

CASE NO.:
Appeal (civil) 1777 of 2002

PETITIONER:
FRITIZ T.M. CLEMENT & ANR.

Vs.

RESPONDENT:
SUDHAKARAN NADAR & ANR.

DATE OF JUDGMENT: 01/03/2002

BENCH:
D.P. Mohapatra & P. Venkatarama Reddi

JUDGMENT:

P. Venkatarama Reddi, J.

Leave granted. The appeal taken up for hearing.

By the impugned order the High Court of Kerala dismissed the Civil Revision Petition filed by the appellants herein, and confirmed the order of the Trial Court rejecting the amendment to plaint in O.S. No. 61 of 1997 (on the file of the Sub Court, Neyyattinkara).

A suit was filed for recovery of a sum of Rs.5,86,268 with future interest towards 'path-way fee' and 'quarrying fee' for various periods. The amendment application was filed at a stage when the suit was ripe for trial. In the affidavit filed in support of the amendment application, it is stated that certain omissions and mistakes crept into the plaint inadvertently and on account of the wrong advice given by the previous counsel engaged by the plaintiffs.

The learned trial Judge was of the view that the application was highly belated and moreover the proposed amendments were based on new cause of action and had the effect of changing the entire pleadings. It was further observed that the amendments would change the very nature and character of the suit. It was also commented that the plaintiffs were trying to withdraw some admissions in the original plaint. As an example, the Trial Court mentioned that "in the Original plaint, they had claimed amount as per the counter-claim granted by the court (in an earlier suit) and now they want to deviate from that plea".

The High Court was also of the view that the nature and character of the suit is sought to be changed by amending the plaint. At the same time, the High Court observed that there was no change in the cause of action or the total amount claimed. The High Court pointed out that the rate of passage fee per lorry was increased from Rs.10/- to Rs.14/- (Rs.40/- mentioned in the judgment seems to be a mistake). Moreover, according to the High Court, if the deletions and additions in respect of paras 4 and 4(a) of the original plaint are allowed, they will contradict the averments in para 3 of the original plaint. The learned Judge then observed that the amendments, if allowed, will be prejudicial to the respondents on account of the "change in the main character of the suit". Though the High Court correctly noted the principle that liberal approach has to be adopted while

deciding an amendment application and the possibility of prejudice to the other party is one of the considerations to be kept in mind, we are of the view that the High Court's conclusion is not in keeping with these principles. Having perused the averments, pleadings and the relief claimed in the original plaint as well as the amendment application coupled with the undisputed Agreement mentioned in the original plaint/I.A., we are of the view that the proposed amendments are not impermissible in law. The Trial Court as well as the High Court proceeded on a wrong premise that by introducing the amendments, a new case is being made out or a new relief is being sought for. Nor can it be said that any of the pleadings in the amendment application have the effect of retracting from any admissions made in the original plaint. At first blush, it might appear that by the proposed amendments which undoubtedly expand the length of the plaint and seek substitution of certain figures in the relief portion, new pleas and reliefs are sought to be raised; but, on deeper analysis, it is not so. Unfortunately, the original plaint, though set out the main basis of the suit is rather cryptic and lacking in relevant particulars. There is a bare reference to the Agreement which is the foundation for appellant's claim. Not only that, the basic terms of the Agreement are not accurately stated in the original plaint. Even the specific date of the Agreement dated 12.7.1987 (which is the basis of the claim in the suit) has not been mentioned; instead only year is mentioned. All this would lend credence to the appellant's contention that sufficient care was not taken in drafting the plaint. The party shall not be penalized for that reason. It is significant to note that the said Agreement between the appellants-plaintiffs and the 1st Respondent/1st defendant entered into on 12.7.1987 is an undisputed document, as is evident from the written statement. What are the rights and obligations under the said Agreement and whether the terms of the Agreement have been violated by the defendants and whether the appellants have legally enforceable claim based on the Agreement could be the matters of controversy in the suit. But, as already observed, most of the averments barring those pertaining to the relief portion centre round the undisputed Agreement. In one of the paragraphs, an earlier Agreement dated 5.9.1972 allegedly entered into between plaintiffs' father and one Enose Nadar has been referred to, but it was only to furnish the background for the Agreement dated 12.7.1987.

In paras 4(a) and 4(b) of which mention was made in the impugned judgment of the High Court, the alleged stipulation in the agreement regarding the rate and mode of payment of quarrying fee and path-way fee to the appellants and Enose Nadar, and the said Enose Nadar making construction on the mortorable road in October 1989 on his portion of land and thereafter the respondents using the portion of the B schedule road situated in the land of the appellants-plaintiffs and another Sukumaran Nadar and the payment being made to the appellants as well as to the said Sukumaran Nadar are mentioned. There is nothing in these two sub-paras which changes the basis and character of the suit. Nor can they have any prejudicial effect vis-a-vis the defence of Respondents. The other paragraphs added seem to be in elaboration of the appellants-plaintiffs' case based on the Agreement and the circumstances in which the Suit No.122/1992 was filed and the events in the aftermath of it which highlight the alleged unjustified refusal of respondents-defendants to pay the fee to the appellants-plaintiffs despite making use of the quarry and the path-way. Some of these averments may at best be considered unnecessary but do not tantamount to setting up a new case or cause of action. So also, the mere fact that in regard to quantification of the fee some changes are sought to be introduced while retaining the total amount claimed in the original plaint does not mean that the nature of relief claimed has undergone a material change. Therefore, the grounds of rejection of amendments are legally unjustified and based on non-application of mind to the exact nature of amendments. We reiterate that no prejudice could possibly be caused to the respondents. In fact, by reason of clarification and elaboration of the appellants-plaintiffs' claim before the trial has started, the respondents-defendants will be in a better position to know the exact case of the plaintiffs and proceed accordingly. On the other hand, it would result in miscarriage of justice if the amendments are not allowed and the appellants-plaintiffs are

compelled to go to trial on the basis of an ill-drafted plaint with cryptic and inaccurate averments. However, we would like to record that in the course of arguments, the learned counsel for the appellants has fairly conceded that certain allegations in the proposed para 4(d) can be deleted as they are unnecessary for the purpose of the case. They are as follows :-

"..in collusion with the afore-said Enose Nadar and incorporating utter falsehood and making the said Enose Nadar the 3rd defendant who had hand in glove with the defendants and their illegal and fraudulent acts. It was the defendants who engaged Advocate for the 3rd defendant and met the expenses of the litigation for the 3rd defendant. In consequence of that, the defendants made the 3rd defendant take false contentions and let in false evidence through the 3rd defendant so as to suit the case of the defendants (plaintiffs in O.S. 122/92)."

We are, therefore, of the view that the appellants-plaintiffs shall be permitted to carry out the amendments in the plaint barring the portion in para 4(d) extracted above. At the same time, in view of the latches on the part of the appellants-plaintiffs, we consider it a fit case to award costs to the respondents-defendants. We direct that the plaint shall be allowed to be amended subject to payment of costs of Rs.2,000/- (Rs.1,000/- each to the respondents-defendants) within four weeks and the proof of payment being produced by the appellants in the Trial Court.

The order of the High Court as well as the order of the Trial Court are set aside and the appeal is allowed accordingly.

J.
(D.P. Mohapatra)

J.
(P. Venkatarama Reddi)

March 1, 2002.

JUDIS