

(2017) 03 RAJ CK 0139
In the Rajasthan High Court
Case No : 789 of 2017

Gafur Khan & Ors.

APPELLANT

Vs

Ramjan Khan & Ors.

RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Code of Civil Pro

Citation : (2017) 03 RAJ CK 0139

Hon'ble Judges : Dinesh Mehta

Bench : SINGLE BENCH

Advocate : Manoj Bhandari, S.S. Khatri, Om Prakash Mehta

Judgement

1. By way of the present Writ Petition under Articles 226 & 227 of the Constitution of India, the petitioners have called in question, the order dated 25.11.2016, passed by the Addl. District Judge No.1, Jodhpur in Civil Appeal Decree No.2/2016, whereby a common application dated 15.03.2016, filed under Order VI Rule 17 of the Code of Civil Procedure, 1908, to amend the Plaint in Civil Original Suit No. 158/1984 and the written statement in the consolidated Case No.631/1987 has been rejected.

2. The skeleton facts necessary for the adjudication of the present writ petition are set out hereinfra:- 2.1 Petitioners-Plaintiffs, legal representatives of Safi Mohammad, instituted a suit for Permanent Injunction, against Ramjan Khan seeking an injunction restraining the respondents- defendants from interfering in the peaceful possession of their residential house situated at Sindhiyon-Ka-Bas, inside Nagauri Gate, Jodhpur.

2.2. The substratum of the plaintiffs' case as projected in the plaint was that their, forerunner Late Shri Safi Mohammad was in possession of the land in question for over 100 years, whose possession was hostile to the right and title

of the Municipal Board, Jodhpur, and as such the defendants have no right to inference in their long possession.

2.3. The respondents-defendant No.1 and 2 filed their joint written statement and contested the suit, inter alia, denying plaintiff's adverse possession over the contentious land, while taking a specific plea that the Municipal Board had executed a registered sale deed dated 01.02.1945 in favour of Ramjan Khan pursuant to which they were having title, besides having possession over the subject property. 2.4 It was also stated in the written statement that another registered sale deed dated 20.09.1978 came to be executed by the State Government, vide which the land in question stood transferred in the name of the defendants-respondents (the legal representatives of Ramjan Khan).

2.5. The Legal Representatives of Ramzan Khan-respondents also filed a suit seeking possession and mandatory injunction in relation to the very same property contending that the land-in- question was purchased by their predecessor (Ramjan Khan) vide registered sale deed dated 01.02.1945, while the defendants had illegally taken possession of the property on 09.03.1984, when the plaintiff (Late Ramjan Khan) was out of station for his business.

2.6. The above suit was registered as Civil Original Suit No.631/1987 and was consolidated vide order dated 09.10.1996 with the suit filed by the petitioners (Suit No.158/84). Based on the pleadings of the parties, following issues were framed by the Trial Court on 27.01.2006: "VERNACULAR MATTER OMITTED"

2.7. Both the consolidated suits, namely Civil Original Suit No.158/84 and Civil Original Suit No.631/87 came to be decided by the Civil Judge & Metropolitan Magistrate, Jodhpur Metro, Jodhpur, vide judgment and decree dated 04.01.2016 (hereinafter referred as "the Trial Court"). The Trial Court rejected the suit of Plaintiffs-Gaffur etc. (petitioners herein) and decreed the suit filed by the defendant-respondents (LRs of Ramjan Khan) vide a judgment and decree dated 04.01.2016, in following terms:-

(i) The plaintiffs" (LRs of Gaffur Khan) shall hand over the peaceful possession of the subject property to legal representatives of defendant Ramzan Khan within a period of two months;

(ii) The "Kachha construction" which has been raised illegally by the plaintiffs Gafoor Khan etc. shall be removed by them, at their own cost and the vacant possession of the plot shall be handed over to the defendants-respondents (LRs of Ramzan Khan); and

(iii) Cost of litigation shall be shared by the parties.

2.8. The petitioners-plaintiffs feeling aggrieved with the aforesaid judgment and decree dated 04.01.2016, preferred a regular appeal before the District Judge Jodhpur, which was registered as Appeal No.02/2016.

2.9. During the pendency of the appeal, the petitioners filed an application dated

15.03.2016, under Order VI Rule 17 read with Section 151 of the CPC, seeking amendment of the plaint filed in Civil Original Suit No.158/84, so also in the written statement filed by them in Civil Original Suit No. 631/1987.

2.10. Petitioners being LRs of Safi Mohammad stated in the application that they are illiterate/less educated persons and were not much aware about the legal intricacies. It was stated in the application that when their relative Nisar Mohammad son of Nazir Khan came to know about the said judgment and decree dated 04.01.2016, he enquired into the matter and realized that the entire case was contested by the plaintiffs, on the basis of adverse possession, whereas they were having ownership right/ title over the said property. Said Nisar Mohammad then informed the plaintiffs that the plot in question was sold by his grand-father (Bashir Khan), who was brother of Safi Mohammad, father of the plaintiffs, by way of registered sale deed. Said Nisar Mohammad handed over a Photostat copy of the registered sale deed dated 06.09.1965 and original map of the subject property.

2.11. As indicated in the amendment application, when the factum of registered sale deed came to the knowledge of the plaintiffs on 15.01.2016, they immediately applied for obtaining certified copies of the relevant sale deeds, which were received on 25.01.2016.

2.12. On the basis of the facts unravelled, the amendment application in question was filed, whereby a new stand was sought to be taken and the petitioners-plaintiff were attempted to be projected as Title Holders of the land-in-question. By way of the application under consideration the following amendments/substitutions were sought for:-

Original Para 3 (in Suit No. 158/84) in "VERNACULAR MATTER OMITTED"

2.13. The application for amendment filed by the petitioners was hotly contested by the respondents and by way of a reply, it was contended that the amendment application was not bona fide; if allowed, it would change the nature of the suit; it does not fall in the scope of the provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908.

2.14. Above referred application dated 15.03.2016, filed by the petitioners came to be rejected by the Court below, vide its detailed order dated 25.11.2016, where in all the arguments and judgments cited by both the parties have been considered.

3. Oppugning the above order dated 25.11.2016, petitioners" have invoked supervisory jurisdiction of this Court under Articles 226 & 227 of the Constitution of India.

4. Mr. Bhandari, learned counsel for the petitioners assailing the order impugned, contended that the learned Court below has committed a serious error of law in rejecting the amendment application filed by the petitioners. He argued that it is a settled position of law that amendment of plaint, even at the appellate stage

can be permitted and the Court while deciding an amendment application, should apply liberal approach, so as to do substantial justice.

5. While taking the Court through the pleadings and averments in the amendment application, Mr Bhandari urged that the plaintiffs being LR's of Safi Mohammad were not aware of the fact that the contentious land, had been purchased by their ancestor Shri Safi Mohammad. He further submitted that legal representatives of Safi Mohammad or the plaintiffs, not well-versed with the law, when came to know about the factum of their ownership, immediately filed an amendment application, seeking incorporation of necessary averments in the plaint and written statement. He submitted that the Court should permit all such amendments, which are necessary to decide the real question and controversy between the parties and would avoid multiplicity of the litigation. In support of his arguments Mr. Bhandari cited the following judgments:-

1. 2006 (4) SCC 384:
2. 2009 (4) CCC 599:
3. 2009 (10) SCC 626: and
4. 2010 (1) Civil Court Cases 446.

6. He added that in case of amendments of the written statement, the Court should apply even a more lenient view and hence petitioners' written statement ought to have been permitted to be amended. He painstakingly strived that the Court below has erred in applying technical approach, whereas the present factual matrix warranted the amendment application to be allowed to set at rest, the controversy and the dispute between the parties.

7. Mr. Om Prakash Mehta on the other hand, countering the submissions of the petitioners, read the provisions of Order VI Rule 17 of the Code of Civil Procedure Code, 1908 and relied upon plethora of judgments, to drive home his point that the amendment application in question was not only frivolous, but an after thought to change not only the fulcrum, but also the frame of the suit.

8. To decide the question as to whether the amendment application in question dated 15.03.2016, subject matter of the present writ petition deserves to be allowed or not, it would be worthwhile to sail through the judgments relied upon by the respective parties one by one. In this process, it will be apt to deal with the judgments cited by the petitioner.

1. 2006 (4) SCC 385 Rajesh Kumar Agarwal & Ors Vs. K.K. Modi & Ors. In this judgment, the Supreme Court has laid down a test commonly known as Real Controversy Test. Paragraph 18 & 19 of the Judgment lays down the principles of Real Controversy Test, which are reproduced as under:-

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment

will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case."

With the help of the above judgment Mr. Manoj Bhandari contended that the Court below ought to have gone into the real controversy involved between the parties, instead of going into the correctness or falsity of the averments made in the application which was required to be gone into at a later stage.

(ii) 2009 (4) CCC 599 2009(10) SCC 626 Surendra Kumar Sharma Vs. Makhan Singh (Para 7), which is reproduced hereunder:-

"7. So far as the second ground is concerned i.e. the prayer for amendment of plaint, if allowed, shall change the nature and character of the suit, we are unable to accept this view of the High Court. We have carefully examined the amendment prayed for and after going through the application for amendment of the plaint, we are of the view that the question of changing the nature and character of the suit, if amendment is allowed, cannot arise at all. The suit has been filed for eviction inter alia on the ground of arrears of rent. It cannot be disputed that even after the amendment, the suit would remain a suit for eviction. Therefore, we are unable to agree that if the amendment of the plaint is allowed, the nature and character of the suit shall be changed. Accordingly, the High Court was not justified in holding that the nature and character of the suit shall be changed, if such prayer for amendment is allowed."

While relying upon the aforesaid paragraph of the judgment counsel for the petitioner has urged that in the present case also the nature and character of the suit would remain the same and it will continue to be a suit for Permanent Injunction, hence the amendment sought should not have been denied.

(iii) 2010(1) Civil Court Cases 446 Sushil Kumar Jain Vs. Manoj Kumar Jain Para 9 & 10 quoted as under:-

9. That apart, a careful reading of the application for amendment of the written statement, we are of the view that the appellant seeks to only elaborate and clarify the earlier inadvertence and confusion made in his written statement. Even assuming that there was admission made by the appellant in his original written statement, then also, such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his defence.

10. At this stage, we may remind ourselves that law is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering, substituting a new cause of action (See Baldev Singh & Ors. Vs. Manohar Singh & Anr. AIR 2006 SC 2832). With the help of the above judgment Mr. Manoj Bhandari argued that at least the amendment in the written statement filed in the Suit No.631/1987 should have been allowed. He submitted that firstly- there is no retraction from the admission made in the written statement and even if, it is presumed to be a retraction, the admission can be explained by amending the written statement, by taking inconsistent pleas or altering the defence.

9. Mr. Om Prakash Mehta learned counsel for the respondents- defendants read the plaintiffs' amendment application, the relevant part of the plaint and dealt with the amendments sought by the petitioners. While reading the plaint vis-a-vis the amendment application, learned counsel for the respondents contended that the amendment, if allowed, would completely change the structure of the suit and so also, the written statement filed by the petitioners. Elaborating his argument, Mr.Mehta urged that the suit in question, as filed by the plaintiffs was for permanent injunction, on the basis of categorical stand that the petitioners' possession (LRs of Safi Mohammad) is hostile to the right and title of Municipality and the sale deed dated 22.02.1984 got executed by the defendants Ramzan Khan was a nullity. It was contended that by way of the amendment application the petitioners have tried to take an altogether different stand to the effect that the plaintiffs did have title, right and ownership over the land in question by virtue of a registered sale deed dated 06.09.1965, executed by Shri Bashir Khan (brother of plaintiff), which is impermissible in law.

The arguments of Mr. Mehta can be categorized as under:-

(A) Amendment sought in the plaint and in the written statement would change the complete structure of the suit, which is forbidden in law, in light of the following judgments.

A-(i) 2009 AIR SC 1948 Alkapuri Cooperative Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) Thr. L.Rs. (para 18) is reproduced as under:-

""18. There cannot be any doubt or dispute that an application for amendment of the plaint seeking to introduce a cause of action which had arisen during the

pendency of the suit stands on a different footing than the one which had arisen prior to the date of institution of the suit. We have noticed herein before that the plaintiff-respondents in their application for amendment of the plaint themselves accepted the fact that the appellant herein not only had filed a suit prior in point of time to the suit filed by the deceased respondent but had also obtained an injunction as a result whereof they did not obtain effective possession of the suit land. If that be so, in our opinion, the plaintiff-respondents in effect and substance are seeking to alter the basic structure of the suit which in the case of Sampath Kumar (supra) itself has been held to be impermissible."''

A-(ii) 2009 AIR SCW 6644 M/s Revajeetu Builders & Developers vs. M/s Narayanaswami & Sons & Ors. Mr. Mehta read various paragraphs of this celebrity judgment wherein, the Supreme Court has culled out the principles and factors to be reckoned, while deciding an amendment application and argued that on any of the counts, the amendment application filed by the petitioners cannot be allowed.

"FACTORS TO BE TAKEN INTO CONSIDERATION WHILE DEALING WITH APPLICATIONS FOR AMENDMENTS:

67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money; (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

A-(iii) AIR 2013 SC 3188 Mashyak Grih Nirman Sahakari Sansthan Maryadit Vs. Usman Habib Dhuka. Para 7 is reproduced as under:-

7. Prima facie the aforesaid statement made in the amendment petition is not correct. Indisputably, the plaintiff- respondent no.1 was the office-bearer of the Society at the relevant time and by Resolution taken by the Society respondent No.1 was authorized to complete the transaction.

Hence, it is incorrect to allege that the plaintiff-respondent No.1 was not aware about the transaction of 1989. Moreover, before the institution of the suit in the year 2010, the plaintiffs allegedly came to know about the Conveyance Deed

dated 8th February, 1989, some time in the year 2009, but relief was not sought for in the plaint which was filed much later i.e. 14th October, 2010. The High Court has not considered these undisputed facts and passed the impugned order on the general principles of amendment as contained in Order VI Rule 17 of the Code of Civil Procedure. Hence we do not find any ground for allowing the amendment sought for by the plaintiffs which was not only a belated one but was clearly an after- thought for the obvious purpose to avert the inevitable consequence. The High Court has committed serious error of law in setting aside the order passed by the trial court whereby the amendment sought for was dismissed. The impugned order of the High Court cannot be sustained in law."

A-(iv) AIR 1922 Privy Council 2 Ram Kishore & Ors. Vs. Jainarayan & Ors.

A-(v) AIR 1950 Privy Council 68 Kanda Vs. Waghu. Para 12 is reproduced as under:-

"In asking the Board to allow the plaint to be amended at this stage attention has been drawn to the provisions of Section 153 and 6. VI, Rule 17, of the Code of Civil Procedure. The powers of amendment conferred by the Code are very wide, but they must be exercised in accordance with legal principles, and their Lordships cannot allow an amendment which would involve the setting up of a new case. The judgment of Lord Buckmaster in *Ma Shwe My a v. Maung Mo Hnaung* (1922) L.R. 48 I.A. 217, s.c. 24 Bom. L.R. 682 is directly in point. It was there held that it was not open to a Court under Section 153 and Order VI. Rule 17, to allow an amendment which altered the real matter in controversy between the parties. The application for leave to amend is rejected."

B- Admission once made cannot be permitted to be withdrawn:

Mr. Mehta contended that the petitioners-plaintiffs in no ambiguous terms had admitted that they did not have right, title or ownership over the property and maintained said stand for about 50 years and admitted that the Municipality is the owner of the land/property. By way of the amendment they want to withdraw from the admission so made, which is impermissible in light of the following judgments.

B-(i) AIR 2005 Madras 431 Pappaymmal Vs. Palanisamy & Ors. (Para 32), which runs as under:-

"32. The following are the important principles, laid down in the above decisions of this Court as well as the Supreme Court :

i) A party can plead adverse possession only when he admits that another person has got title.

ii) In the case of a co-owner, mere possession, however long it might be, would not constitute adverse possession. The possession must be over the statutory period and there must be clear ouster to the knowledge of the co-owner against whom the adverse possession is pleaded.

iii) As between the co-owners, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment of one of them to the knowledge of the other, so as to constitute the ouster. The burden of making out ouster is on the person, claiming to displace the lawful title of the co-owner, by his adverse possession.

iv) The party pleading adverse possession must state with sufficient clarity as to from when his adverse possession commences and the nature of his possession.

v) When the co-owners are close relations, something more is to be proved, to prescribe title by adverse possession, than a case between two strangers.

vi) It would not be sufficient to show that one co-owner was in separate possession of the property and another co-owner was out of possession.

vii) A single circumstance of payment of tax or mutation of records would not, by itself, establish ouster or adverse possession as against the co-owner."

With the help of the aforesaid judgment, Mr. Mehta contended that by way of placing fresh facts, documents and seeking an amendment, the petitioners are making an attempt to call upon the respondents to admit or deny fresh pleadings. While reading Para 32 of the judgment, he contended that the party can plead adverse possession only when he admits that another person has got title.

Advancing his argument, he pointed out that the petitioners' specific case was that they are having possession on the contentious property hostile to the right and title of the Municipality and, therefore, admitted that Municipality had title and ownership of the subject land and if, the amendment in question is permitted, their case of adverse possession as originally framed cannot continue.

B-(ii) AIR 1998 SC 618 Heera Lal Vs. Kalyan Mal & Ors. Para 9 & 10 are reproduced hereunder:-

"9. Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind his admission that there was an agreement of 25th January 1991 between the parties but the nature of agreement was sought to be explained by him by amending the written statement by submitting that it was not agreement of sale as such but it was an agreement for development of land. The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondents. Even that apart the said decision of two learned judges of this Court runs counter to a decision of a Bench of three learned judges of this court in the case of Modi Spinning Co. [(1977) 1 SCR 728]. In that case Ray, CJ., Speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff.

It was held that such an inconsistent plea which would displace the plaintiff complete from the admissions made by the defendants in the written statements cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000/- against the defendants. The defendants in their written statement admitted that by virtue of an agreement date 07th April 1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under order Vi Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockist- cum-distributor. Such amendment was rejected by the Trial Court and the said rejection was affirmed by the High Court in Revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned judges of this the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the notice of the Bench of two learned judges that decided the case in *Akshaya Restaurant (supra)*. In the latter case it was observed by the Bench of two learned judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in *Akshaya Restaurant (supra)* proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However the aforesaid decision of the three member Bench of this Court in *Modi Spinning (supra)* is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff's case the cause him irretrievable prejudice.

10. Consequently it must be held that when the amendment sought in the written statement was of such nature as to displace the plaintiff's case it could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view.

B-(iii) AIR 2005 SC 3708 *Union of India Vs. Pramod Gupta* Para 142 is reproduced as under:-

142. We do not agree. The pleadings before the Trial Court are the basis for

adduction of evidence either before the Trial Court or before the Appellate Court. By amending the memo of appeal the original pleadings cannot be amended. The claimaints-Respondents made their claim before the Reference Court claiming compensation for the lands acquired under two different references at a certain rate. They are bound by the said pleadings. Section 53 merely provides for applicability of the provisions of the Code of Civil Procedure including the one containing Order 6 ,Rule 17 thereof, Order 6,Rule 17 of the Code of Civil Procedure postulates amendments of pleadings at any stage of the proceedings. Before an amendment can be carried out in terms of Order 6,Rule 17 of the Code of Civil Procedure the court is required to apply it's mind on several factors including, viz., whether by reason of such amendment the claimant intends to resile from an express admission made by him. In such an event the application for amendment may not be allowed. [See Ms Modi Spinning & Weaving Mills Co. Ltd. and another v.Ms Ladha Ram & Co.[AIR 1977 SC 680],Heeralal v.Kalyan Mal and others [(1998) 1 SCC 278] and Sangramsingh P. Gaekwad & Ors. v.Shantadevi P. Gaekwad (Dead) thr. Lrs.& Ors.[JT 2005 (1) SC 581]].

(C) Facts available not supplied:-

It was also argued on behalf of the respondents that the sale deed in question which was being sought to be brought on record and made basis of the present case, was admittedly executed, way back on 06.09.1965 and it cannot be believed that the plaintiffs who have been contesting over the disputed property even during the lifetime of Safi Mohammad were not aware of the said sale deed. Mr. Mehta contended that though the said sale deed was available with the plaintiffs but since the sale deed in question was executed by Bashir Khan, (brother of Safi Mohammad) having no title over the property, the plaintiffs knew it well that they could not succeed in establishing ownership of the property. As such they did not consciously choose to stake their claim on the basis of such sale deed. After having lost the case and on realizing that their plea of adverse possession is worthless, they have come out with the said sale deed and are trying to take a completely different stand. In other words, he contended that by way of an amendment application, the applicants cannot be permitted to place the facts, which were available, but not placed. In support of this contention, he relied upon the following judgments:-

C- (i) AIR 1976 216 Bhubaneswar Vs. Janak Patel. Para 6 being reproduced hereunder:-

"6. In the present case the plea that the plaintiffs had acquired title to the suit lands by inheritance was available to them when they filed the suit but such a case was not made out in the plaint. Allowing the amendment at this stage would necessitate remand of the suit to the trial Court, addition of new parties, filing of fresh written statement, framing of fresh issues and recording of fresh evidence."

C-(ii) AIR 1984 (P & H) 292 Ranjit Kaur Vs. Ajaib Singh : (Para 4), reproduced as under:- "4. After hearing the learned counsel. for the parties, I am of the

considered opinion that no amendment sought for by the defendant could be allowed by the lower appellate Court. No one is entitled to seek amendment of the pleadings as a matter of right; particularly in appeal. The argument that an amendment could be allowed at any stage and that the prayer to that effect could not be declined on the ground that the application made in that behalf was a delayed one, does not mean that the parties to the proceedings are entitled to seek amendment of the pleadings at any stage as a matter of right. It only means that if the Court finds that the proposed amendment is necessary for the determination of the controversy between the parties, the amendment may be allowed even at a late stage. Here again the jurisdiction of the Appellate Court is further limited, because after the passing of the decree by the trial Court, the right of the parties is closed and then a very strong case is to be made out why the plea sought to be taken by way of amendment could not be taken earlier. In that situation, the delay in making the application in this regard, has all to be explained to the satisfaction of the Court. It is at that stage, if the Court is satisfied, that the Court may allow the amendment in a given case. As regards the facts of the present case, the conduct of the defendant speaks for itself. All the possible pleas were taken by him in the written statement before the trial Court. The plea now sought to be taken by way of amendment in the written statement was very much available to him at the trial stage. There is absolutely no explanation why the plea was not taken earlier in the trial Court. The approach of the lower appellate Court in this behalf is wholly erroneous; particularly when it was observed that the proposed amendment could not be defeated simply because it had been sought at the appellate stage. As observed earlier, the facts of the present case did not warrant that the defendant should have been allowed to take the plea by the proposed amendment of the written statement in appeal. Prima facie, the application for amendment of the written statement seems to have been actuated by mala fide intentions."

C-(iii) AIR 1950 Madras 32 Bhagvantula Gopalakrishnamurthi & Ors. Vs. Dhulipalla Sreedhara Rao & Anr. Relevant para 7 of the judgment is being reproduced for ready reference-

"If by reason of the subsequent events certain rights accrued to the plaintiff the plaintiff would be entitled to claim relief under those rights. But in this case certain facts are alleged which facts were available to the plaintiffs and which the plaintiffs have not chosen to mention in the original plaint and I do not think it would be open to Courts to permit such an amendment as it would, in the words of their Lordships of the Privy Council in the case reported in *Ma Shwe Mya v. Maung Mo Hmaung*, 48 Cal.832 : (A.I.R. (9) 1922 P.C.249), permit a new case to be made on facts which were available but were not pleaded. I think that the result of allowing the amendment would be to introduce a new element which was absent in the original plaint and that the plaintiffs are not entitled to any such amendment. I hold that the learned Subordinate Judge was in error in granting the amendment. The petition is allowed with costs."

D:- Amendment will not be allowed if fresh suit on the new facts is barred With the help of the principles so enunciated by the Supreme Court, learned counsel contended that the amendment sought is neither bonafide nor a fresh suit on the basis of amendment sought could be maintained being barred by limitation. In support of this argument he again relied upon the principles reverberated in Revajeetu Builders & Developers (Supra).

E:- Limited scope of interference under Article 227 of the Constitution of India:

Having argued on the merit of the amendment application, Mr. Mehta also addressed the Court on the scope of interference under Articles 226 & 227 of the Constitution Of India in the matter arising from interlocutory orders passed by the Civil Courts.

He submitted that in light of various decisions of the Supreme Court, there is a little scope of interference by the High Court under its Supervisory Jurisdiction. He cited the following judgments of the Supreme Court to buttress his argument:-

E-(i) AIR 2011 SC 1353 Kokkanda B. Poondacha & Ors. Vs. K.D. Ganapathi & Anr.;

E-(ii) AIR 2010 SCW 6387 Shalini Singh Shetty & Anr. Vs. Rajendra Shankar Patil.

E-(iii) AIR 2009 SCW 4006 Radhey Shyam & Anr. Vs. Chhabi Nath & Ors. Para 29 is reproduced as under:-

"29. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in Surya Dev Rai and with that we have no disagreement." In light of the above submission, Mr. Mehta contended that neither does the amendment application in question fall within the ambit of Order VI Rule 17 of the Code of Civil Procedure nor can the documents in question be taken on record and considered, under Order IVI Rule 27 of the Code of Civil Procedure; the amendment in question was not bonafide and if the amendment is permitted, the entire frame work of the suit, would be changed; and the matter will have to be examined de-novo; the Court below has passed a detailed order examining each and every aspect of the matter which does not suffer from any infirmity or error of law so as to call for interference by this Court.

10. Mr. Bhandari arguing in rejoinder, read Para 3 of the plaint and written statement filed by his client in connected case No.631/1987 and contended that the proposed amendment would serve the ends of justice and even after

amendment, the suit in question would continue to be a suit for mandatory injunction. He added that the ground for seeking injunction, which was adverse possession, after amendment would however be the title, nevertheless the plaintiffs' case against the defendants would remain/ continue to be a suit for permanent injunction. As such the nature and character of the suit will remain the same, and there should be no impediment in allowing the amendment application.

After hearing learned counsel for the parties at length and scanning the judgments cited by both the parties, it would be worthwhile to be reminded the principles enounced by various courts of law with respect to ambit and scope of Order VI Rule 17 of the Code of Civil Procedure, 1908.

To understand the real nature and scope of amendment and the fundamentals governing the law relating to the applications for amendment filed under Order VI Rule 17, one must advert to the celebrated judgments of *M/s Revajetu Builders & Developers (Supra)*. In the aforesaid judgment, the Supreme Court after considering almost all the judgments on the subject and legislative history, has asserted with authority the following principles:-

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
- (2) Whether the application for amendment is bona fide or mala fide? (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

If the amendment application in question is tested on the touchstone of the principles propounded in *Revajetu Builders & Developers (Supra)*, and other judgments, I unhesitantly hold that it deserves to be rejected. The reasons for reaching to such conclusion are catalogued here under :-

(i) Amendment is not bonafide:-

The petitioners have portrayed a story in the application that the sale deed in question came to the knowledge of the plaintiffs only when Nisar Mohammad, grand son of Bashir Khan, (the seller of the land in question) learnt that the plaintiffs have lost their case, as it was based upon adverse possession, whereas his grand father Bashir Khan, brother of Safi Mohammad had sold the property to the plaintiffs" vide sale deed dated 06.09.1965.

In considered view of this Court, it is a canard created to bring in a new case, cause of action whereof had already become extinct. It is difficult nay impossible for anyone to digest that in a dispute like the one, when the parties have locked horns, rather afayed over the property for more than four decades and seeds whereof had been sowed in the lifetime of Safi Mohammad, the purported purchaser, would not claim the ownership or title over the property, if he were having a valid title in his favour.

Mr. Mehta's line of reasoning in this regard, appears to be understandable that said Bashir Khan, the alleged seller, himself did not have any title over the property and as such, though the sale deed in question had been concocted by the plaintiffs, they could not muster the courage to place the same before the Court, being wary of the legal position that their stand on such sale deed was too shaky or tender to triumph.

The plaintiffs having lost the battle on the basis of adverse possession, have tried to shift their stance and for the first time brought to fore, the sale deed dated 06.09.1965. By way of the application under consideration, they have sought an amendment in the plaint as well as in the written statements, which application lacks bona fides and deserves rejection.

(ii) Proposed amendment constitutionally and fundamentally changes the nature and character of the case.

A conjoint reading of the amendment application with the plaint shows that by way of amendment sought, the plaintiffs have tried to change the nature and character of the case and as such, the amendment in question cannot be permitted in light of the judgments of the Supreme Court; referred in foregoing paragraphs.

It is not in dispute that the petitioners-plaintiff had filed a suit for permanent injunction, on the basis of adverse possession, wherein it was specifically averred that the plaintiffs had been enjoying the possession of the said property for about 100 years and their possession was hostile to right, title and ownership of Municipality.

By way of the application for amendment, the plaintiffs have attempted to change their stand and have sought to contend that they are the owners of the property, by virtue of the sale deed executed by Bashir Khan, brother of Safi Mohammad, the forerunner of the plaintiffs.

If such amendment is allowed, it would not only change the nature and character of the case, it would procreate an entirely new case, which is impermissible in the guise of an application for amendment filed after the suit itself had been dismissed on merit, having continued for about 30 years.

One wonders that when Safi Mohammad himself had filed an appeal against the order dated 25.05.1973 of the Land Allotment Committee of the Municipality, why had he not staked his claim on the basis of a title document executed in his

favour and harped upon and contested the case only on the plank of possession.

Arguendo, if the amendment in question is allowed, vide which, the applicants, instead of raising any additional plea, have sought replacement of Para 3 of the plaint and Para 2 of the written statement in place of earlier paragraphs (comparative chart whereof has been reproduced in earlier part of the judgment), this Court is sure that the same would constitutionally and fundamentally change the nature and character of the case.

Mr. Bhandari's contentions that even after the amendment, the suit in question will continue to be a suit for permanent injunction, cannot be accepted inasmuch as ultimate relief is not the sole decisive factor for deciding the nature and character of the case. For this purpose pleadings and stand of the parties are equally important aspects to be considered. Hence, the application under consideration was meant to be rejected and has been rightly rejected by the Court below.

My aforesaid conclusion is fortified by the judgments of the Supreme Court reported in AIR 2009 SC 1948; AIR 2009 SCW 6644, AIR 2013 SC 3188 and AIR 1950 P & H 68.

(iii) Fresh suit on the amended claim would be barred.

In the judgment *Revajeetu Builders & Developers (Supra)* the Supreme Court has laid down a very important criterion viz. "as general rule the Court should decline the amendments, if a fresh suit on the amended claims would be barred by limitation on the date of application.

Mr. Bhandari on behalf of the petitioners argued that he can very well bring a fresh suit for injunction on the basis of title documents or the sale deed dated 06.09.1965 and thus, the Court below ought to have allowed the amendment to avoid multiplicity of litigation.

Without commenting much on this argument, to avoid possible prejudice to the petitioners' cause, this Court feels that if the plaintiffs wish to seek a permanent injunction and annulment of the sale deed, executed in favour of the respondents in 1984, on the basis of the subject sale deed dated 06.09.1965, it would be preposterous to argue that the limitation would be counted from the date, when the sale deed has been unearthed by a stranger to the suit i.e. from 15.01.2016.

As such, the amendment in question cannot be and should not be permitted, as the fresh suit would be apparently barred by limitation, if filed on the basis of the sale deed dated 06.09.1965.

(iv) Admission cannot be permitted to be withdrawn.

A careful reading of the plaint filed by the petitioners and their written statement filed in other connected case reveals that the plaintiffs had in unequivocal terms admitted that the Municipality is the owner of the subject property and they are having adverse possession over the said land. If the amendment in question is

permitted to be carried out, the plaintiffs would be resiling from their admission regarding Municipality's ownership over the plot. Such stand of the petitioners-plaintiff cannot be treated to be an alternative stand; rather it is a contradictory or self defeating stand. In opinion of this Court, one stand defeats or counters the other. The petitioners having admitted and iterated that Municipality is the owner of the land, cannot be permitted to backtrack, rather take a somersault to begin a new race from square one. As such the amendment application under consideration merits rejection.

(v) Frame of the suit will be changed:-

Besides the aspect of fundamental nature and character of the case, another important aspect which should be considered by the Court, is as to whether the amendment in question would change the frame and structure of the case.

In the present case, the case of the plaintiff has hinged upon the possession, if the amendment as prayed is allowed it would rest on the title. The amendment as sought will not only change the frame and structure of the case, but would also change it's fulcrum. In considered opinion of this Court fulcrum or substratum of the case cannot be permitted to be changed by way of an amendment or substitution of the pleadings.

As such in considered view of this Court, the amendment rather substitution as prayed for, if allowed, will result in miscarriage of justice and will be violative of the fundamental principles of pleadings.

(VI) Facts available not supplied.

A reading of para Nos. 6 & 7 of the plaint reveals the the plaintiffs have taken a specific stand that the Land Allotment Committee of the Municipality had issued an allotment letter in favour of the defendant Ramjan Khan and others against which, late Safi Mohammad himself had filed an appeal which came to be allowed.

As discussed earlier the factum of sale deed having been executed by Bashir khan in favour of Safi Mohammad cannot be believed to be unknown to the plaintiffs. The entire case of the petitioners-plaintiffs has been that they were having adverse possession, while the sale deed in question had been executed on 06.09.1965. Said Safi Mohammad who had purportedly purchased the property, ought to have himself brought this important document to the light and should have contested the case on the basis of such title document. The fact regarding the purchase of the land, was obviously known to the plaintiffs, yet they have kept the same up their sleeves, for the reasons best known to them.

It is surprising to note the manner, in which the said sale deed dated 06.09.1965 has been attempted to be brought to the light. As stated in the amendment application, Nisar Mohammad, grand son of the seller Bashir Khan informed the plaintiffs that they are having title over the property, pursuant to a sale deed executed by his grand father Bashir Khan. It is all the more astonishing that said Nisar Mohammad so closely related, has pleaded ignorance about the present

litigation, despite the fact that many of his other relatives had appeared in witness box and there had been instances of physical altercation/assault between the parties.

Learned Trial Court has aptly dealt with the stand of the applicants and Nisar Mohammad, and discard to disbelieve their story by observing that no seller would keep a copy of the sale deed for 50 years. The story portrayed by the plaintiffs is interesting to read, difficult to believe and impossible to approve.

In sum and substance, the facts sought to be brought on record, if at all existed, they were very much available with the plaintiffs. If the plaintiffs have chosen not to bring those facts before the Court, they cannot now be permitted to bring the same, after having fought over the property for 50 long years and more particularly when they have failed in their attempt to prove adverse possession. The attempt to supplant new facts cannot be permitted by way of the amendment application, at a subsequent stage. As such the application dated 15.01.2016 filed in Civil Appeal Decree No.2/2016 deserved to be rejected and the same has been rightly rejected by the Court below.

Viewed from any angle, no error can be found in the order under scrutiny dated 25.11.2016. The same is approved, whereas the writ petition instant is rejected.