SUPREME COURT OF INDIA

Usha Devi

Vs.

Rijwan Ahamd

C.A.No.481 of 2008

(G.P.Mathur and Aftab Alam JJ.)

17.01.2008

JUDGMENT

Aftab Alam, J.

1. Leave granted.

2. This appeal is directed against the order dated July 13, 2006, passed by the High Court in W.P. (C) No.2325 of 2006. It is a brief and non-speaking order by which the High Court dismissed the writ petition and affirmed the order passed by the trial court which, in turn, had rejected the appellants petition under Order 6, Rule 17 of the Code of Civil Procedure (CPC for short) for amendment of the suit property as described in the Schedule to the plaint.

3. The material facts are brief and simple. In the year 2002, the appellant filed a suit, inter alia, seeking permanent injunction restraining the respondents-defendants from interfering with her rights over the suit property and further directing them not to build or demolish the building already existing on the suit land. In the Schedule to the plaint, the description of the suit premises was given as follows:

> "Southern half portion of measuring an area of 1937.97 sq.feet = 0.04.448 acres or 0.04.9/20 acres bearing at present holding Nos.304, before that 275 and presently 201, Ward No.IV(Old) New 13, of Giridih Municipality having double storied house together the land over which it stands bounded as follows :-
>
> xxx xxx xxx xxx
> xxx xxx xxx xxx
> xxx xxx xxx xxx"

4. The defendant-respondents filed their written statement in which objection was especially taken to the description of the suit property as given in the plaint. On behalf of the

respondents it was stated that the area of land that might possibly be the subject matter of any dispute was much smaller and the plaintiff had described properties lawfully belonging to them as the suit property. No rejoinder to the written statement was filed on behalf of the plaintiff and on the basis of the pleadings issues were framed on August 13, 2002. Thereafter, the proceedings in the suit remained in abeyance but on August 5, 2002, the appellant-plaintiff filed a Misc. Petition under Order 39, Rule 2(A) read with Section 151 C.P.C. (registered as Misc. Case No.28/2002) for alleged breach of an interim injunction earlier granted in her favor. In that proceeding, the husband of the plaintiff was examined as one of the witnesses. In course of his cross-examination, it was repeatedly put to him that he did not have any idea of the suit land and that he would not claim all the area mentioned in the Schedule to the plaint but the plaintiffs claim would be only over one decimal of land. It was also suggested to him that the rest of the land admittedly belonged to the defendants and further that any alleged dispute between the parties could only be over a very limited area and not the entire property as stated in the Schedule to the plaint.

5. The witness (the appellants husband), however, denied the suggestions made on behalf of the defendants and stuck to the stand that the disputed property was correctly described in the plaint and that was the subject matter of the suit. Later, on September 29, 2004, the amendment petition was filed that gives rise to the present appeal. In the amendment petition it was stated that due to inadvertence the suit land was wrongly described in the Schedule to the plaint and the mistake required to be corrected. It was further stated that, as a matter of fact, one decimal equivalent to 9 chhatak by standard measurement, i.e., 414 square feet of land (along with some structure) was the subject matter of the suit. Accordingly, it was prayed that from the description of the suit property in the plaint the opening words southern half portion of measuring an area of 1937.97 square feet = 0.04.448 acre or 0.04.9/20 acres be deleted and substituted by the following:

> "Decimal (one decimal) equivalent to about 9 chhatak (Nine chhatak) by standard measurement that is 414 square feet land alongwith old double storied house consisting of four rooms, two rooms in ground floor and two rooms in first floor and one verandah towards west that is in road side covered with cogurated sheet, a stair case for going to upper floor rooms. Bearing at present holding number No.304"

6. The trial court rejected the petition by order dated February 2, 2006, observing as follows:

> "As such it cannot be said that plaintiff in spite of due diligence could not have raised this discrepancy in the plaint prior to 29.09.04 i.e. after nearly 2 years of the settlement of the issues and after witnesses have been examined on oath in the Misc.Case 28/2002 arising out of T.S.58/2002. Hence it is clear that the plaintiff in spite of ample opportunity to have corrected the discrepancy in the Schedule of the plaint did not care to remove the same instead kept of (sic) insisting and asserting the correctness of the land and boundary mentioned in the Schedule."

7. The order of the trial court was challenged before the High Court in a writ petition which was dismissed with the observation that there was no illegality in the impugned order.

8. Amendment of pleadings used to be one of the easiest things in the course of judicial proceedings before the amendments came to be made in the C.P.C. in the year 1999. It was felt that the provision for amendment of pleadings (Order 6, Rule 17) was greatly abused and it was one of the significant sources of delay in the judicial process. Accordingly, as per the recommendation of the Law Commission, the provision for amendment of pleadings was altogether deleted by Act 46/1999. The deletion of the provision led to widespread protests by lawyers and different legal bodies and as a result the provision was once again introduced, albeit with a rider, by Act 22/2002, with effect from July 1, 2002. In its amended form, Rule 17, Order VI carries a proviso that bars any amendment after the commencement of trial unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.

9. As noted above, the trial court found and held that there was singular lack of due diligence on the part of the appellant-plaintiff inasmuch as the wrong description of the suit property was pointedly brought up by the defendants not only in the written statement but also in course of the proceedings of the Misc.Case.

10. Mr.Devashish Bharuka, learned counsel appearing on behalf of the appellant, submitted that the proviso to rule would come into play only after the commencement of trial and in this case the trial court was in error in rejecting the appellants prayer invoking the due diligence clause in the proviso. Learned counsel further submitted that neither the framing of issues nor the proceedings of Misc. case could be taken as commencement of trial. The prayer for amendment was made at the pre- trial stage and hence, the prayer should have been allowed without difficulty as was the position under the unamended Rule 17.

11. Mr.S.R.Sharma, learned counsel appearing for the respondents-defendants, on the other hand, submitted that the plaintiff-appellant had obtained interim injunction against the defendants in regard to the property as described in the plaint and now the proposed amendment made it manifest that the defendants were made to suffer injunction for a long time with regard to their own property. The prayer for amendment, according to him, was fit to be rejected on that ground alone and allowing the prayer would be quite unreasonable, unjust and unfair. He further submitted that on the plaintiffs own showing the suit in its present form was bound to fail and the permission to amend the plaint would, therefore, amount to giving an undue advantage to the plaintiff. He further submitted that the proposed amendment would not only change the suit property but would also change the cause of action and would thus render the suit not maintainable in any event. He lastly submitted that the prayer for amendment was made after the commencement of the trial and the trial court had, therefore, rightly rejected the prayer. He maintained that the trial of the suit would commence with the settlement of the issues. In support of the submission that the framing of the issues marked the commencement of trial of the suit, Mr.Sharma, relied upon the decision

of this Court in *Ajendraprasadji N.Pandey & Anr. Vs. Swami Keshavprakeshdasji N. & Ors*[1] In paragraph 57 of the decision, it was observed as follows:

> "It is submitted that the date of settlement of issues is the date of commencement of trial. *Kailash v. Nanhku*[2] Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter-affidavit which proves lack of due diligence on the part of the defendants 1 and 2 (the appellants)."

12. From the above-quoted passage, it appears that the decision did not hold that settlement of issues marks the commencement of trial. Earlier in the decision, the court exhaustively examined the proceedings from date to date and on that basis came to hold and find that the prayer for amendment was made after the commencement of trial.

13. Mr.Bharukha, on the other hand, invited our attention to another decision of this Court in *Baldev Singh & Ors. Vs. Manohar Singh & Anr*[3] In paragraph 17 of the decision, it was held and observed as follows:

> "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."

14. Mr.Bharukha also invited our attention to a three-Judge Bench decision of this Court in *Sajjan Kumar vs. Ram Kishan*[4] In this decision too the proposed amendment related to correction of the description of the suit premises in the plaint. The amendment was sought on the plea that the description of the property given in the rent note itself was incorrect and the same description was repeated in the plaint and there would be complications at the stage of execution to avoid which the description of the suit premises as given in the plaint needed

to be corrected. Another similarity with the case in hand was that the prayer for amendment was opposed by the defendant-respondent on the principal ground that although the defendant had taken the plea in the written statement itself that the suit premises were not correctly described, yet the plaintiff-appellant proceeded with the trial of the suit and did not take care to seek the amendment at an early stage. The trial court rejected the prayer for amendment and the High Court dismissed the civil revision against the order of the trial court. Allowing the prayer for amendment this Court in paragraph 5 of the decision observed as follows:

> "Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit."

15. In view of the decision in Sajjan Kumar, we are of the view that this appeal too deserves to be allowed. We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in Sajjan Kumar and following that decision the prayer for amendment in the present appeal should also be allowed.

16. As to the submission made on behalf of the respondents that the amendment will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and it will be open to the defendants-respondents to raise their objection in regard to the amended plaint by making any corresponding amendments in their written statement.

17. The counsel for the respondents also submitted that as a result of the description of the suit property in the plaint the defendants-respondents had to suffer injunction against their own property. We feel that the ends of justice would meet by allowing the proposed amendment subject to a cost of Rs.10,000/-.

18. This appeal is accordingly allowed. The orders of the trial court and High Court are set aside and it is directed that the appellant may be allowed to make the proposed amendment in

the plaint subject to payment of Rs.10,000/- as cost to the respondents-defendants. The amendment will be allowed in case the amount of cost is paid within two months from today.

Cases Referred

[1]*2006 12 SCC 1*
[2]*2005 4 SCC 480*
[3]*2006 6 SCC 498*
[4]*2005 13 SCC 89*