

Civil Revision

Present:

The Hon'ble Justice Jyotirmay Bhattacharya**C.O. 228 of 2008****Sri Shyam Sundar Kayal****-Vs-****M/s. Mist Valley Vinimoy Pvt. Ltd.****With****C.O. No. 463 of 2008****C.O. No. 464 of 2008****M/s. Mist Valley Vinimoy Pvt. Ltd.****-Vs-****Sri Shyam Sundar Kayal****Judgment On : 15.01.2010****Point:**

AMENDMENT: Application for amendment- Whether Court can consider the merit of the proposed amendment – Code of Civil Procedure, 1908 O. 6 R. 17

Fact: The plaintiff filed a suit for declaration of his ownership in the suit property with further declaration that the defendant has not acquired any right, title or interest therein.

The subject matter of challenge in the civil Revisional application being C.O. No.228 of 2008 which was filed by the plaintiff/petitioner herein is part of the order by which the plaintiff's prayer for amendment of plaint was disallowed by the Ld. Trial Judge on the ground that no reasonable explanation was given as to why such facts could not be brought on record in the plaint earlier.

Held: In the instant case amendment has been sought for before commencement of the trial of the suit and that too for not withdrawal of the admission but for elaboration of the cause of action which are already on record and for seeking additional relief for complete resolution of the dispute. That apart, this Court cannot consider at this stage as to whether the proposed amendment is hit by the provision of Order 9 Rule 9 of the Civil Procedure Code, as it is the consistent view of the Hon'ble Apex Court, that while considering the prayer for amendment of a party, Court cannot consider the merit of the proposed amendment which can only be assessed during the trial of the

suit, after such amendment is allowed.

Paragraph – 27, 28

Cases:

- A. 2006(12)SCC1 (Ajendra Prasadji N. Pandey & Anr. –Vs- Swami Keshavprakeshdasji N & Ors.)
- B. 2008(5)SCC117 (Chandra Kanta Bansal –vs- Rajinder Singh Anand)
- C. 2008(14)SCC364 (Raj Kumar Gurawara (dead) through Lrs. –Vs- SKS K. Sarwaji & Co. Pvt. Ltd. & Anr.)
- D. 2009(3)SCC467 (Alkapuri Co-operative Housing Society Ltd. –Vs- Jayantibhai Naginbhai (deceased through Lrs.)

For the Petitioners : Mr. Haradhan Banerjee,
In C.O. No.228 of Mr. Subhrangshu Datta,
2008. Mr. Partha Pratim Mukherjee.

For the Opposite
Parties in C.O. No.
463 & 464 of 2008.

For the Opposite Mr. M.P. Gupta.
Parties in C.O. No.
228 2008.

For the Petitioner
In C.O. Nos.463 &
464 of 2008.

The Court:

1. Since the abovementioned three revisional applications are interrelated to each other, all these three revisional applications were heard analogously. The plaintiff's application for amendment of plaint was partly allowed and partly rejected by the learned Trial Judge vide Order No.30 dated 15th February, 2007. Part of the order by which the plaintiff's prayer for amendment

of plaintiff was disallowed by the learned Trial Judge is the subject matter of challenge in the civil revisional application being C.O. No.228 of 2008 which was filed by the plaintiff/petitioner herein. The part of the order by which the plaintiff's prayer for amendment of plaintiff was partly allowed is the subject matter of challenge in the civil revisional application being C.O. No.464 of 2008 which was filed by the defendant. The other revisional application being C.O. No.463 of 2008 is directed against an order being No.37 dated 29th January, 2008 by which the plaintiff's prayer for addition of party was allowed by the learned Trial Judge. The said revisional application was filed by the defendant.

2. Let me first of all consider the merit of the revisional applications being C.O. No.228 of 2008 and C.O. No.464 of 2008 hereunder.

Re: C.O. No.228 of 2008:

Facts in brief

3. The plaintiff filed the said suit for declaration of his ownership in the suit property with the further declaration that the defendant has not acquired any right, title or interest therein. A relief by way of permanent injunction was also sought for therein for restraining the defendant including his men, agents, employees and associates from making any construction on the suit property by changing the nature and character thereof and further for restraining them from dispossessing the plaintiff from the suit property and/or from selling/ transferring/ encumbering/ alienating/assigning the suit property to any third party.

4. It was stated by the plaintiff in the plaint that originally the suit property belonged to Sushil Chandra Kayal who had executed a deed of settlement relating to his property for making provision for his wife during her lifetime with restriction on her power to sell, transfer or encumber the suit property in favour of any person. The plaintiff claimed his ownership in the suit property on the basis of the said deed of settlement as provision was also made for him in the said deed. It was further stated therein that since the wife of the settlor namely Nalini Bala has only life interest in the suit property and further since restriction was imposed on her power to transfer the suit property in the deed of settlement, the defendant cannot claim any right in the suit property by virtue of a so-called deed executed by the said Smt. Nalini Bala Kayal. Thus, the plaintiff claimed that since the defendant has not acquired any right, title and interest in suit property on the basis of any fake deed executed by Nalini Bala, the defendant should be restrained from raising any construction in the suit property. A reference of an earlier suit filed by one Kalyan Kumar (now deceased) against the said Nalini Bala Kayal and the plaintiff herein, concerning the rights of the parties in this suit property, was made in the plaint of the said suit. It was stated therein that the said suit was initially dismissed by the learned Trial Judge but the appeal preferred therefrom was ultimately disposed of by this Hon'ble Court on compromise between the said Kalyan Kumar and Nalini Bala Kalyal with a rider that the suit stood dismissed as against Shyam Sundar Kayal, the plaintiff herein. It was further stated therein that the plaintiff herein challenged the said decree before the Hon'ble Supreme Court by filing a special writ petition which was ultimately disposed of by the Hon'ble Supreme Court with the finding that since the suit being Title Suit No.95 of 1979 was dismissed against the plaintiff herein, his right, title and interest in the suit property cannot be affected in any way. It was further stated therein that another suit being Title Suit No.51 of 1995 was filed by the plaintiff before the Court of the learned Civil Judge, Senior Division, 2nd Court at

Howrah for declaration of the plaintiff's title in the suit property and the said suit is still pending. Since the defendant was trying to create a third party interest in the suit property and was also trying to raise construction on the suit property, the instant suit was filed on the basis of the cause of action as mentioned above.

5. The defendant is contesting the said suit by filing written statement therein. The case which was made out by the plaintiff in the plaint was denied by the defendant in the said written statement. The defendant has asserted its right to raise construction on the suit property on the strength of its title therein which it acquired by virtue of its purchase from Nalini Bala Kayal and others.

6. The trial of the said suit has not yet commenced.

7. Even before filing of the written statement, the defendant in its objection filed against the plaintiff's application for temporary injunction disclosed the particulars of the sale deed executed by Nalini Bala Kayal and other heirs of the original settlor through which the defendant was claiming its title in the suit property.

8. After coming to know about the particulars of the said transaction from the objection filed by the defendant against the plaintiff's application for temporary injunction, the plaintiff filed an application for amendment of his plaint before commencement of trial of the suit. Various new paragraphs including certain additional reliefs were sought to be added to the plaint by way of amendment thereof. In fact, the plaintiff wanted to add four new paragraphs namely paragraphs

2a, 2b, 2c and 2d after paragraph 2 of the original plaint. In paragraphs 2a and 2b the plaintiff proposed to elaborate the actual right which Nalini Bala acquired in the suit property by virtue of the deed of settlement executed by her husband. The right of the other heirs of the original settlor in the suit property was also clarified in those paragraphs. In fact, the plaintiff wanted to introduce therein that not only Nalini Bala but also the other heirs of the original settlor had no right to transfer the suit property under the said settlement deed.

9. The reason for which the said averments could not be included in the original plaint has also been explained by the plaintiff in paragraph 2b wherein he stated that since the particulars of the said transaction were not known to him earlier, those averment could not be included specifically in the original plaint. A challenge regarding legality of mutation of the name of the defendant in the municipal record and/or the validity of the sanctioned plan granted by the Municipal Authority in favour of the defendant on the basis of the aforesaid transaction, was also proposed to be introduced by way of amendment of plaint by addition of paragraph 2b therein.

10. On the basis of such averments the plaintiff wanted to add certain additional prayers in the plaint for declaring the alleged sale deed dated 11th August, 2005 as void and the defendant has not acquired any title on the basis of the said sale deed. A further declaration for declaring the deed of settlement is still in existence and the right, title and interest of the plaintiff in the suit property was not affected by virtue of the void mutation and sanctioned plan were also sought to be added in the plaint. A further declaration was sought for declaring that the defendant has neither acquired any right to raise any construction on the suit property by virtue of the building plan sanctioned by the Bally Municipal Corporation nor it has acquired any title by virtue of the void mutation.

11. This part of the proposed amendment was rejected by the learned Trial Judge by applying the proviso added to Order 6 Rule 17 of the Code of Civil Procedure. The learned Trial Judge held that since no reasonable explanation was given as to why such facts could not be brought on record in the plaint earlier, the plaintiff's prayer for such amendment could not be allowed. This part of the order is the subject matter of challenge in C.O. No.228 of 2008.

12. However, the remaining part of the proposed amendment wherein the plaintiff wanted to introduce that the construction of five storeyed building, raised by the defendant in the suit premises on the basis of a void sanctioned plan and in violation of the order of injunction was allowed by the learned Trial Judge. The other part of the proposed amendment wherein the plaintiff prayed for inclusion of additional reliefs for demolition of the said construction and for an injunction for restraining the defendant from transferring any portion of such construction was allowed by the learned Trial Judge by holding inter alia that since the said events are all subsequent events, plaintiff's prayer for amendment for incorporation of such subsequent events in the plaint and also for introducing their additional reliefs in the changed scenario, can be allowed. This part of the order is the subject matter of challenge in C.O. No.464 of 2008.

13. Heard Mr. Banerjee, learned Advocate appearing for the plaintiff and Mr. Gupta, learned Advocate appearing for the defendant. Considered the materials on record.

Submission of Mr. Banerjee on behalf of the plaintiff

14. Mr. Banerjee supported that part of the order by which the plaintiff's prayer for amendment was allowed by submitting that the subsequent events altering the rights of the parties during the pendency of the suit due to certain acts committed by the defendant in violation of the order of injunction can always be taken note of by the Court and the Court is not powerless to give appropriate relief to the parties to mitigate justice in such altered scenario.

15. Mr. Banerjee further contended that the learned Trial Judge committed an illegality in rejecting the other part of the plaintiff's prayer for amendment by applying the proviso added to Order 6 Rule 17 of the Civil Procedure Code even though, such amendment was admitted sought for, before commencement of trial of the suit. Mr. Banerjee contended that even the evidence-in-chief on affidavit has not yet been delivered by any of the parties in the said suit as such, according to Mr. Banerjee that part of the impugned order by which the plaintiff's prayer for amendment of plaint was partly rejected by applying the proviso under Order 6 Rule 17 of the Code of Civil Procedure should be set aside.

16. Mr. Banerjee further contended that the plaintiff did not want to introduce a new cause of action by the said amendment. He contended that, in fact, the challenge with regard to the defendant's title which was faintly introduced in the original pleadings of the plaint was sought to be elaborated by way of clarification and/or by giving further details regarding such transaction which came to the knowledge of the plaintiff subsequent to the filing of the suit, when the written objection was filed by the defendant against the plaintiff's application for injunction.

17. Mr. Banerjee, thus, contended that when such amendment was sought for before the commencement of the trial of the suit, neither party would be prejudiced if such amendment was allowed. On the contrary, if the amendment is rejected then the rights of the parties cannot be adjudicated completely in the said suit. Accordingly, Mr. Banerjee prayed for setting aside that part of the impugned order by which the plaintiff's prayer for amendment of the plaint was partly rejected by the learned Trial Judge.

Submission of Mr. Gupta on behalf of the defendant

18. Mr. Gupta, learned Advocate appearing for the opposite party submitted that though the proviso added to Order 6 Rule 17 of the Code of Civil Procedure is not applicable in the instant case as amendment was sought for before the commencement of the trial of the suit but such amendment cannot be allowed as the dispute between the plaintiff and the vendors of the defendant relating to their claim for title in the suit property which was sought to be introduced in the suit by amendment was the subject matter of challenge in the other suit being Title Suit No.51 of 1995 filed by the plaintiff against the vendors of the defendant. Mr. Gupta pointed out that the plaintiff asserted therein that the plaintiff's right to act as trustee and beneficiary of the trust estate created by Sushil Chandra Kayal by the deed of settlement dated 25th January, 1968 which is still in existence. The plaintiff further claimed therein that his right to act as trustee and further to enjoy the benefits granted to him under the said deed of settlement, have not been affected by the compromise decree passed in F.A. No.318 of 1987. Mr. Gupta, thus, contended that since ascertainment of the plaintiff's right in the suit property is the subject matter of consideration in the said suit, the plaintiff cannot introduce the said challenge in the present suit by way of amendment of plaint.

19. Mr. Gupta, however, submitted that the said suit of 1995 has already been dismissed for default and no step has yet been taken for restoration till date. Mr. Gupta, thus, wanted to submit that the reliefs which the plaintiff, wanted to introduce by way of amendment of plaint is barred under Order 9 Rule 9 of the Civil Procedure Code and as such, there was nothing wrong in the impugned order whereby the plaintiff's prayer for amendment was rejected by the learned Trial Judge.

20. Mr. Gupta further contended that it was settled law all throughout and even prior to the amendment of the Civil Procedure Code in 2002, consistent view of the Hon'ble Apex Court was that belated amendment cannot be allowed without any reasonable explanation for the delay particularly when a party seeks to amend his pleading for introducing certain pre-suit events in the suit and such pre-suit events discloses independent cause of action having no nexus with the cause of action pleaded in the original plaint and such new cause of action cannot be effectively tried without joining third parties in the suit. In support of such contention Mr. Gupta cited the following decisions before this Court:-

1. In the case of Ajendra Prasadji N. Pandey & Anr. –Vs- Swami Keshavprakeshdasji N & Ors. reported in (2006)12 SCC page 1.
2. In the case of Chandra Kanta Bansal –vs- Rajinder Singh Anand reported in (2008)5 SCC page 117.
3. In the case of Raj Kumar Gurawara (dead) through Lrs. –Vs- SKS K. Sarwaji & Co. Pvt. Ltd. & Anr. reported in (2008)14 SCC page 364.
4. In the case of Alkapuri Co-operative Housing Society Ltd. –Vs- Jayantibhai Naginbhai (deceased through Lrs.) reported in (2009)3 SCC page 467.

21. Relying upon those decisions Mr. Gupta submitted that the plaintiff's prayer for amendment of plaint should have been rejected as a whole as the proposed amendment was a belated one which was sought to be introduced, long after the filing of the suit and particularly when the construction of a five storeyed building was completed by the defendant in the suit property in the meantime. Accordingly, he prayed for rejection of the plaintiff's application for amendment as a whole.

22. Let me now consider the respective submission of the learned Counsel of the parties in the facts of the instant case.

23. At the very outset this Court wants to make it clear that since admittedly amendment was sought for prior to the commencement of the trial of the suit, the learned Trial Judge ought not to have rejected the plaintiff's prayer for amendment in part by the impugned order which is the subject matter of challenge in C.O. No.228 of 2008 by applying the proviso added to Order 6 Rule 17 of the Civil Procedure Code. Of course, it is rightly pointed out by Mr. Gupta that even if the said proviso is not applicable in a case where amendment was sought for prior to commencement of the trial of the suit but, still then, the Court can refuse to allow the plaintiff's prayer for amendment in certain circumstances. The circumstances in which such prayer for belated amendment can be rejected in certain circumstances has been explained by the Hon'ble Supreme Court in the case of Alkapuri Co-operative Housing Society Ltd. (supra) wherein it was held that where introduction of any pre-suit event unconnected with the existing cause of action, results in alteration of the basic structure of the suit, such amendment cannot be allowed particularly when third parties are required

to be joined for adjudication of the independent cause of action proposed to be introduced by way of amendment.

24. The said principle, in my view, has no application in the facts of the instant case as in the instant case no new cause of action was sought to be introduced by way of amendment. In fact, the amendment was sought for elaborating the challenge which was already on record in the plaint. The defendant's right in the suit property is already an issue in the suit. The validity of the deed of transfer through which the defendant is claiming title in the suit property is also an issue in the said suit. The title of the vendor of the defendant in the suit property is also an issue in the said suit. The dispute regarding title of the vendor of the defendant in the suit property is also an issue in the suit. The plaintiff simply wanted to introduce further details regarding the legality of the transaction made between the defendant's vendor and the defendant in respect of the suit property by way of amendment and such introduction was sought for only with a view to challenging the legality of such transaction effectively in the suit.

25. Such amendment cannot be refused as in case of such refusal, complete adjudication of the dispute relating to the title of the parties in the suit property cannot be made.

26. The other decisions which was cited by Mr. Gupta excepting the decision in the case of Chandra Kanta Bansal (supra) are all cases where amendment was sought for in a suit filed after the amendment of Civil Procedure Code of 2002 came into effect and in all those cases it was held that when a party applies for amendment after the commencement of the trial of the suit, the Court before allowing the said party to amend his pleading must be satisfied that in spite of due diligence

such amendment could not be made by the said party before commencement of trial of the suit. Those decisions have no application in the facts of the instant case as this Court has already indicated above that in the instant case amendment has been sought for before commencement of the trial of the suit.

27. The decision which was cited by Mr. Gupta in the case of Chandra Kanta Bansal (supra) also has no application in the instant case as that was a case where amendment was sought not only after the closure of the evidence but also after the conclusion of the hearing of the arguments and that too for withdrawal of his admission made in the written statement but here is the case where amendment was sought for before commencement of the trial of the suit and that too for not withdrawal of the admission but for elaboration of the cause of action which are already on record and for seeking additional relief for complete resolution of the dispute.

28. That apart, this Court cannot consider at this stage as to whether the proposed amendment is hit by the provision of Order 9 Rule 9 of the Civil Procedure Code, as it is the consistent view of the Hon'ble Apex Court, that while considering the prayer for amendment of a party, Court cannot consider the merit of the proposed amendment which can only be assessed during the trial of the suit, after such amendment is allowed. As such, this Court does not find any substance in such submission of Mr. Gupta.

Conclusion

29. As such, this Court holds that the learned Trial Judge was not justified in rejecting the plaintiff's prayer for amendment of plaint in part by the impugned order which is the subject

matter of challenge in C.O. No.228 of 2008. That part of the impugned order is, thus, set aside and the revisional application, thus, stands allowed.

Re: C.O. No. 464 of 2008

Since subsequent events which were allowed to be brought on record by amendment, occurred during the pendency of the said suit and further since such events are all c-related to the cause of action pleaded in the original plaint, this Court does not find any justification to interfere with this part of the impugned order which is under challenge in this revisional application as the Court's power to give remedies to the parties in the altered situation is well recognized in law, and the Court cannot shut its eyes particularly when situation, as on the date of filing of the suit, was allegedly altered by one of the parties in violation of the order of injunction.

Conclusion

Accordingly, this Court does not feel any necessity to interfere with this part of the impugned order. This revisional application, thus, stands rejected.

Ultimate result of C.O. No.228 of 2008 and C.O. No.464 of 2008

The plaintiff is, thus, permitted to carry out such amendment in the plaint as mentioned in the schedule of the proposed amendment as a whole excluding the portion in which certain parties were sought to be added as defendants in the suit, within two weeks from date in compliance of the provision contained Order 6 Rule 18 of the Civil Procedure Code subject to payment of cost of Rs.500/- by the plaintiff to the defendant. The defendant is given liberty to file additional written statement to the amended plaint within four weeks from date of service of copy of the amended plaint upon the defendant.

Re: C.O. No.463 of 2008 (addition of party) :

In fact, the plaintiff earlier wanted to implead the vendors of the defendant as well as the Municipal Authority as defendants in the said suit by filing an application under Order 6 Rule 17 of the Civil Procedure Code. The plaintiff's such prayer for addition of party was rejected by the learned Trial Judge vide Order No.30 dated 15th February, 2007 as the plaintiff has not applied for addition of those parties in the suit under Order 1 Rule 10 of the Code of Civil Procedure which is a relevant provision under which such addition can be sought for by a party.

While rejecting such prayer for amendment of the plaintiff, leave was granted to the plaintiff to apply for addition of those parties as defendant in the said suit under the specific provision of law. Accordingly, the plaintiff filed an application for adding them as defendant in the said suit under Order 1 Rule 10 of the Civil Procedure Code. Such prayer for addition of party having been allowed by the learned Trial Judge, the defendant has filed the instant revisional application before this Court.

Mr. Gupta cited the following decisions in support of his contention that Court's wide discretion to add parties cannot be exercised for mere asking for such addition as such power can be exercised only when such parties who were sought to be added were either proper party or necessary party for the decision in the suit:-

1. In the case of Firm of Mahadeva Rice and Oil Mills & Ors. -Vs- Chennimalai Goundar reported in AIR 1968 Madras 287.

2. In the case of Lakshmi Narain –Vs- The District Judge, Fatehpur & Ors. reported in AIR 1992 Allahabad 119.

In my view those decisions cannot help the defendant in any way in the instant case as it cannot be denied that the dispute involved in the suit, after allowing amendment, cannot be adjudicated upon in the absence of those parties, as not only reliefs have been claimed against them but also the right of the vendors of the defendant in the suit property is required to be ascertained in this suit. as such, the vendors of the defendant are, no doubt, necessary parties in the suit.

That apart, when certain actions of the Municipal Authorities are also under challenge in the suit, it cannot be said that the presence of the Municipal Authority is not necessary for complete adjudication of dispute involved in the suit.

As such, this Court does not find any illegality in the impugned order by which the plaintiff's prayer for addition of party was allowed by the learned Trial Judge.

This revisional application, thus, stands rejected.

In view of the order passed by the Hon'ble Supreme Court on 1st October, 2007 in Special Leave to Appeal (Civil) No.17721 of 2007, the learned Trial Judge is requested to expedite the disposal of the suit as far as possible so that the suit can be disposed of within six months to the communication of this order.

Urgent xerox certified copy of this order, if applied for, be supplied expeditiously after complying with all formalities.

(Jyotirmay Bhattacharya, J.)