

(1949) 04 CAL CK 0007
In the Calcutta High Court

Case No : Application for Amendment of Plaintiff in Ordinary Original Suit No. 105 of 1947

Ahmed Hossein

APPELLANT

Vs

Mt. Chembelli and Others

RESPONDENT

Date of Decision : 12-04-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 6, Order 7 Rule 11
Negotiable Instruments Act, 1881 (NI) — Section 30, 98

Citation : AIR 1951 Cal 262 : (1950) 1 ILR (Cal) 606

Hon'ble Judges : Sarkar, J

Bench : Single Bench

Advocate : E.R. Meyer, for the Appellant; S.P. Mitra, for the Respondent

Final Decision : Allowed

Judgement

Sarkar, J.—This is an application for amendment of the plaintiff. The suit is on a dishonoured cheque. The plaintiff did not state that any notice of dishonour has been given or that any circumstances existed which rendered it unnecessary to give such notice. The plaintiff now seeks to introduce these statements in the plaintiff by an amendment. The application is opposed by the defendants on the ground that by reason of the absence of these allegations the plaintiff as it stands now discloses no cause of action and hence it must be rejected under Order 7, Rule 11 (a), Civil P. C. and the Court has no power to allow the amendment. The defendants rely on the judgment of Gentle J. in Sailesh Nath v. J. Chaudhury, 50 C. W. N. 540 which directly supports their contention.

2. The plaintiff's answer is two fold : First the plaintiff discloses a cause of action in spite of the omission to state anything with regard to the notice of dishonour and secondly that Order 7, Rule 11, does not take away the Court's power to order amendment of the plaintiff and that Gentle J. was wrong.

3. With regard to the first point the plaintiff's contention is that the facts relating to the notice of dishonour are not part of the cause of action on a dishonoured

cheque but are mere conditions precedent necessary for the case on the cheque, the performance or occurrence of which is to be implied in the plaint under Order 6, Rule 6 of the Code. I am unable to accept this contention. A cause of action is that bundle of facts which would, if left to itself, create in law a right or obligation, while a condition precedent is something which prevents the right or obligation which would have otherwise sprung out from those facts from springing out. A condition precedent has thus been described in the notes to Order 19, Rule 14 in the White Book :

"Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money, or vest in him a certain light of action there is yet something more which must be done or something more which must happen in the particular case before he is entitled to sue either by reason of the provisions of some statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on the common law."

I would in the above quotation add to the words "common law" the words "or statute." How the liability of the drawer of a cheque arises u/s 30, Negotiable Instruments Act, and except as laid down in that section the drawer of a dishonoured cheque has no liability. This is because the whole law as to cheques is contained in that Act and the only section dealing with the liability of the drawer of a cheque is Section 30. The section provides that the drawer of a cheque shall be liable to compensate the holder in case of dishonour "provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided." Sections 91 to 98 of the Act lay down the provisions relating to the manner of the giving of the notice of dishonour and the cases where the giving of the notice is excused. The only way therefore in which liability on a cheque may arise is when (1) the cheque is dishonoured and (2) notice of such dishonour has been given or circumstances exist which render it unnecessary to give such notice. It is not a case where if no provisions as to notice of dishonour had been laid down, a right would have arisen in the holder on the dishonour of the cheque and where the only effect of those provisions is to prevent such right from springing up. The notice of dishonour as the law as to cheques stands is a part of the cause of action on a dishonoured cheque. In *Fruhauf v. Grosvenor & Co.* (1892) 67 I. T. 350 : (61 L. J. Q. B. 717), Lord Coleridge C. J., expressed himself in these words :

"The obligation upon the drawer of a cheque to pay does not arise until notice of dishonour thereof has been given to him, and therefore the statement of the case against the defendant here is not full and complete without either an allegation of notice of dishonour of the cheque having been given to the defendant the drawer of it, or of facts excusing the plaintiff from giving such notice."

It was decided in this case that in the absence of the allegations as to the notice

of dishonour, the plaint on a dishonoured cheque would not disclose a cause of action. Mr. Meyer appearing for the applicant baa referred me to the case of Krishna Prasad Singh Vs. Adyanath Ghatak and Another, as an authority for the contrary proposition. There a notice of forfeiture of a lease u/s 111(g), T. P. Act seems to have been held to be a condition precedent. With great respect I am unable to agree if such was the decision. The learned Judges give no reasons for their view. Since the Transfer of Property Act came into force the determination of a lease by forfeiture can only arise u/s 111(g) of that Act and under this section there is no forfeiture till the notice is given so that the giving of the notice creates the forfeiture which does not exist independently of it and is therefore a part of the cause of action on forfeiture and not merely a condition precedent to it. Further the decision of this point was not necessary for the case for the learned Judges held that Section 111(g) as amended in 1929, which amendment introduced the requirement as to the notice, did not apply to the case before them. As is well known prior to the amendment the section required, besides the breach, an overt act on the part of the lessor to show his intention to determine the lease. The amendment omitted the provision as to the overt act and replaced it by the provision as to notice. The learned Judges applying the section as it stood before the amendment to the case before them held that the language used in para. 15 of the plaint contained a "clear implication" that the overt act had been done. This shows that the learned Judges treated the overt act as a part of the cause of action and not a condition precedent for, if it was the latter there would then have been no necessity to spell out an implication as to it out of something in the plaint for such implication would have arisen under Order 6, Rule 6 of the Code itself. If the overt act was part of the cause of action I wholly fail to see how the notice which replaced it could be otherwise. The plaintiff's first point therefore fails.

4. I now come to the second point which is the more important of the two raised namely whether Order 7, Rule 11 takes away the Court's power to amend the plaint. I will first consider the matter as one of construction of the rule and then deal with the authorities on the point.

5. The provisions as to amendment are contained in Order 6, Rule 17 of the Code which lays down that

"all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The making of amendments therefore is not really a matter of power of a Court but its duty. It is a duty which has been cast upon Courts so that substantial justice may be done for which alone Courts exist. In the words of Bowen L. J. in *Cropper v. Smith* (1884) 26 Ch. D. 700

"Now I think it is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their

rights. Speaking for myself and in conformity with what I have heard laid down by the other divisions of the Court of appeal and by myself as a member of it, 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. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of grace. Order 28, Rule 1 of the Rules of 1883, which follows previous Legislature on the subject says that "All such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties." It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy it is as much a matter of right on his part to have it corrected, if it can be done without injustice as anything else in the case is a matter of right."

This then is the real nature of the matter and it is the same in India as in England. The position therefore shortly put is that as a fundamental principle the law strongly favours an amendment where it is necessary in the ends of justice and it would require the clearest language to alter this very beneficial legal principle. What is there in the language used in Order 7, Rule 11 which would lead to the view that it took away the plaintiff's right to have the plaint amended? Obviously the rule does not expressly purport; to take away the Court's power or duties in the matter of amendment nor expressly interfere with them in any way. Does it then take away such power impliedly? Now there is a well recognised presumption against altering the law by implication except where without such implication the object of the enactment would be defeated. Maxwell in his well known treatise, of Statutes at pp. 85-6 of Edn. 9 thus explains the principle of implication :

"One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it expressly declares, either in express terms or by clear implication or in other words, beyond the immediate scope and object of the statute. In all general matters outside these limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness and to give any such effect to general words, simply because they have a meaning which would lead thereto when used in either their widest, their usual, or their natural sense would be to give them a meaning other than that which was actually intended. General words and phrases, therefore however wide and comprehensive they may be in their literal sense, must, usually be construed as being limited to the actual objects of the Act."

6. What then is the object of Order 7, Rule 11? The rule contemplates four cases viz: (a) where the plaint does not disclose a cause of action; (b) where the relief claimed has been undervalued; (c) where court fees of full value have not been

supplied and (d) where the suit appears on the face of the plaint to be barred by any law. In none of these cases even if the rule had not been enacted could a decree have been passed. In cases (a) and (d) no decree could be passed for the reason that either there was no cause of action of which a decree could be passed or that the suit was barred. In cases (b) and (c) by reason of Sections 6 and 28, Court-fees Act, the plaint would be invalid and no Court would file or record it. In the absence of a provision like Order 7, Rule 11 in cases (a) and (b) the suit would have to be dismissed and in cases (b) and (c) the plaint would not be entertained or if entertained the suit would have to be dismissed. Order 7, Rule 11 provides that the suit will not be dismissed but only the plaint will be rejected. Order 7, Rule 13 provides that if the plaint is so rejected the plaintiff will not be precluded by reason of each rejection only from filing another suit on the same cause of action. The object of Order 7, Rule 11 therefore is really to prevent the ordinary consequences of dismissal viz., to prevent the filing of another suit on the same cause of action that is to say prevent another suit filed on the same cause of action from being barred. If such is the object, it cannot be defeated by allowing the plaint to be amended so as to remove the defect and prevent the operation of Order 7, Rule 11. The result of saying that when Order 7, Rule 11 applies the plaint cannot be amended would be to say that it was the intention of the Legislature that the parties would be compelled to have the suit dismissed and start afresh and made to throw away large costs incurred in the first suit. It strikes me as absurd to say that this was what the Legislature intended. In my view therefore Order 7, Rule 11 does not in the least affect or take away the Court's powers or duties as to amendment and all necessary amendments should be made even if Order 7, Rule 11 applies.

7. The consideration of the history of the evolution of the provisions contained in Order 7, Rule 11 since the first CPC also leads to the conclusion that it really does not in the least affect the Court's power to amend the plaint. The corresponding provisions in all the earlier Codes laid down that if the plaint did not disclose a cause of action or the right of action was barred, the Court must reject a plaint provided that the Court might in any case allow the plaint to be amended if it appeared proper that this should be done. See Section 32 of the Code of 1859, Sections 53 and 54 of the Codes of 1877 and 1882. None of these Codes contained any provision for amendment of the plaint apart from the provisions contained in the sections enumerated above in all of which the power to amend was given only as an alternative to or as preventing the rejection of the plaint. The Code of 1882 was replaced by the present Code which was enacted in 1908. The law therefore as it stood before the present Code came into force empowered the Court in cases in which a plaint did not disclose a cause of action to allow it to be amended and only made it obligatory on the Court to reject the plaint if no such amendment was made after being ordered or where the Court in its discretion did not think it fit to allow the plaint to be amended. The Code of 1908 for the first time detached the power of amendment from the provisions relating to the rejection of the plaint and embodied it in an

independent and separate section viz. Order 6, Rule 17. This Code being only an Act to "consolidate and amend the laws relating to the procedure of Courts of Civil Judicature" there is a presumption that it did not intend to alter the law as it previously stood. So Chitty J. said in *Re Budgett Cooper v. Adams* (1894) 2 Chn. 557 : (63 L. J. Chn. 847),

"I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature."

The view expressed by Chitty J, has been cited by Maxwell in his aforesaid work at p. 26. In considering the present Code therefore it is legitimate to keep in mind the previous law and lean to the presumption that this was not intended to be altered. This rule of construction will be readily applicable to the present case, if such application is considered at all necessary as it is at any rate far from clear that Order 7, Rule 11 took away the Court's power to amend in those cases where this rule was applicable.

8. In my opinion, what I have said above is sufficient for the decision of this question. But there are one or two other matters leading to the same conclusion that I have formed and I think it proper to indicate them. If Order 7, Rule 11 has the effect as contended by the defendants it will cut down practically entirely the scope of Order 6, Rule 17. Any experience in these matters shows that if a plaintiff discloses a complete cause of action there would rarely be any necessity to amend it. Now it is well known that a statute has to be so construed as to prevent any conflict arising between the different parts of it for "it cannot be said that Parliament has given with one hand what it has taken away with another:" Maxwell on Statutes Edn. 9, p. 163. Then again if the Court cannot allow any amendment because of the mandatory nature of Order 7, Rule 11 it would for the same reason be unable to do anything at all except reject the plaintiff. What happens then in a case where the Court realises only at the hearing of the suit either because of the difficulty involved in the case or because its attention had not been directed to the matter earlier that Order 7, Rule 11 applied? In such a case, various orders must have been passed in the meantime e.g., for discovery, inspection and soon and it would follow if Order 7, Rule 11 is mandatory to the extent mentioned above that all these orders would be invalid. Indeed logically in such a case the Court would not have the power even to direct the issue of a summons in the suit to the defendant. The position would be reduced to absurdity. Order 7, Rule 11 does not state when the plaintiff is to be rejected and it can, therefore, be rejected at any stage of the suit up to the hearing. It would follow from this that in the meantime the suit is to be treated as properly constituted and all necessary orders may hence be made by the Court till the actual rejection. Apart, therefore, from being absurd it would be wrong to say that when Order 7, Rule 11 applies the Court has no power to pass any orders except for rejecting the plaintiff. And if it has power to make certain orders why not an order for amendment? Section 149 of the Code again gives the Court

discretion to extend the time for paying in the deficit court-fees. This extension is obviously no other than the time given under Order 7, Rule 11 (c) because it is obligatory on the Court to give this latter time and not merely discretionary. If the Court has no power to do anything else but to reject the plaint if Order 7 Rule 11 (c) applies the result would be to render Section 149 infructuous in so far as plaints are concerned.

9. For these reasons I am unable to hold on a construction of Order 7, Rule 11 that it takes away the Court's power to amend a plaint when it discloses no cause of action.

10. I now come to the authorities and I have to confess that a certain amount of confusion exists. Gentle J. has held in the case of Sailesh Nath Bisi Vs. J. Chaudhuri and Others already mentioned that if a plaint does not disclose a cause of action the Court has no power to allow it to be amended. The learned Judge has, however, given no reasons of his own for the judgment but has simply followed the case of Midnapur Zamindary Co., Ltd. v. Secretary of State, it Cal. 352 : (A. I. R. 1917 Cal, 77). That was a case under Clause (c) of Order 7. Rule 11, There the Subordinate Judge had held that full court fees had not been paid on the plaint and had directed the plaintiff to supply the deficit within a time fixed by him. The plaintiff did not carry out the order and the Subordinate Judge, therefore, rejected plaint on the expiry of the time fixed by him. The plaintiff then filed an appeal to this Court against the order of rejection and contended that the court-fee stamp originally affixed to the plaint was of the proper value and the Subordinate Judge's order requiring further stamp to be supplied was wrong and hence his order rejecting the plaint for failure to supply the deficit was also wrong. Sanderson C. J. and Mookerjee J. who heard the appeal held that the Subordinate Judge had rightly held that the court-fee originally supplied was not of full value and that his order of rejection was, therefore, quite correct. It appears that in the course of the argument the learned Judges having indicated that in their view the order of the Court as to the value of the court fee required was correct, learned counsel for the plaintiff asked for permission to abandon part of the prayer in the plaint so as to make the stamp originally fixed sufficient but this prayer was not allowed. It is to be noted that no request to be allowed to abandon part of the claim had been made to the Subordinate Judge, Sanderson C. J. with whom Mookerjee J. agreed held that

"the learned Judge rightly came to the conclusion that the plaint was written upon paper insufficiently stamped and the plaintiff, on being required by the Court to supply the requisite stamp paper within the time fixed by the Court failed to do so. Therefore, he had no other alternative but to reject the plaint in accordance with the terms of the rule. In my judgment the learned Judge was right in his decision; he had no alternative but to reject the plaint."

This was all that was necessary for the decision of the appeal. Sanderson C.J., however proceeded to observe :

"The learned counsel who appeared on behalf of the plaintiff asked this Court to give the plaintiff leave to amend his plaint by striking out para, (b) of Clause 11 in his plaint. In my judgment he ought not to be allowed to do so for the reasons I have already given and this Court has no more power than the learned Judge when it is shown that the case comes within Order 7, Rule 11. This Court has no jurisdiction, the provision is mandatory and this Court, just the same as the Court below, is bound by that section which provides that under the above-mentioned circumstances the suit shall be rejected."

These observations no doubt support the contention of the defendant. They imply that the lower Court had no power to permit the plaintiffs to abandon part of their claim. As has already been seen no request had been made to the Subordinate Judge to be allowed to abandon part of the claim and no question had at any stage arisen whether he had power to grant such request if made. It follows that no question as to the Subordinate Judge's power in this behalf was involved in the appeal. The plaint had been rejected by the Subordinate Judge and the rejection was upheld in the appeal. There was in fact before this Court no plaint and hence there could not be any abandonment of a portion of it in any event. In fact it does not appear that the question of any Court's power to allow abandonment of a portion of the claim in spite of Order 7, Rule 11 was at all discussed or that the various implications of the question considered. I, therefore, think that these observations of Sanderson C. J. are obiter. They were not at any rate necessary for the decision of the appeal. Consequently they do not have any force as an authority binding on me.

11. This decision has evoked much criticism from the other High Courts and has not been followed by them but these cases I shall notice later. The broad proposition laid down in the Midnapur Zemindary's case (44 Cal. 352 : AIR 1917 Cal. 77) does not seem to have been followed in this High Court also except by Gentle J., in Sailesh Nath Bisi Vs. J. Chaudhuri and Others . I propose to notice two cases. The first is Mahammad Fateh Nasib Vs. Saradindu Mukherjee, . In this case the plaintiff had been given time till 30-6-1932 to put in deficit court fee. He failed to do so but on that date put in an application for grant of further time. Subsequently and before this application was disposed of the plaintiff put in another application for permission to continue the suit in forma pauperis. The High Court held that such an application lay in spite of the fact that time fixed under Order 7, Rule 11 (c) to put in the deficit court-fee had expired. Mukherji and S. K. Ghose JJ., who decided that case observed as follows :

"In the present case the plaintiff's application for further time made on 30th June was pending on 6th July when he applied to continue the suit in forma pauperis, And in our opinion the Court not having up to that point of time made up its mind not to grant any further time the provisions of Order 7, Rule 11 (c) cannot be said to have operated ipso facto. If within one of the periods allowed or even beyond it but before the plaint is rejected or before circumstances have arisen under which it is bound to be rejected an application is made to continue

the suit as a pauper is it obligatory for the Court to reject the plaint and relegate the plaintiff to a fresh application or is the Court competent to entertain the application and shape its proceedings in such a manner as would conduce to convenience and saving of time and costs. There is nothing in the Code that we can see which will force us to adopt a construction such as the defendant seeks to put upon the procedure. In our judgment the mandatory provision contained in Order 7, Rule 11 of the Code is intended for cases where no other complications intervene and that in a case of the present nature the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. There have been instances in which under similar circumstances notwithstanding failure on the part of the plaintiff to put in deficit court fees on the plaint within the time fixed and so attracting the operation of Order 7, Rule 11 (c) of the Code an application to continue the suit in forma pauperis has been ordered to be entertained. One of such cases is the case of Surendra Chandra Roy and Others Vs. Showdamini Roy, which though it purports only to distinguish the case of Selina Sheehan Vs. Hafez Mohammad Fateh Nashib, and does not dissent from it does in our opinion do so on a ground which is too narrow. Another case that may be cited in this connection is that of Bava Sahib v. Abdul Ghani (A. I. R. 1933 Mad. 498). The only point of difference between the present case and the cases just cited is that in those cases the application to continue the suit in forma pauperis was made at a time when a period allowed by the Court had not expired. But on principle we do not see why that should make any difference so long as it is clear that an application for further time was pending consideration at the time when the application to continue the suit in forma pauperis was made, and so long as it is also clear that the Court could if it so wished, grant further time thus repelling the operation of Order 7, Rule 11 (o) of the Code."

12. It is clear that the learned Judges were laying down a view quite inconsistent with that formulated in the Midnapur Zemindary's case: (44 Cal. 352 : A. I. R. 1917 Cal. 77), though that case was not referred to in the judgment at all.

13. The next case is that of Mt. Saiyadunnessa Khatun and Others Vs. Gaibandha Loan Co. Ltd. and Others, a judgment of S.K. Ghosh and Patterson JJ. In that case the plaintiff had been given time till 21-6-1934 to pay in the deficit court-fee. On that date the plaintiff instead of paying the deficit filed a petition for amendment of the plaint by reducing an alternative prayer contained in the plaint for compensation from one lakh of rupees to sixteen thousand rupees. This application was rejected by the trial Court on the same date as it held that in view of the decision in the Midnapur Zemindary's case : (44 Cal. 352 : A. I. R. 1917 Cal. 77) the prayer for amendment could not be allowed. Thereafter the plaintiff filed another petition for further time to put in the deficit court-fees but this also was rejected. Thereupon as the plaintiff did not take any further steps the plaint was rejected on 23-6-1934. Against that order of rejection an appeal was taken to the High Court. The learned Judges distinguished the Midnapur case on the ground that the order for rejection of the plaint having already been made

there it was no longer open to the Court to allow further amendment of the plaint. The learned Judges then made the following observations:

"But in the present case the prayer for amendment was made actually before the order rejecting the plaint was passed and before the time allowed by the Court for payment of the deficit court-fees had expired. The Court undoubtedly had power to allow abandonment of a part of the plaint on the part of the plaintiff or if it be treated as amendment of the pleadings to order such amendment under Order 6, Rule 17. Either of these things could be done at any time after the institution. Surely it cannot be said that the Court had lost that power by reason of the fact that the party had been allowed a certain time within which to pay the court-fees."

Upon that view of the matter the learned Judges set aside the order of rejection and directed the amendment to be made. This again is a departure from the strict principle laid down in the Midnapur Zamindary case, (44 Cal. 352: AIR 1917 Cal. 77).

14. I now come to the cases in the other High Courts. First I will refer to the case of Kolisetti Basavayya and Others Vs. Mittapalli Venkatappayya and Another, , which was decided by Wallace J. The substance of the decision was that u/s 149 of the Code the Court might in its discretion at any stage i. e., even after the time fixed under Order 7, Rule 11 (c) had expired allow a party to pay the deficient court-fee and that the Court has discretion to extend to any limit the time within which the deficient court-fee might be paid and if the fee was paid within such extended time the plaint would stand good as on the date of its presentation. The learned Judge refused to follow the Midnapur Zamindary case (44 Cal. 352: A. I. R. 1917 Cal. 77), and with regard to it observed:

"In Midnapur Zamindary Co. Ltd. v. The Secy. of State (44 Cal. 352: A. I. R. 1917 Cal. 77), the appellate Court refused to interfere with an order by the lower Court rejecting the plaint because the additional court-fee had not been paid within the time fixed. Possibly the language used is too strong when the learned Judges say that the Subordinate Judge had no other alternative but to reject the plaint. Section 149 is not referred to in the judgment."

The next Madras case that I shall refer to is Duggempudi Ramakrishna Reddi, minor by next friend and maternal grandfather Gadey Peda Venkata Reddy Vs. Duggempudi Veerareddi and Another, . Referring to the observations of Sanderson C. J. in the Midnapur Zamindary case (44 Cal. 352: A. I. R. 1917 Cal. 77), Somayya J. who decided this Madras case stated as follows:

"These observations no doubt seem to be in favour of the respondents but the decision must be confined to the facts of the case which were that at the stage when the request was made to the High Court, the plaint had already been rejected. This is how this decision has been viewed and applied by the same High Court in Mt. Saiyadunnessa Khatun and Others Vs. Gaibandha Loan Co. Ltd. and Others, .

I now come to a case in Inayatulla Vs. Madari and Others, decided by Sullaiman and Kendall JJ. The learned Judges in this case allowed an amendment of the plaint in spite of the fact that it did not disclose a cause of action. With regard to Midnapur Zamindary case (44 Cal. 352 : A. I. R. 1917 Cal. 77) they observed as follows :

"It is not necessary to consider the Calcutta case referred to above as the facts are different inasmuch as in that case the plaint was rejected on the ground that the plaintiff on having been required to supply the requisite stamp paper within the time fixed had failed to do so and also because the prayer to amend the plaint by striking out the paragraph was apparently made only in the High Court."

The only other case that I wish to note is the Bombay case of Mahant Narsidasji Balmukunddasji Vs. Bai Jamna, . In this case the plaintiff was asked to pay additional court-fees within a certain time but instead of doing so she before the time expired made an application for amending the plaint which would avoid the necessity of her having to pay the extra court-fee demanded. The amendment was allowed and the suit decreed. Broomfield J, who delivered the judgment of the Court repelled the argument that the additional court-fee demanded not having been paid the plaint should have been rejected under Order 7, Rule 11. The learned Judge held that the rule was "mandatory only rebus sic stantibus that is to say when the Court has to deal simply with the position referred to in the Rule and would not preclude an amendment of the plaint which under Order 6, Rule 17 may be made at any stage of the proceedings."

Referring to the Midnapur Zamindary case (44 Cal. 352 : A. I. R. 1917 Cal. 77), he made the following observations:

"We are referred to Midnapur Zamindary case 44 Cal. 352: (A. I. R. 1917 Cal. 77). With all deferences however to the learned Judges who decided that cases we think that it takes too technical a view of the-Rule."

15. On the above state of the authorities therefore it cannot be said that the principle in the Midnapur Zamindary case 44 Cal. 352 : (A. I. R. 1917 Cal. 77), has been accepted or followed in any Court. That being so, I do not consider that there is in any event any decision: binding on me which prevents me from following my own judgment in this matter. If it is necessary I say that I prefer to follow the view-taken in the two later Calcutta cases cited by me and in the other High Courts rather than that formulated in the Midnapur Zamindary case (44 Cal. 352 : A. I. R. 1917 Cal. 77). I think it right to say that the broad proposition laid down by Sanderson C. J. does not appeal to me and with very great respect I desire to differ from it for the reasons mentioned by me in connection with the construction of Order 7, Rule 11. I do not consider that Gentle J. was bound to follow the above broad proposition. For the reasons hereinbefore given I respectfully dissent from the view expressed by Gentle J. in the case of Mt. Saiyadunnessa Khatun and Others Vs. Gaibandha Loan Co. Ltd. and Others,

16. In the result I allow this application. The plaintiff will pay the costs of this

application. The plaintiff will also pay the costs of any additional written statement that it may necessary for the defendants to use and all such further costs may have been necessitated by the amendment. The defendants will have a fortnight's time to file their additional written, statement from the date the amended copy of the plaint is served on them. Further discovery, if any, shall be within a week from the expiry of the fortnight and inspection forthwith thereafter. The suit will appear on the list for hearing a month after the fortnight. Certified for Counsel.