

2016-HC-DEM-CIV-APL-95

IN THE FULL COURT OF THE HIGH COURT OF THE
SUPREME COURT OF JUDICATURE ON APPEAL FROM A
JUDGE OF THE SUPREME COURT (IN CHAMBERS) IN SUIT
NO. 2015-HC-DEM-CIV-W-231

In the matter of the Deceased Persons Estates
(Administration) Act, Chapter 12:01, Laws of
Guyana

-and-

In the matter of the Wills Act Chapter 12:02,
Laws of Guyana

-and-

In the matter of the Estate of ABDOOL
AZEEZ, deceased, intestate

BETWEEN:

1. ABDOOL HAFEEZ
2. JAMAL AZEEZ
3. RAMAN AZEEZ, in their capacity as
beneficiaries of the Estate of ABDOOL
AZEEZ, deceased, under the Rules of
Intestacy

Appellants/ Plaintiffs

-and-

1. SALAHUDDIN AYUBI SALEEM
individually and in his capacity as the duly
constituted attorney of BIBI HASINA
SALEEM agreeably with Power of
Attorney made and executed on the 3rd day

of November, 2014 and duly registered at the Deeds Registry, New Amsterdam, Berbice on the 12th day of November, 2014 and numbered 2040 of 2014.

2. BIBI HASINA SALEEM individually and in her capacity as the Executrix named in the alleged or pretended last Will and Testament of ABDOOL AZEEZ, deceased, dated the 14th day of September, 2008.

Respondents/ Defendants
Jointly and/ or Severally

The Honourable Justices Navindra A. Singh and Gino P. Persaud, Puisne Judges

Mr. Kashir Khan for the Appellants

Mr. Manoj Narayan for the Respondents

Delivered September 8th 2020

DECISION

BACKGROUND

The Appellants instituted High Court Action 2015-HC-DEM-CIV-W-231 on June 22nd 2015, thereafter the Statement of Claim was filed in July 2015, a Defence and Counterclaim was filed in August 2015 and a Reply and Defence to Counterclaim was filed in September 2015.

The trial of the Action commenced on June 20th 2016 on which date Jamal Azeez, the Second Named Plaintiff [SNP] testified in chief and was cross examined to completion.

The next day, June 21st 2016, the Appellants filed a Summons seeking the Court's permission to amend their Statement of Claim, specifically, paragraph 16. This

application was resisted by the Respondents and after hearing all of the parties the learned trial Judge refused/ dismissed the Summons on September 29th 2016.

It is that refusal/ dismissal that the Appellants have appealed to this Court and therefore the sole issue to be determined by this Court is whether the Appellants ought to have been allowed to amend their Statement of Claim.

ISSUE

Whether the Appellants ought to have been allowed to amend paragraph 16 of their Statement of Claim.

FACTS

Paragraph 16 of the Statement of Claim states;

16. The Plaintiffs will contend that the alleged or pretended Last Will and Testament dated 14th day of September, 2008 was obtained or executed under circumstances amounting to fraud, undue influence or under suspicious circumstances.

PARTICULARS OF FRAUD AND UNDUE INFLUENCE

(a) The Defendants took unfair advantage of the said ABDPOOL AZEEZ, deceased who was weak and feeble minded at the time and exerted force or pressure in order to influence him to execute the alleged or pretended Last Will and Testament dated 14th day of September, 2008.

(b) The said ABDPOOL AZEEZ, deceased was not in his full senses and could not have given instructions to anyone to prepare his Last Will and Testament dated 14th day of September, 2008 nor could he have read or understood any Will that was placed before him for his signature on that day.

(c) *The circumstances surrounding the execution of the alleged or pretended Last Will and Testament dated 14th day of September, 2008 by ABDOOL AZEEZ, deceased are suspicious in that it was the intention of ABDOOL AZEEZ, up to and until the time of his death that all his children should benefit equally from the assets of the estate.*

In fact, paragraph 16 also contained two paragraphs titled/ headed “***SUBSTANCE OF THE CASE***”, whereby the Appellants sought to explain exactly what the particulars meant, which provided;

SUBSTANCE OF THE CASE

The Defendant took unfair advantage of the extremely weak condition of the deceased and his excitable state and knowledge that his memory was greatly impaired induced him to make a Will. The influence of the Defendants over the deceased on the 14th day of September, 2008, was so complete that he was not a free agent and the said pretended Last Will and Testament was not a product of his own volition but was obtained by the importunity of the Defendants.

SUBSTANCE OF THE CASE

The said ABDOOL AZEEZ, now deceased, never gave any instructions for the pretended Last Will and Testament dated the 14th day of September, 2008, as drawn or at all and the said pretended Last Will and Testament was not read over to him, he then being incapable of understanding and appreciating its contents and was not aware of its nature and effect.

The Appellants applied to amend the Statement of Claim by adding the following sub-paragraphs to paragraph 16;

PARTICULARS OF FRAUD, UNDUE INFLUENCE AND SUSPICIOUS
CIRCUMSTANCES

- (d) *In fact the Will was prepared by the First Named Defendant in the month of September 2014 at the home of the Plaintiffs further in the presence of the Third Named Plaintiff.*
- (e) *The First Named Defendant typed out the Will on his computer and upon completion he used two photocopies a letter to the Commissioner of Police dated the 14th day of September, 2012 that was signed by the Plaintiffs' father and traced ABDOOL AZEEZ's signature from the letter unto the Will that he had prepared.*
- (f) *Further after getting the impression of ABDOOL AZEEZ's signature on the alleged Will that he had prepared he filled in that impression of ABDOOL AZEEZ's signature on the Will with a pen.*
- (g) *The First Named Defendant thereafter gave the Third Named Plaintiff a photocopy of the Will to take to the probate Registry at the High Court in Berbice to register same.*
- (h) *The Third Named Plaintiff then took the forged Will dated 14th day of September, 2008 and showed it to the First and Second Named Plaintiffs.*
- (i) *At no time at all were the witnesses to the Will dated 14th day of September, 2008 present when the First Named Plaintiff was placing ABDOOL AZEEZ's signature Will.*

LAW

Order 26 rule 1 of the Rules of the High Court; High Court Act; CAP 3:02 of the Laws of Guyana, which provides;

“The Court or a Judge may, at any stage of the proceeding, allow either party to alter or amend his indorsement or 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.”

Order 26 rule 6 of the Rules of the High Court, which provides;

“In all cases not provided for by the preceding rules of this Order, application for leave to amend may be made by either party to the Court or a Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.”

Order 26 rule 12 of the Rules of the High Court, which provides;

“The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

Cropper v Smith [1884] 26 Ch. D. 700 per Bowen LJ

“I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party.”

Clarapede v Commercial Union Association [1883] 32 W.R. 262 per Brett M.R.

“However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made

without injustice to the other side. There is no injustice if the other side can be compensated with costs.”

Tildesley v Harper [1879] 10 Ch. D. 396 per Bramwell L.J.

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.”

Cooke v Gill [1873] L.R. 8 C.P. 107 @ 116 per Brett J.

A cause of action consists of *“every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse”*.

Savings & Investment Bank Ltd (In Liquidation) v Fincken [2001] EWCA Civ 1639 at [30] per Peter Gibson L.J.

“The exercise which is required is the comparison of the pleading in its state before the proposed amendment and the pleading in its amended state. What must be examined is the pleading of the essential facts which need to be proved. To define the cause of action the non-essential facts must be left out of account as mere instances or particulars of essential facts.”

It is a principle of law that if an application is filed after the commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

In addition it is accepted that the interests of justice would not be advanced by amendments that are bound to fail on the merits and therefore the Court will allow an amendment only if it has a reasonable prospect of success.

Surender Kumar Sharma v Makhan Singh [2009] 10 Supreme Court Cases 626 [Supreme Court of India] wherein the Court determined that a Court must consider whether the amendment changes the character of the suit before deciding whether to grant leave to amend the pleading.

ANALYSIS

It is clear from the provisions of Order 26 of the Rules of the High Court that a trial Judge has wide discretion to grant a party leave to amend its pleadings after the commencement of the trial and therefore no legal discourse is necessary or warranted relating thereto.

The first material point to be addressed in this issue is, what is the nature of the amendment sought.

The particulars stated under the heading of “*Particulars of Fraud and Undue Influence*” in the Statement of Claim amounted to fraud in the creation of the Will, in that the Testator, being alive, would not or did not give instructions to prepare that Will and there was undue influence in securing the signature of the Testator.

The Appellants sought to introduce the requested amendments as particulars under an expanded heading of “*Particulars of Fraud, Undue Influence and Suspicious Circumstances*”, but in fact the additional particulars are clearly particulars of fraud and could not possibly be categorised as suspicious circumstances.

The amended particulars amount to fraud in the creation and attestation of the Will **AFTER** the death of the Testator.

It is noted that there was no requested amendment to the “Substance of the Case”.

This requested amendment clearly introduces a new/ fresh cause of action in fraud in the case.

The Appellants contend that it’s not a new cause of action because they were always claiming fraud, however, upon a proper examination of the proposed amended pleadings, it is clear that the facts that give rise to the fraud sought to be claimed in the proposed amendment are substantially different from anything previously claimed and gives rise to a completely different cause of action in fraud to that previously claimed.

The dicta of Brett J. in Cooke v Gill explains very simply what a cause of action consists of and I find that there is no reason to depart from that elucidation.

The practical application of that explanation is found in Savings & Investment Bank Ltd (In Liquidation) v Fincken per Peter Gibson L.J. and having gone through the exercise laid out therein I have arrived at the irrefutable conclusion that the requested amendment seeks to introduce a new cause of action grounded in fraud.

The cases cited by the Appellants [Baptiste v Supersad 12 WIR 140; Guinness Mahon Cayman Trust Ltd. v Washington International Bank and Trust Ltd (1987) CILR 447 and Guyana Sugar Corporation v Boodhoo 81 WIR 379] are irrelevant to this case since the facts that are sought to be included in the Statement of Claim

by way of amendment in this case are not simply additional facts to support a cause of action already pleaded.

Of course the Court ought not to refuse an application to amend simply because the amendment introduces a new cause of action, however, where a party seeks to introduce a new cause of action, especially one of fraud, after the commencement of the trial, the Court must inquire whether the party applying to amend could not, with reasonable diligence, have discovered the “new” facts sooner.

The learned trial judge clearly addressed her mind to this question and found that the “new” facts were not genuine. She found that the application was *mala fides* and the Appellants were in fact attempting to formulate a new cause of action because they believed they could no longer rely on the one pleaded based on the evidence adduced on the first day of trial.

This means that the Learned Trial Judge found that the Appellants could not have discovered these “new” facts sooner simply because they are a fabrication.

Based on the record before this Court, the only explanation given for the omission of these facts from the Statement of Claim is that the Appellants in fact instructed their Attorney of these circumstances but he inadvertently omitted to include them in the Statement of Claim.

The question that inevitably must be asked then is whether the SNP, who according to the proposed amended pleadings was fully aware of the “new” facts, also inadvertently omitted to testify to them when he testified on June 20th 2016 before

the Learned Trial Judge since according to the requested amendments the manufactured forged Will was shown to him soon after it was manufactured.

In fact the pleadings and the testimony of the SNP creates completely different and irreconcilable scenarios with respect to the creation of the Will as compared to the proposed amendments.

It is very unlikely that the Appellants would have instructed their Attorney of the two diametrically opposed causes of action and this would have slipped the Attorney while drafting the Statement of Claim and the SNP would have completely forgotten to mention these facts when he testified.

The Learned Trial Judge considered the evidence that was before the Court, as she was entitled to do, and found that the evidence, from no other than the SNP, did not substantiate the Appellants' claim that the Testator was incapable of making and executing the Will.

The Appellants no doubt formed the same opinion and as a result, in a desperate effort to invalidate the Will, sought to add a new cause of action of fraud, in which they themselves appear to be complicit in the fraud.

Based on the disparity between the pleadings, the testimony of the SNP and the requested amendment, there can be no reasonable prospect of success of the cause of action sought to be added through the requested amendment.

The interests of justice would not be advanced by amendments that are bound to fail on the merits. The Court will allow an amendment only if it has a reasonable prospect of success.

In considering whether to grant an amendment after the commencement of trial a Court must consider whether the amendment will change the character of the suit; Surender Kumar Sharma v Makhan Singh [2009] 10 Supreme Court Cases 626 [Supreme Court of India]

When the Court takes into account all of the foregoing and the fact that the requested amendments will undoubtedly substantially change the character of the suit granting the Appellants leave to amend their Statement of Claim cannot be justified.

CONCLUSION

The Learned Trial Judge found that the application to amend was not bona fides in that it was not an oversight on the part of the Appellants' then Counsel that these particulars were omitted from the Statement of Claim.

The Learned Trial Judge found that as a result of the varying evidence of the SNP the Appellants were in fact attempting to inject another ground of fraud into the Statement of Claim which was contrary to the evidence thus far adduced in the trial and to the existing pleadings.

In those circumstances the Learned Trial Judge was justified in refusing to allow the Appellants to amend their pleadings based on her findings.

In addition, the fact that the requested amendment/s sought to change the character of the suit and did not have any reasonable prospect of success, the Learned Trial Judge was correct to refuse the Appellants application to amend their pleadings.

In the circumstances this appeal is dismissed with costs against each Appellant to each Respondent in the sum of \$100,000.00 to be paid on or before September 7th 2020.

Justice N. A. Singh

I concur.

Justice G. P. Persaud