

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.64 of 2017

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1. Subodh Kumar, S/o Sharad Chandra Prasad, Resident of 'Sita Kun', Road No. 8, Ashok Nagar, P.S.- Kankarbagh, District- Patna.

.... Appellant/s

Versus

1. Sharad Chandra Prasad, S/o Late Khaderan Ram.
2. Binod Kumar
3. Pramod Kumar, Both S/o- Sharad Chandra Prasad. null
4. Sunita Kumari, W/o Pramod Kumar, All Resident of Road No. 8, Ashok Nagar, P.S.- Kankarbagh, District- Patna.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Pramod Kumar Singh

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 09-01-2018

1) Heard Mr. Pramod Kumar Singh, learned counsel appearing on behalf of the petitioner and Mr. Devendra Kumar Sinha, learned senior counsel appearing on behalf of the respondent.

2) This Civil Misc. Application has been filed for setting aside the order dated 24.11.2016 passed by Sub Judge-IV, Patna in Title (Partition) Suit No.383 of 2008 by which the two petitions filed by the petitioner-plaintiff under Order VI Rule 27 have been dismissed.

3) The petitioner is the plaintiff in Title (partition) suit No.383 of 2008. The petitioner filed the suit for partition of the properties mentioned in the schedule of the plaint. Defendants are father and brothers and wife of brother of the plaintiffs. During the



pendency of the suit, the plaintiff filed two petitions one on 12.06.2015 and another on 15.07.2016 for amendment in the body of the plaint as well as in the schedule of the plaint. The petitioner in amendment petition dated 13.05.2015 stated that he obtained certified copy of the sale deed No.1186 of 1966 executed by Bulkan Rai and others in favour of Sita Devi, mother of the plaintiff with regard to 3 kathas 2 dhurs and 5 dhurkis of survey plot No.233 of khata No.47 situated in Mauja Mahammadpur Pakauli alias Changar, present P.S.-Kankarbagh, District-Patna and constructed four storied pucca building therein. Therefore, the said land is joint property and after the death of mother of the plaintiff, the plaintiff is entitled to get share in the aforesaid land, therefore, the same be added in Schedule-IIIC after Schedule IIIB of the plaint.

4) In another amendment petition, the plaintiff stated that he obtained certified copy of two sale deeds No.2929 of 2016 dated 01.03.2016 executed by Sharad Chandra Prasad, defendant No.1 in favour of stranger to the suit with Jwala Singh son of Chhotu Singh, and the sale deed No.2928 of 2016 dated 01.03.2016 executed by the said Sharad Chandra Prasad, defendant No.1, in favour of stranger to the suit Pintu Kumar Sao, son of Sidheshwar Prasad Sao. Both the sale deeds related to survey plot No.326 of khata No.175 situated at Mauza Nauratampur, P.S. Kankarbagh which are the subject



matter of present partition suit fully described in Schedule IIIB of the plaint and the aforesaid lands are joint family property but the father of the plaintiff executed a collusive sham and shady sale deed in order to deprive the plaintiff from getting share in the aforesaid land and sought amendment in the suit that after defendant No.5- defendant No.6 and 7, purchasers of his father be added as defendant No.6 and 7 and after para 6A, para 6B be added which reads as follows :-

“6B The alleged two sale deeds bearing no.2928 and 2929 dated 01.03.2016 are collusive, fabricated, manufactured, void ab-initio, without any right and authority against the provision of law manufactured and created by defendant No.1 Sharad Chandra Prasad in collusion and concert with defendant no.3 without consent of coparceners plaintiff, defendant 2 and defendant no.5. The alleged two sale deeds are void ab-initio, which never create right, title and interest to the alleged vendees above named. Jwala Singh and Pintu Kumar Sao, nor binding on plaintiff or other coparceners.”

5) Defendants filed rejoinder opposing the amendment petition mainly on the ground that after beginning of hearing of the suit in view of the Proviso of Order VI Rule 17 of the Code of Civil Procedure, the amendment petitions cannot be allowed unless the plaintiff fulfils the conditions of the Proviso. The amendment petition



is intentionally and purposely brought to demolish the defence and to fill up the legal lacuna of the defendants. The defendant No.1, the father of the plaintiff sold the property, which was exclusively acquired by the defendant No.1, through registered sale deed in favour of Pintu Kumar Sao and Jwala Singh.

6) The Hon'ble Apex Court has directed vide order dated 27.7.2015 passed in Civil Appeal No.5763-5764 of 2015 arising out of Special Leave petition (Civil) No.14622-14623/2014 to dispose of the suit within one year but the plaintiff on one pretext or the other by filing amendment after amendment petition wanted to drag the suit.

7) The learned counsel for the petitioner submitted that the learned Court below vide order dated 24.11.2016 rejected the amendment petition that the plaintiff in spite of the order of the Hon'ble Supreme Court to dispose of this case filed amendment after amendment only to delay the disposal of the suit and the suit land sought to be amended after schedule and the land which was sold to Pintu Kumar and Jwala Singh does tally with lands mentioned in the Schedule IIIB of the plaint. The plaintiff being aggrieved by the aforesaid order filed this petition.

8) Mr. Pramod Kumar Singh, learned counsel appearing on behalf of the petitioner, submits that by amendment petition the petitioner wanted to add in the schedule of the plaint of plot No.2233



of khata No.47, Area 3 kathas 2 dhurs 5 dhurkis as Schedule IIIC of the plaint after Schedule IIIB and aforesaid land and three storied house standing thereof stands in the name of the mother of the plaintiff and the same was acquired by joint family property. The petitioner is entitled to get share after the demise of his mother. Similarly petitioner wanted to incorporate and add certain facts after paragraph 6 and 6B with regard to the sham execution of sale deed by his father, defendant No.1 in favour of Pintu Kumar Sah and Jwala Singh with regard to the suit land mentioned in Schedule 3B of the plaint and the purchaser be added as defendant which are necessary party in order to declare the sale deed inoperative, without consideration.

9) The petitioner did not know about the execution of the sale deed by his father defendant No.1 or the lands standing in the name of his mother and that is why, this facts could not have been incorporated in the plaint. The amendments are necessary in order to determine the dispute between the parties and will not change the nature of the suit.

10) It is further submitted that Proviso of Order VI Rule 17 came up for consideration before the Hon'ble Supreme Court in the case of *Rajesh Kumar Aggrawal Vs. K.K. Modi (2006) 4 SCC 385* the Hon'ble Supreme Court has held that 'Court should allow all amendments that may be necessary for determining real question in



controversy between the parties provided it does not cause injustice or prejudice to the other side. The real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties, however, the Court should not go into the correctness or falsity of the case in the amendment nor record any finding on the merits of amendment at the stage of considering the prayer of amendment. The Court should also take notice on the subsequent events in order to shorten the litigation to preserve and safeguard the rights of both parties and to subserve the ends of justice.

11) On the contrary, Mr. Devendra Kumar Singh, learned senior counsel, for the respondent contending the submission of the learned counsel for the petitioner submitted that the proviso of Order VI Rule 17 says that no application for amendment shall be allowed if the trial has commenced, unless the Courts comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is submitted that the Proviso of Order VI Rule 17 is couched in a mandatory form. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent, therefore, are satisfied. The Court must come to a conclusion that in spite of due diligence, the parties could not have raised the matter before the commencement of the trial. It is further



submitted that the commencement of the trial begins after framing / settlement of issues. In the present case the plaintiff petitioner has already examined two or three witnesses, therefore, the amendment is fit to be rejected. The learned senior counsel for the respondent, Mr. Devendra Kumar Singh, heavily placed reliance in support of his submission on the judgment of the Hon'ble Supreme Court in the case of *Vidyabai Vs. Padmalatha AIR 2009 SC 1433*.

12) On the basis of the submission of both the parties, the question arises for consideration is whether pleadings can be directed to be amended after hearing of the case begins, in view of the Proviso of Order VI Rule 17 and whether provision is in the nature of directory or mandatory?

13) Order VI Rule 17 reads thus :-

“17. Amendment of pleadings – The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”.

14) This Rule mandates that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also says that such



amendment should be necessary for the purpose of determining the real questions in controversy between the parties. The Proviso which brought into effect in the year 2002 enactment that no application for amendment should be allowed after the trial has commenced unless the Courts comes to the conclusion that in spite of due diligence, the party could not have raised the matter for which amendment is sought before the commencement of the trial. The object of the rule is that the Court should try the merits of the case and should allow all amendments that may be necessary for determining the real controversy between the parties, provided it does not cause injustice or prejudice to other side.

15) In the case of *Ramesh Kjumar Aggrawal Vs. K.K. Modi* .(2006) 4 SCC 385, the provision of Order VI Rule 17 and its Proviso came up for consideration and the Supreme Court has held in para 18 and 19 of the aforesaid judgment are as follows :-

“18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the



parties before the Court.

19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated byway of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.

16) The Hon'ble Supreme Court (2016) 1 SCC 332 L.C. *Hanumanthappa Vs H.B.Shivakumar* has held that 'all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Thus, amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

17) In the case of *Vidyabai Vs. Padmalatha AIR 2009 SC 1433* on which the learned counsel for the petitioner placed his reliance, it has been held in the aforesaid judgment that "Under the proviso, no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the mater could not be raised before the commencement of trial. After the trial of the case has commenced, no application of amendment shall be allowed, unless



requirements as contained in the provisions are satisfied. Order 6 Rule 17 was firstly deleted and thereafter on recommendation of the Law Commission, the same was substituted with the Proviso. That to shorten the litigation and speed up disposal of suits, amendment was made by the Amending Act, 1999, deleting Rule 17 from the Code.

18) After going through the aforesaid Judgments, I find that even after insertion of the Proviso of Order VI Rule 17, the Court has got power to allow the amendment but with certain limitations which are contained in the Proviso added to the Rule. The condition is that after commencement of the trial, the amendment can be allowed only after fulfilment of the condition that even if due diligence of the parties who sought amendment could not be impleaded in the plaint at the initial stage. From the facts of the present case, it is apparent that the plaintiff filed the suit for partition of the property mentioned in the schedule of the plaint against father and brothers. The petitioner stated in the amendment petition that the lands and the sale deed sought to be incorporated in the plaint or in schedule of the plaint are the lands purchased in the name of his mother and sold by his father during the pendency of the suit, although both the properties were purchased by joint family income. Therefore, I find that the conditions of the Proviso are fulfilled and the amendment sought for are required to be incorporated in order to determine the real dispute between the parties.



Therefore, I find that the learned Court below has committed jurisdictional error by not exercising the jurisdiction vested in it by law.

19) Having considered the facts aforesaid, the order dated 24.11.2016 (Annexure-5) is set aside. The Civil Misc. Petition is allowed. The amendment petition is allowed. The learned Sub Judge is directed to proceed further in accordance with law.

(Prabhat Kumar Jha, J)

Sanjeev/-

AFR/NAFR	NAFR
CAV DATE	-
Uploading Date	05/03/2018
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