise to multiplicity of proceedings. Moreover if the said Letters of Intimation are not challenged the law of limitation would come into play. Since the learned Trial Judge considered that by the proposed amendment there would be no change either in the cause of action or in the nature of the suit, the discretion exercised by learned Trial Judge in allowing amendment may not be interfered with.

6. Relying upon the judgment in **Shah Babulal Khimji v. Jayaben and another: AIR 1981 SC 1786** it is submitted that as by the impugned order dated 13th August, 2015 new cause of action has not been introduced either by altering the nature of the suit or by taking away any vested right or any other valuable right, if any, accrued to the appellant/defendant, the impugned order does not amount to a "judgment" within the meaning of Letters Patent. Therefore the appeal, against such an interlocutory order, is not maintainable. Mr. Deb relied on the following decisions :-

1. **Sheshriridas Shanbhag v. Sunderrao, AIR 1946 Bombay 361.**
2. **Narendra Nath Dutt v. Jitendra Nath Dutt and Others, AIR 1959 Calcutta 62.**
3. **Gaganmal Ramchand v. The Hongkong & Shanghai Banking Corporation, AIR 1950 Bombay 345.**
4. **Calcutta Gujarati Education Society and Another v. Calcutta Municipal Corporation and Ors.: (2003) 10 SCC 533.**
5. **North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) by Lrs., (2008) 8 SCC 511.**
6. **State of Maharashtra v. Hindustan Construction Company Limited, AIR (2010) 4 SCC 518.**
7. **Ramesh Kumar Agarwal v. Rajmala Exports Private Limited and Ors, (2012) 5 SCC 337.**
8. **Shah Babulal Khimji v. Jayaben D. Kania & another, AIR 1981 SC 1786.**

7. It appears from the impugned order that by allowing the amendment the appellant-defendant has been given liberty to submit additional written statement in respect of the amended part of the plaint. That apart, keeping the point of locus standi to maintain the suit by the plaintiff open before the trial Judge, liberty has been given to mention for early hearing, once the suit is ready for hearing, on completion of usual other formalities.

8. We have gone through the decisions cited at the Bar. The settled principles of law on amendment of pleadings are as under:-

(a) Whether the proposed amendment is necessary to adjudicate real issue in controversy,

(b) In absence of the proposed amendment, whether the suit can proceed, since the party would not be allowed to lead evidence on any count if it is absent in pleading.

(c) Whether amendment of plaint, if allowed, would change nature and character of the suit.

(d) Whether the proposed amendment in plaint would give rise to any separate cause of action.

(e) Whether the proposed amendment, if allowed, would take away any right of the rival party already acquired by lapse.

(f) Whether the proposed amendment if rejected would give rise to multiplicity of proceedings.

(g) Whether the proposed amendment, if allowed, would cause irreparable loss and prejudice to the other side which cannot not be compensated in any other manner.

9. We find from the impugned order that learned Trial Judge while allowing the amendment, as proposed in the pleadings and in prayer of the plaint, had reserved right and liberty of the defendant/appellant to file additional written statement and to raise the point of maintainability including the point of locus standi of the respondent/plaintiff in filing the suit.

10. However, since submission has been advanced on maintainability of appeal against an interlocutory order allowing amendment of plaint, let it be dealt with first. Undoubtedly the purpose and effect of incorporation of some averments by amendment in plaint is to place the case, which is subject to proof by legal evidence. So an interlocutory order allowing amendment of plaint is to grant leave for addition or deletion of some pleading or prayers. Against the amendment of the plaint the defendant is at liberty to file additional written statement. Therefore, by such interlocutory order the right of a party is not determined finally. At the cost of repetition it can be said that the determination of right between the parties in a suit would be settled finally only after adjudication on consideration of evidence by the Court. But evidence would not be allowed to be led unless there are pleadings to the effect. Thus a final order determining the right of the parties obviously comes within the meaning of "judgment" within the meaning of Letters Patent.

11. In this regard it is appropriate to set out hereunder, the relevant part of paragraph 120 from the Judgment in Shah Babulal Khimji (supra) to take note as to which interlocutory orders are appealable treating those as "judgements" within the meaning of Clause 15 of the Letters Patent.

Paragraph 120. *****

- i. An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.
- ii. An order rejecting the plaint.
- iii. An order refusing leave to defend the suit in an action under Order 37, Code of Civil Procedure.
- iv. An order rescinding leave of the trial Judge granted by him under Clause 12 of the Letters Patent.
- v. An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against competency of the suit against the defendant even though the suit is kept alive.
- vi. An order rejecting an application for a judgment on admission under Order 12, Rule 6 .
- vii. An order refusing to add necessary parties in a suit under Section 92 of the Code of Civil Procedure.
- viii. An order varying or amending a decree.
- ix. An order refusing leave to sue in forma pauperis.
- x. An order granting review.
- xi. An order allowing withdrawal of the suit with liberty to file a fresh one.
- xii. An order holding that the defendants are not agriculturists within the meaning of the special law.
- xiii. An order staying or refusing to stay a suit under Section 10 of the Code of Civil Procedure.
- xiv. An order granting or refusing to stay execution of the decree.
- xv. An order deciding payment of court-fees against the plaintiff."

12. The judgment in the case of **Sheshgiridas Shanbhag v. Sunderrao** (supra), on the effect of amendment, though was cited by the respondent, however therein too question was raised whether an appeal would lie from an order granting amendment of plaint. The answer of the Division Bench of Bombay High Court was as under:-

"On behalf of the appellant, Mr. Desai relied on two judgments of the Calcutta High Court, viz., 8 Beng. L.R. 433 and 13 Beng. L.R. 91. In those cases the question, what if a "judgment" within the meaning of Clause 15 of the Letters Patent came to be

considered by the Court. Under the Civil Procedure Code, an order made under Order 6, Rule 17 is not appealable. Therefore, the appellant can succeed in his contention that an appeal lies only if the case is covered by the word "judgment" in Clause 15 of the Letters Patent. According to those two decisions (which are accepted as classical pronouncements) a judgment must finally determine some right between the parties. That view is accepted by the Judicial Committee of the Privy Council in 10 I.A. 4. In spite of the counsel's industry, Mr. Desai has been unable to point out any precedent where this question was considered and decided by any Court. There is no reported decision in favour of the appellant."

13. The same view was followed in a subsequent judgment of the Bombay High Court in **Gaganmal Ramchand v. The Hongkong & Shanghai Banking Corporation** (supra).

14. Mr. Bose invited our attention to the cases of **Rajesh Kumar Aggarwal and Others v. K.K. Modi** (supra), **Sampath Kumar v. Ayyakaunu & Another** (supra), **Andhra Bank v. ABN Amro Bank N.V.** (supra), **Vineet Kumar v. Mangal Sain buttres** to the point that in all those cases the interlocutory order for amendment was entertained in appeal by the Supreme Court and Supreme Court did not hold that appeal was not maintainable.

We find that in either of those cases it was not the issue whether appeal would lie against an interlocutory order relating to amendment of pleadings. Therefore, the issue having neither been raised nor answered in those cases, the argument of Mr. Bose about maintainability of appeal against an order allowing amendment of plaint under Letters Patent cannot be accepted. In the aforesaid decisions the Supreme Court did not deal whether the appeal is maintainable against interlocutory order relating to amendment. Rather in addition to what have been set out herein above in paragraph 7 in the judgment in **Nurul Hoda v. Amir Hasan** (supra), a Full Bench decision of this Court cited by Mr. Bose, also laid down the same law defining as to when an order amounts to a "judgment " within the meaning of Letters Patent. Relevant portion from the said paragraph 7 is set out herein below:-

"The following tests should be applied in considering whether a particular order amounts to a "judgment" or not namely, (i) whether the order in question puts an end to the proceeding so far as the court dealing with it is concerned, in which the order was sought and made, (ii) the order must involve determination of some right or liability affecting the merits (iii) an adjudication or a decision, which is not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding is not judgment within the meaning of Letters Patent (iv) where the decision involves adjudication on the question of limitation or jurisdiction of the Court in certain cases such decisions would amount to judgment."

15. Thus the impugned order not having determined the right of the parties or not having introduced a new cause of action altering the nature and character of the

suit and does not take away vested right, if any, already accrued by the Corporation and having kept all rights of the appellant open, it is not a judgment within the meaning of Clause of 15 of Letters Patent, and, therefore it is not appealable either under Order 41, Rule 11 or Order 43, Rule 1 or Section 104 of the Code of Civil Procedure. Hence, the order dated August 13, 2015 under challenge being an interlocutory order and not appealable, we hold that the appeal is not maintainable and is, thus, liable to be dismissed.

16. However, since it is submitted on behalf of the Municipal Corporation that by filing the instant suit the respondents in a way are challenging the assessment orders, in view of the provisions contained in the Kolkata Municipal Corporation Act, 1980 particularly Sections 179 to 197 thereof, the learned Single Judge, after settling the issues, is requested at the outset to hear on the point of maintainability of the suit.

17. Thus, the appeal fails and is dismissed.

Soumitra Pal, J. - I agree.