IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Muzammel Hossain.
-Chief Justice.
Mr. Justice Surendra Kumar Sinha.
Mr. Justice Md. Abdul Wahhab Miah.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Muhammad Imman Ali.
Mr. Justice Md. Shamsul Huda.

CIVIL PETITION FOR LEAVE TO APPEAL NO.681 of 2009.
(From the judgment and order dated 15.01.2009 passed by the High Court Division in Civil Revision No.1396 of 2007)

Md. Akram Ali Pk. and others. : .....Petitioners.

-Versus-

Md. Yasin Ali and others : .....Respondents.

For the Petitioners.	:	Mr. Shaheed Alam, Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For Respondent Nos.1-13	:	Mr. Abul Kalam Mainuddin, Advocate, instructed by Mr. Nurul Islam Chowdhury, Advocate-on-Record.
Respondent Nos.14-113	:	Not represented.
Date of Hearing.	:	**The 3rd May, 2012.**

JUDGMENT

SYED MAHMUD HOSSAIN, J: This civil petition for leave to appeal is directed against the judgment and order dated 15.01.2009 passed by a Single Bench of the High Court Division in Civil Revision No.1396 of 2007 discharging the Rule and affirming the judgment and order dated 07.03.2007 passed by the learned District Judge,

Bogra in Civil Revision No.98 of 2006 reversing the order dated 27.07.2006 passed by the learned Senior Assistant Judge, Bogra in Other Suit No.300 of 2000 allowing an application under Order VI Rule 17 of the Code of Civil Procedure.

The facts, leading to the filing of this petition, in brief, are that the petitioners and others instituted Other Suit No.300 of 2000 in the Court of Senior Assistant Judge, First Court, Bogra for declaration of their easement right to the suit ponds. Their case, in short, is that during the C.S. operation the suit ponds were recorded in the name of Bharat Samrat and the names of Gyanoda Prashad Sukul, Chundra Prashad Sukul and Jogodeshwari Debba were recorded as the possessors who had been enjoying the possession thereof on payment of rent to the concerned authority. After the death of those persons, the petitioners, proforma respondents and the villagers of the respective villages had been enjoying the possession of the suit ponds claiming their easement right. The suit pond measuring 1.93 acres appertaining to C.S. Khatian No.17 containing Plot No.709 belonged to one Jogodeshwari and others. In the remark’s column of the said khatian that pond had been shown as being used ‘by the public’ but in the D.P.Khatian No.1362 the said pond had been wrongly recorded in the name of respondent No.2 having no right, title, interest and possession therein. The suit pond measuring 1.71 acres of plot No.680 appertaining to C.S. Khatian No.17 is being used by the

public but in the D.P. Khatian No.538 the same had been wrongly recorded in the name of respondent No.1. The suit pond measuring 0.23 acre of C.S. Khatian No.17 containing plot No.1108 belonged to Jogodeshwari and others and the said pond is also being used by the public but in D.P. Khatian No.1076 the same had been wrongly recorded in the name of respondent Nos.3-5. It has further been alleged that the defendants respondents in connivance with the settlement officials have managed to get their names recorded in D.P. Khatian in respect of the suit ponds. In fact, the petitioners and the general public have been enjoying the possession of the said ponds in exercise of their easement right. The cause of action of the suit arose on 15.11.2000 when the defendants-respondents obstructed the petitioners from exercising their right of easement in the suit ponds. Hence the suit.

The defendants respondents appeared and contested the suit by filing a joint written statement denying the materials statements made in the plaint.

On 16.05.2006, the petitioners filed an application under Order VI Rule 17 of the Code of Civil Procedure before the learned Senior Assistant Judge, First Court, Bogra for amendment of the plaint. They stated, inter alia, that owing to inadvertence some important facts have not been incorporated in the plaint. Not only correction of the description of the names of some of the plaintiffs is necessary but striking out the name of plaintiff No.61 is also essential. Inclusion of C.S.

Khatian No.18 containing plot Nos.709,680 and 1108 is essential and a paragraph to the effect that the plaintiffs-petitioners shall conduct the suit in representative character for declaration of their easement and customary right on replacing the original prayer for declaration of their title over the suit ponds is also necessary.

Respondent Nos.1-13 contested the application by filing written objection dated 28.06.2006. They contended, inter alia, that the proposed amendment has introduced new facts and different cause of action from those which have been made earlier in the plaint and that the said prayer has been made after 6(six) years from the date of initiation of the instant suit. It has been contended that the procedures under Order 1 Rule 8 of the Code of Civil Procedure having not been complied with, the prayer for amendment of the plaint should be rejected.

The learned Senior Assistant Judge, First Court, Bogra by his judgment and order dated 27.07.2006 allowed the application.

Being aggrieved respondent Nos.1-13 preferred Civil Revision No.98 of 2006 before the District Judge, Bogra who after hearing both the parties, vide judgment and order dated 07.03.2007 allowed the said Civil Revision setting aside the order dated 27.07.2006 passed by the learned Senior Assistant Judge, First Court, Bogra in Other Suit No.300 of 2000.

Challenging the judgment and order passed by the learned District Judge rejecting the prayer for amendment the plaintiffs-petitioners filed a revisional application before the High Court Division and obtained Rule in Civil Revision No.1396 of 2007.

The High Court Division discharged the Rule by the impugned judgment and order dated 15.01.2009.

Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the plaintiffs-petitioners have preferred this civil petition for leave to appeal before this Division.

Mr. Shaheed Alam, learned Advocate, appearing on behalf of the leave petitioners, submits that the High Court Division wrongly came to a finding that the proposed amendment would change nature and character of the suit although addition of new fact cannot in any way change the nature and character and as such the impugned judgment delivered by the High Court Division should be set aside.

Mr. Abul Kalam Mainuddin, learned Advocate appearing on behalf of respondent Nos.1-13, supports the impugned judgment and order passed by the High Court Division.

We have considered the submissions of the learned Advocates, the impugned judgment and order and the materials on record.

The plaintiffs instituted Other Class Suit No.300 of 2000 in the Court of Senior Assistant Judge, First Court, Bogra, for declaration of title and for establishment of

their easement right over the suit ponds. From the impugned judgment, it appears that the plaintiffs amended the plaint more than once. On 15.06.2006, the plaintiffs filed an application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure for amendment of plaint incorporating new facts and prayer.

On 27.07.2006, the trial Court allowed the application for amendment of plaint with a cost of Tk.500 as it was filed at a belated stage without assigning any other reason whatsoever.

The contesting defendant challenged the order of amendment in Civil Revision No.98 of 2006 before the District Judge, Bogra. On 07.03.2007, the learned District Judge allowed the revision holding that in the application, it was not clarified as to why the application for amendment was filed at a belated stage and that the amendment had changed the nature and character of the suit.

The High Court Division affirmed the judgment and order of the learned District Judge holding that the amendment would change the nature and character of the suit.

Having considered the application for amendment, it appears that the plaintiffs incorporated new facts by the amendment but incorporation of new fact cannot in any way change the nature and character of the suit. The suit still be named as a suit for declaration of plaintiffs' easement right. The finding of the High Court Division

that the nature and character of the suit would be changed by the amendment without elaboration of its finding cannot sustain in law. Amendment is always necessary to determine the real question of controversy between the parties otherwise there is likelihood of croping-up of multifarious litigations.

Admittedly the trial Court allowed the application for amendment by a cryptic and slipshod order. A judicial order devoid of reasoning causes error of law but mere error of law cannot be a ground for interference unless it has occasioned failure of justice. While exercising any discretion under Order VI Rule 17 of the Code of Civil Procedure the court is required to assign its reasons so that when the order is called in question, the higher Court may be in position to see that there has been application of mind by the Court concerned and that it is aware of the principles involved in the exercise of its discretion.

In this connection, reliance may be made on the case of ***Abdul Motaleb Vs. Md. Ershad Ali and others (1998) 18 BLD(AD)121*** in which it was held that, since the impugned order was not a speaking order, could not by itself be a valid ground for interference by the High Court Division unless it could be shown that the Subordinate Court has committed any error of law 'resulting in an error in the decision occasioning failure of justice'. The order of the learned Senior Assistant Judge may have been a bad or improper order for not assigning reasons but before

interfering with the same the High Court Division is required to examine whether the same has resulted in an erroneous decision occasioning failure of justice.

In the above case, the Appellate Division held as under:

> “There is one limitation in amending a plaint which is well recognized, that is, the nature and character of a suit cannot be changed by amendment. It is not, however, always correctly appreciated as to what is meant by a change in the nature and character of the suit. For example, as in the present case, a simple suit for declaration of title to the suit land was converted following an alleged dispossession in the meantime, into a suit for recovery of possession by amendment. Can it be said that by adding a new prayer for recovery of possession there has been a change, although apparently it may seem so, in the nature and character of the suit? ‘The answer is obviously no. Has there been a change in the nature and character of the suit then by adding the prayer for partition which was allowed by the learned Subordinate Judge? The answer again must be no, because the principle is that the nature and character of a suit do not change so long as the fundamental character of the suit remains the same. ”

In the above case, this Division has found that a suit for simple declaration of title to the suit land may continue with an additional prayer for recovery if the dispossession was made during pendency of the suit. Even in a suit for declaration of title and recovery of

possession, the plaintiff may ask for partition and such amendment by introducing a relief for partition will not change the nature and character of the suit.

In the case of ***Managing Committee N.M.C. Model High School and others Vs. Obaidur Rahman Chowdhury and others, (1979) 31 DLR(AD) 133,*** the plaintiff initially filed a suit for permanent injunction. During progress of the suit the defendants raised some structures and then the plaintiff filed an application under Order VI Rule 17 of the Code of Civil Procedure praying for amendment of plaint by adding a new prayer for declaration of title and recovery of possession of a portion alleged to have been encroached upon by the defendants. The plaintiffs paid ***advalorem*** court fee on the proposed amended plaint. The order of amendment was upheld by the Courts below. Turning down the contention of the defendants who stated that the proposed amendment would change the nature and character of the suit land this Division held as under:

> "Turning to the leave order we find that it is now well-settled that the amendment of the pleadings could be allowed at any stage of the proceedings for the purpose of determining the real question of controversy between the parties, but it could not be allowed, if, it changed the nature and character of the suit, or if the prayer for amendment had became barred by lapse of time and a right had accrued to the other side. But the latter principle can be departed from, if there are circumstances which outweigh the hardship and cause a prejudice to the applicant."

In the case referred to above this Division relied upon the case of ***Charan Das Vs. Amir Khan, A.I.R. 1921 P.C.50***, which has been followed by the Supreme Court of Pakistan in the case of ***Keramat Ali Vs. Muhammad Younus Haji P.L.D. 1963(S.C.)191=15 DLR(S.C.)120.*** This Division also considered the case of ***Md. Zahoor Ali Khan's case 11 M.L.A. 468*** in which **Privy Councils'** observation is that the Mufussil Court's pleadings are to be construed liberally and for the confused pleadings, the party should not suffer. We cannot make ourselves oblivious of the prevailing situation in the **Mufussil Courts** where drafting of good pleading is a rarity now-a-days. For the failure of the lawyers the common litigants should not be penalized. One of the fundamental principles governing the amendment of the pleadings is that all the controversies between the parties as far as possible should be included and multiplicity of the proceedings avoided.

Therefore, the judgment and order passed by the High Court Division affirming the judgment and order passed by the learned District Judge cannot sustain.

Admittedly the suit filed in 2000 is yet to be disposed of by the trial Court. Such being the state of affairs we do not find any point dragging the case before this Division in an interlocutory matter. Therefore, it would be proper to dispose of this Civil Petition for Leave to appeal.

Accordingly the impugned judgment and order passed by the High Court Division affirming the judgment and order passed by the learned District Judge is set aside and the order of trial Court allowing amendment is restored. The trial Court is directed to dispose of the suit as expeditiously as possible.

C.J.

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The 3rd May,2012.
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