

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.1231 of 2017

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1. Lalan Singh
2. Tarkeshwar Singh Both Sons of Late Gorakh Singh.
3. Chintamani Devi, Wife of Lal Babu Singh alive. All Resident of Village- Parsa, Tole Bishun Singh, P.O. Parsa Garh, P.S. Ekma, District Saran.

.... Petitioner/s

Versus

1. Ragho Singh, Son of Late Ram Dahin Singh.
2. Singaro Kuer, Wife of Late Bachcha Singh, Residents of Village- Parsa, Tole Bishun Singh, P.O. Parsa Garh, P.S. Ekma, District Saran.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Nagendra Rai

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 09-08-2018

Heard Mr. Nagendra Rai, learned counsel for the petitioners
and Mr. M.N.Parbat, learned senior counsel for the respondents.

The petitioners have filed this civil miscellaneous petition under Article 227 of the Constitution of India under supervisory jurisdiction of this Court to set aside the order dated 27.02.2017(Annexure-5) passed by Munsif I, Chapra in Title Suit No.54 of 2007 and to allow the amendment petition dated 07.12.2016(Annexure-3) filed by the defendants-petitioners to amend written statement regarding an agreement, Ekrarnama which is already exhibited.

The brief facts in short which is relevant for disposal of this



case are that petitioners are the defendants in the suit. Plaintiffs filed Title Suit No.54 of 2007 against the defendants for a declaration that two deeds of bai-bashart dated 08.06.1989 executed by the plaintiffs in favour of the defendants-petitioners with respect to Schedule I and II properties are usufructuary mortgage and by amendment, the plaintiffs also sought for redemption of the mortgage. The plaintiffs stated that two mortgage deeds were executed one with respect to schedule I property for Rs.9,500/- and the other with respect to Schedule II property for Rs.16,000/- after setting off the earlier mortgage and paying the balance amount to the plaintiffs in cash but the scribe of the deeds in collusion with the defendants some condition was incorporated in the deed of mortgage itself.

The defendants filed written statement contending that the plaintiffs executed sale deed with condition to re-purchase bai-bashart bainama and there was no talk of execution of mortgage deed nor any mortgage deed was executed. The plaintiffs did not return the money till 08.06.1996 and thus, the plaintiffs lost the right of repurchase after 08.06.1996. Both sides adduced their evidences. The defendants also closed their evidence but on 07.12.2016, the defendants-petitioners filed a petition for amendment of written statement and to add para 14(ka) in the written statement to the effect that as per the agreement between the parties registered Ekrarnama were also executed on the



same day i.e. 08.06.1989 in favour of the plaintiffs undertaking to execute reconveyance deed if the money was paid by 08.06.1996. The certified copy of the Ekrarnama has been exhibited as Ext.D and D/1 by defendant witness Nos.2 and 4 who also deposed about the execution of the deed of Ekrarnama in their depositions. The plaintiffs objected the amendment inter alia on the ground that the plea of Ekrarnama is factually incorrect and it will change the entire nature of the suit, besides this fact, if amendment is allowed, the suit shall have to be tried de novo and such amendment in which the defendants could not be able to show the due diligence on their parts to incorporate and produce the facts with regard to the execution of any such Ekrarnama on the same day i.e. date of execution of mortgage dated 08.06.1989 and, therefore, such amendment is barred under the proviso of Order 6 Rule 17 of the Code of Civil Procedure. Learned court below after hearing both sides dismissed the amendment petition of the defendants-petitioners for amendment in the written statement and thus, the defendants filed this civil miscellaneous petition.

Mr. Nagendra Rai, learned counsel for petitioners has submitted that learned court below has failed to exercise the jurisdiction vested in it by law. The amendment sought for will not change the nature or scope of the suit. The amendment is relevant for determination of the core issue arising in the suit. In the suit, the



consideration is whether the deeds admittedly executed by the plaintiffs on 08.06.1989 are mortgage by conditional sale or a sale with condition to repurchase is under consideration. The petitioners-defendants filed a petition for amendment in the written statement. The amendment in written statement should be more liberally construed as has also been held in the case of Sushil Kumar Jain vs Manoj Kumar, 2009(4) PLJR 69(SC). It is further submitted that in Civil Misc. No.687 of 2017 (Umesh Chandra Singh vs. Neeraj Kumar and others) after relying on the judgment of Rajesh Kumar Aggarwal vs. K.K.Modi, (2006)4 Supreme Court Cases 385, Surendra Kumar Sharma vs. Makhan Singh, (2009) 10 Supreme Court Cases 626 and in Ram Niranjana Kajaria vs. Sheo Prakash Kajaria, (2015) 10 Supreme Court Cases 203, it has been held that mere delay in the prayer for amendment in the written statement is not a factor to give undue importance while considering the prayer for amendment in the written statement. The amendment should be allowed taking into consideration the facts of doing complete justice in the matter and if the same is required for resolution of the dispute between the parties. Learned counsel also placed his reliance on the judgment of Ashok Kumar Singh vs. Rajendra Singh & Ors. reported in 2017(1) PLJR 711.

Contending the contention of the learned counsel for the



petitioners, Mr. M.N.Parbat, learned senior counsel for the respondents submitted that the elements of due diligence is absent. According to the case of the defendants, the deed of agreement for executing deed of reconveyance on payment of the amount mentioned in the deed said to have been executed on the same day i.e. 08.06.1989. The defendants admitted in their written statement that the nature of deed is bai-bashart bainama and, therefore, the suit rests on the sole consideration of the nature of deeds whether the deeds are mortgage by conditional sale or the sale on condition of repurchase but by introducing amendment, defendants wanted to withdraw the admission about the nature of the deeds which they have admitted that the deeds are bai-bashart bainama. According to the statements made by the defendants, the defendants are fully acquainted with the facts that on the same date on which bai-bashart bainama were executed the deeds of agreement according to the defendants were also executed but the defendants did not state anywhere in their written statement about the execution of these deeds of agreement to execute reconveyance and by amendment, the defendants wanted to introduce a new case. If the amendment is allowed, the de novo trial of the suit has to be undertaken. It is further submitted that the proviso of Order VI Rule 17 C.P.C. which was inserted by amendment in Order VI Rule 17 C.P.C. in 2001, the intention of the legislature to shun



frivolous amendment and the Supreme Court in the case of Vidyabai and others vs. Padmalatha and another reported in (2009) 2 Supreme Court Cases 409. Learned counsel placed his reliance on para 19 of the judgment and submitted that proviso puts an embargo on exercise of its jurisdiction and also restricts the power of the court, if a party seeking amendment is unable to show even after due diligence about the non discovery of the facts sought to be amended and, therefore, the order impugned is perfectly right and does not require any interference.

Having considered the submissions of both sides, the sole question arises “whether the amendment sought for by the petitioners in the written statement is appropriate to be allowed and whether the order suffers from any jurisdictional error or illegality?”

In order to decide this question it is very relevant to reproduce Order VI Rule 17 C.P.C. which reads as follows:

“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.”

On bare perusal of Order VI Rule 17, the Court is duty



bound to allow all such amendments which are necessary for resolution of the disputes between the parties if such amendment does not cause irreparable loss or injustice to either side. This view has been reiterated in the case of Rajesh Kumar Aggarwal vs. K.K.Modi(supra) and many other cases.

In the case of L.C. Hanumanthappa vs. H.B. Shivakumar., (2016) 1 Supreme Court Cases 332, it has been reiterated that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Thus, the amendments should be refused only where the other party cannot be placed in the same position as if the pleading has been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule. In the facts of the present case, it is admitted that the plaintiffs filed the suit for declaration of the deeds as usufructuary mortgage and for redemption. The defendants in their written statement admitted that the deeds, subject matter of the suit, are bai-bashart bainama. The defendants did not whisper about the execution of other deeds on the same day about which the defendants wanted to incorporate the amendments by way of stating some facts in para 14(ka) of the written statement only after closing of the evidence



of the defendants and the plaintiffs. The defendant has nowhere stated that he exercised due diligence to find out the documents or state about the facts of execution of deed of agreement to execute the reconveyance after payment of the amount mentioned in the deed by 08.06.1996. The petitioners have not stated in the petition that even after due diligence they could not be able to know about the execution of the deeds of agreement on the same day. Under the proviso of Order VI Rule 17, no application for amendment shall be allowed after trial has commenced unless in spite of due diligence the matter could not be raised before the commencement of trial. After the commencement of the trial no such amendment can be allowed unless the above requirement is satisfied. The proviso of Order VI Rule 17 was inserted by Civil Procedure Amendment Act, 2002 with certain limitation which is contained in the new proviso added to the rules if the defendants or a party fails to prove the facts of due diligence.

It has been held by the Apex Court in para 19 of the case of **Vidyabai and others vs. Padmalatha and another, (2009) 2 Supreme Court Cases 409** which is as follows:

“19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court’s jurisdiction, in a case of



this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

Having considered the facts and discussions made above, I find that besides the facts about the absence of elements of due diligence on the part of the defendants who did not incorporate in the amendment petition that in spite of due diligence they could not bring about the amendment aforesaid at earlier stage, the defendants wanted to introduce a new case for interpretation of the two deeds by withdrawing the admission about the deed bai-bashart bainama which the plaintiffs stated that it is a deed of mortgage with conditional sale.

Thus, I find that the learned Munsif has rightly rejected the amendment petition and the order does not suffer from any jurisdictional error. Accordingly, this civil miscellaneous petition is dismissed.

(Prabhat Kumar Jha, J)

Saurabh/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A
Uploading Date	11.10.2018
Transmission Date	

