
(1973) 08 DEL CK 0015

In the Delhi High Court

Case No : Civil Revision Appeal No. 244 of 1972

Kartar Singh

APPELLANT

Vs

Sir Sobha Singh and Sons Pvt. Ltd.

RESPONDENT

Date of Decision : 13-08-1973

Acts Referred:

Citation : (1974) ILR Delhi 82 : (1974) RLR 491

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Advocate : G.S. Vohra, H.R. Khanna and Anantbir Singh, for the Appellant;

Judgement

H.L. Anand, J.

(1) This revision is directed against an order of the trial Court allowing the respondent's application for amendment of the plaint in the suit instituted by the respondent inter alia, for recovery of possession of the property in dispute from the petitioner.

(2) The facts are not in dispute and may be briefly stated. The petitioner has been in occupation of the premises in dispute since September, 1963 on the basis of a letter issued by the respondent the owner of the property, and one of the questions in controversy between the parties is as to the true construction of the letter viz" whether the aforesaid letter can be construed as creating a lease in favor of the petitioner or a mere license in respect of the property in dispute. The suit out of which the revision has arisen was tiled by the respondent on October 29," 1969 oddly enough for a "mandatory injunction^ directing the petitioner to vacate the premises in dispute and for recovery of license fee on account of the petitioner's use and occupation of it. The frame of the suit was either because of inartistic drafting of the plaint or was intended to save court fees because the court fees on the value of the property was not paid on the plaint initially. On the objection of the petitioner that the suit was in effect one for recovery of possession from the petitioner and that the respondent was,

Therefore, liable to pay court fees on the value of the property, the trial Court directed the respondent to pay additional court fees and after the adjudication of the question as to the true valuation of the property by the trial Court, the deficiency was made good by the respondent. It is then that the respondent made an application under Order 6 Rule 17 of the CPC on April 15, 1971 seeking to add the word "vacate" in the relief with a view to make the relief more explicit but this application was withdrawn on August 25, 1971.

(3) In his written statement, the petitioner contended that the petitioner was a tenant in respect of the premises in dispute and had been paying rent in respect of it to the respondent and denied the averment that the petitioner was a licensee. The petitioner also contended that the suit in its present form was not maintainable. In its replication, the respondent by and large reiterated the allegations made in the plaint and in particular affirmed that the petitioner has been a licensee and was not a tenant in respect of the premises.

(4) On the pleadings of the parties, the trial Court framed as many as 9 issues. Issues No. 3, 4, 6 and 8 which would have some bearing on the points in controversy in the present petition are in the following terms:

"3. Whether the defendant is a licensee under the plaintiff in respect of the said flat at a monthly license fee of Rs. 255.00 besides electric charges as alleged? O. P. P." 4. If issue No. 3 is proved whether the defendant is a tenant under the plaintiff as alleged? O. P. D." "6. Whether the suit is not maintainable as alleged in para 1, of the preliminary objections? O. P. D." "8. To what amount, the plaintiff is entitled to recover as being the license fee and damages? O. P. P."

(5) On May 8, 1972, the respondent, an application under Order 6 Rule 17 of the CPC seeking leave of the Court to amend the plaint, inter alia, to describe the suit as being for recovery of possession instead of for mandatory injunction and for future mesne profits, to bring out the alleged obligation of the petitioner to hand over possession of the premises to the respondent on the termination of the license, to add to the existing claim for recovery of license fee etc. a claim of the amount as arrears of rent in the alternative and to modify the prayer clause so as to seek a decree for possession of the property in dispute and for the award of future mesne profits from the date of the suit till the date of recovery.

(6) The application was opposed on behalf of the petitioner on various grounds and by the impugned order, the trial Court granted leave to the respondent to amend the plaint.

(7) In the course of the impugned order, the trial Court justified leave to amend the title of the plaint on the ground that the suit, though described as for mandatory injunction, was in substance one for recovery of possession and the respondent having since paid the necessary court fees requisite on such a suit, the substitution of the description of the suit would not in any way change the nature of the cause of action. The proposed addition of the claim for recovery of rent in the alternative was justified by the trial Court on the ground that the

claim being in the alternative did not introduce any change in the nature of the suit particularly because the respondent had not sought any change in the alleged basis of the petitioner's occupation of the property. The contention of the petitioner that the proposed amendment would prejudice the petitioner as the claim for arrears of rent had become barred by time was, however, negated on the ground that once the amendment was allowed it would date back to the date of the institution of the suit. The introduction of the claim "mesne profits" in the suit was also justified by the trial Court on the ground that it would not change the nature of the suit or the cause of action. The contention of the petitioner that the application for leave to amend was belated, was negated.

(8) Aggrieved by the order of the trial Court, the petitioner has come up in revision.

(9) S. Gian Singh Vohra learned counsel for the petitioner conceded that the trial Court was justified in permitting the respondent to amend the title of the suit and to add the relief by way of recovery of possession of the premises in dispute as the plaint in substance though inartistically or deliberately drawn as originally filed was one for recovery of possession. Learned counsel also did not take any exception to the introduction of the term "mesne profits" but contended that the claim for "future mesne profits" should not have been allowed to be added because such a claim was not sustainable in law. The challenge to the impugned order was Therefore principally confined to the extent it granted leave to the respondent to amend the plaint "so as to introduce the claim of the amount as arrears of rent in the alternative.

(10) Learned counsel for the petitioner contended that the suit of the respondent as originally framed was, apart from the relief regarding mandatory injunction, for recovery of Rs. 4,400.00 on the allegation that the petitioner has been in possession of the premises as a licensee and had not paid license fee for a certain period until the termination of the license and was liable to pay license fee for the said period and for use and occupation subsequent to the termination of the license besides notice charges and that the attempted introduction by the respondent into the plaint of a claim of rent in the alternative would be tantamount to setting up an entirely new case because originally the case was based on the alleged legal character of the petitioner as a licensee in respect of the property while the alternative claim is based on his purported legal character as a tenant in respect of the premises. It was further contended that because the amendment was sought after a considerable delay the petitioner was seriously prejudiced by the leave as a fresh suit for the recovery of rent had meanwhile become barred by time and as a result of the amendment, the petitioner would be deprived of an opportunity to set up the plea of limitation.

(11) In support of his first contention, the learned counsel for the petitioner relied on Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, and two unreported judgments of this Court in Civil Revision No. 174 of 1969 and Civil Revision No. 304 of 1970.

(12) In *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, , the Supreme Court was concerned with a suit which had been filed by the plaintiff under Order 21 Rule 103 of the CPC after the execution of the decree obtained by the plaintiff for possession against one of the defendants had earlier been obstructed by the other defendants. In the plaint, the plaintiff did not make any averment as to the facts and grounds on which the plaintiff based his title to the suit properties besides mentioning the decree obtained in the earlier suit. The application of the plaintiff for permission to give further and better particulars of the claim was rejected by the trial Court but was allowed in appeal by the High Court and the question before the Supreme Court was whether the High Court should not have exercised its power to allow the amendment because the period of limitation for a suit had already expired before the date on which the application for amendment was made and there was delay in seeking the amendment. Relying on AIR 1921 50 (Privy Council) , the Supreme Court held that the power exercised by the High Court was within its discretion and the discretion had not been exercised on any wrong principle because amendment did not introduce a new case and that the other party could not be said to have been taken by surprise or to have to meet a new claim set up for the first time after the expiry of period of limitation. It was also held that all amendments ought to be allowed which satisfy two conditions of not working injustice to the other side and of being necessary for the purpose of determining the real question in controversy between the parties. It was further held that where a party sought to amend the plaint by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation the amendment must be refused.

(13) In *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, , the Supreme Court upheld the order of the first appellate Court which allowed amendment at the appellate stage even though it realised that by doing that it was depriving defendant No. 1 of a very valuable right which he claims he had acquired, namely, that of pleading a bar of limitation against the amended plaint but felt that it would be guided more in this matter by regard to the principles of substantial justice. This is how the High Court had justified the order :

"WE realise that by doing what we propose to do, we may deprive defendant No. 1 of a very valuable right which he claims he has acquired, namely, that of pleading bar of limitation against the amended plaint but we are guided more in this matter by regard to the principles of substantial justice and we think that if we can make sufficient compensation to the first defendant by making drastic order of costs in his favor and against the plaintiff we shall not be doing any injustice to him."

(14) In the course of the judgment, S. L. Das J. speaking for the Court, inter alia, referred to an earlier decision of the Supreme Court in the case of *L. J. Leach and Co. vs. Jardine Skinner & Co.* AIR 1957 SC and of the Privy Council in the case of AIR 1921 50 (Privy Council) which laid down the principle that even if

a fresh suit on the amended claim may be barred by limitation, there was full power to make the amendment and although such a power should not as a rule be exercised yet, there were cases where such considerations were outweighed by the special circumstances of the case. Das J. also quoted with approval the observations of Batchelor J. in the case reported as 33 Bombay 644, a case where the claim was for dissolution of partnership of the accounts and the plaintiff had alleged that in pursuance of the partnership agreement, they had delivered Rs. 4001.00 worth of cloth to the defendants. The trial Court found that the plaintiff did deliver cloth but that no partnership was created and at the appellate stage plaintiff was allowed to abandon the plea of partnership and substitute a prayer for the recovery of the amount even though on the date of the amendment, the claim for the recovery of money was barred by limitation on the ground that the amendment had been rightly allowed as the claim was not a new one.

(15) In *Rachhea Singh V. Upendra Chandra Singh* 27 Cal 239, a Division Bench of the Calcutta High Court held that in a suit for rent on damage can be decreed for use and occupation in the absence of an alternative claim for use and occupation. No such alternative claim had been made in that case.

(16) In *Narayan Ganesh V. Hari Ganesh* ILR 13 Bom 664, a Division Bench of the Bombay High Court held that it was not open to a Court to frame new issues which would have the effect of altering the nature of the suit because the power to raise additional issues appeared to the High Court to be co-extensive with its power of amending the pleadings and was subject to the same restrictions. In that case, the plaintiff had originally used the defendant as a trespasser claiming damages for wrongful occupation and for injury done to the land in dispute and sometime after the issues had been framed, the plaintiff had applied for amendment of the plaint seeking to recover rent for the land in suit on the basis of a subsisting tenancy. The trial Court without making the amendment framed two additional issues as to the relationship of landlord and tenant and as to the liability to pay rent and eventually found that the tenancy was still subsisting and granted a decree for the rent claimed by the plaintiff. It was held that the trial Court had no authority to frame the new issues which had the effect of converting one claim into another. The substituted plea was, however, not sought to be raised in the alternative but in substitution of the earlier plea and the question whether the plea based on the relationship of landlord and tenant could be raised in the alternative by the amendment of the plaint did not fall for consideration.

(17) In *Varry Mutyalamma alias Murtyalu and others V. Dasary Narayanaswamy and others* Air 1949 Mad 719, it was held that the Court cannot allow amendment which may help plaintiff not really within the court's jurisdiction to come within its jurisdiction.

(18) In *Joges Chandra Pal V. Budhram Lohar* Air 1953 Ass 102, a Single Judge of the Assam High Court held that a Court which has no jurisdiction to entertain a

suit could not permit the plaintiff to amend the plaint so as to bring the suit within the jurisdiction of the Court.

(19) In Civil Revision No. 174 of 1969, decided by Sachar, J. on July 29, 1971, the question was whether the defendant who had all along been resisting the plaintiff's plea for possession to certain property should be allowed at the fag end of the trial to amend his written statement so as to incorporate the plea that the property in dispute bore municipal number which was different from the number which was alleged by the plaintiff to be the municipal number of the property and that the defendant had been a victim of fraud and the plea of the defendant for amendment was turned down on the ground that by the amendment, the defendant was seeking to introduce entirely a new case in respect of the fraud and that to allow the amendment would "amount to a new trial on new allegations and new pleas" and that "virtually the whole of the previous evidence would be redundant and of no consequence." It was further held that the scope of amendment, however, wide, was, "not so wide as to allow a new claim and a new plea to be substituted after the period of so many years."

(20) In Civil Revision No. 304 of 1970 decided by Prakash Narain, J. on July 30, 1970, defendant's plea to put the question as to the rate of rent in controversy between the parties by adding the word "allegedly" in the written statement was turned down on the ground that the defendant having made an admission with regard to the rate of rent. could not be allowed to take a fresh plea which may be inconsistent with the earlier plea when "it is no where stated that the plea of not admitting the rate of rent is being taken in the alternative." The right of the defendant to raise the plea in the alternative was, Therefore, not questioned.

(21) With great respect to the learned counsel, I am unable to see how he can derive any assistance from any of these decisions to re-enforce his contention. Some of these decisions would appear to me to support the contrary view. Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, reiterated the principle enunciated in AIR 1921 50 (Privy Council) as to the undoubted power of the Court to allow amendment even where the amendment may have the effect of depriving the other party of the right to set up a plea of limitation and the Court upheld the order of the High Court in allowing amendment in spite of considerable delay and even though the period of limitation for a fresh suit had expired. The Court also referred to the decision of the Supreme Court in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., where a completely new case was allowed to be substituted even at the Supreme Court stage of the proceedings and in spite of the fact that a fresh suit had by then become barred by time. The Supreme Court also approved the observations of Batchelor, J. made in a case in which the plaintiff was allowed to abandon the plea of partnership and substitute a prayer for recovery of the amount even though the claim of recovery of the money had by that time become barred by time. In 27 Calcutta 239, a decree for damages for use and occupation was refused because no case was set up for use and occupation in the alternative. In ILR Bom 664, a

completely different plea was sought to be substituted and no attempt was made to raise a plea in the alternative. In Air 1949 Mad 719 and Air 1953 Ass 102, the amendment could not have been granted because the suit as laid was beyond the jurisdiction of the Court. Such a situation did not obtain in the present case. The situation in the present case would appear to some extent to be reverse. No part of the case as originally laid was in any manner beyond the jurisdiction of the Court but on the amendment being allowed a part of the relief i.e. for dispossession may, however, be rendered outside the jurisdiction of the Court if it ultimately holds that the relationship between the parties was one of landlord and tenant, while it is not permissible for a Court to allow amendment so as to bring a suit within its jurisdiction there is nothing in law to prevent a Court to grant leave to amend the plaint which may render a part of the relief outside its jurisdiction. In the former case, there is no proper suit before the Court which may be amended but that could not be said of the latter case. In Civil Revision No. 174/69 a new case which was wholly foreign to the existing suit was sought to be substituted while in Civil Revision No. 304/70, an admitted allegation in respect of quantum of rent was sought to be put in controversy by the amendment without seeking an amendment in the alternative and the right of the defendant to raise the plea in the alternative was, Therefore, not questioned and was clearly assumed.

(22) In the present case, the respondent came to the Court on the allegation that the petitioner was a licensee in respect of the property in dispute by virtue of a certain document and was liable to pay for the use and occupation of the premises license fee for a certain period until the expiration of the license and damages for use and occupation on account of the period subsequent thereto and for the relief of possession of the property. The petitioner resisted the suit, inter alia, on the ground that the petitioner was a tenant on a true construction of the said document and not a licensee and that the suit for possession was not maintainable in view of the provisions of the Delhi Rent Control Act, 1958. The liability to pay license fee or damages was also denied, because of the contention of the petitioner that he was a tenant. It is in this context that the respondent sought to amend the plaint, inter alia, to claim the amount in suit as rent in the alternative and to add the plea of future mesne profit. The plea of the respondent for rent in the alternative is certainly inconsistent with the plea for the recovery of the money as license fee because while the former denotes relationship of landlord and tenant, the later does not but the plea was not sought to be completely substituted but was being taken as plea in the alternative in view of the defense of the petitioner and could not, Therefore, be said to be a plea which was tantamount to setting up a new case or a case which was wholly foreign to the suit. Under Order 7 Rule 7 of the Code of Civil Procedure, it is open to a party to set up inconsistent pleas in the alternative so long as such pleas are otherwise maintainable in law and it has been so held by the Supreme Court in the case of Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, .

(23) The pleas and the relief sought to be added by the amendment do not contain any new facts at all but seek to place slightly different construction on the facts already in the plaint and constitute a slightly different approach to these facts. The plea sought to be added is consistent with the case that has been set up by the petitioner himself who could not Therefore be said to have been taken by surprise or to have been called upon to meet a new case.

(24) In *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, , the Supreme Court was concerned with a suit in which the plaintiff initially claimed a declaration that on a proper interpretation of a clause in the contract, the plaintiff would be entitled to a certain enhancement over the tendered rates. Eventually in appeal in the High Court, the question as to the maintainability of the suit because of the terms of the proviso to section 42 of the Specific Relief Act, 1877 was raised and proved fatal to its maintainability as a sequel to which the appellant sought leave of the High Court to amend the plaint by adding extra relief for a decree of specific amount or such other amount which may be found due on proper account being taken. The amendment was refused leading to the appeal by Special Leave to the Supreme Court.

(25) In the Supreme Court, it was not disputed that at the date of the application for amendment a suit for a money claimed under the contract would be barred. The Supreme Court, however, observed that the general rule no doubt was that a party was not allowed amendment to set up a new case or a new cause of action particularly when a suit on a new case or cause of action was barred but observed that it was well recognised that where the amendment did not constitute addition of a new cause of action or raised a different case but amounted to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation and the earlier decision of the Court reported as *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, and of the Privy Council reported as *Air 1921 P.C. 50* were relied upon.

(26) The Supreme Court further observed that the principal reason that had led to the above rule were that the object of Courts and rules of procedure was to decide the rights of the parties and not to punish them for their mistakes and that a party was strictly not entitled to rely on the statutory limitation when what is sought to be brought in by the amendment could be said "in substance to be already in the pleadings" sought to be amended. In this case, 33 Bombay 64 was approved and the earlier decision of the Supreme Court reported as *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, was referred to.

(27) The Supreme Court had this to say in the above case with regard to the true interpretation of the expression "cause of action" in the context of the propriety for granting leave to amend the pleadings:

"THE expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was

said in *Cooke v. Gill* (1873) 8 Cp 107, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Union Property Corporation Ltd.* 1962 2 All. Er 24, and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case" have been understood to mean "new set of ideas". *Dorean v. J. W. Ellis and Co. Ltd.* 1962 1 All Er 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time".

(28) The contention of the petitioner that by the introduction of the Pleas of rent in the alternative would cause an injustice to the petitioner by depriving the petitioner of the plea of limitation if a fresh suit for rent had been filed, is not sustainable because what was sought to be brought in by the amendment was in substance already there in the plaint, and as held by the Supreme Court in *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, , a party in such a situation would strictly not be entitled to reply on the statute of limitation.

(29) Even otherwise the power of the Court to allow amendment even if a fresh suit on that cause of action would be barred by time, was never in doubt although it has been held that such a power should not as a rule be exercised where its effect was to take away from the defendant his legal right which has accrued to him by efflux of time and it has been held that there are cases where such considerations are outweighed by the special circumstances of the case and such an amendment was upheld by the Judicial Committee in AIR 1921 50 (Privy Council) and the Supreme Court in the proceedings before it in *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, .

(30) In AIR 1921 50 (Privy Council) , the Judicial Committee was concerned with the amendment of the plaint allowed by the Judicial Commissioner which had the effect of converting a suit for declaration of right to pre-empt into a suit for pre-emption and while upholding the order granting leave to amend, the Board observed that all that happened in that case was that the plaintiffs, through some "clumsy blundering," attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit. Dealing with the argument that a fresh suit for pre-emption would be barred by time the Board observed "that there was full power to make the amendment cannot be disputed, although such a power should not as a rule be exercised where its effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there were cases where such considerations are outweighed by special circumstances of the case," and held that in their lordships opinion, the case before their Lordship was not one in which they should differ from the decision of the Judicial Commissioner. The Board referred with approval to an earlier decision of the Judicial Committee in a case reported as (1867) 11 M. T.

A. 467.

(31) In *L. J. Leach & Co. vs. Jardine Skinner & Co.* Air 1952 SC 357, it was held that although the Courts would as a rule, decline to allow amendments, if a fresh suit on the amender claim would be barred by limitation on the date of the application but that was a factor to be taken into account in the exercise of the discretion as to whether amendment should be ordered and did not effect the power of the Court to order it if that was required in the interest of justice. In that case the suit of the plaintiff was for damages on the footing of conversion and it was held by the Supreme Court that the claim as laid must fail but at the Supreme Court stage leave to amend the plaint was granted so as to allow the plaintiff to raise in the alternative a claim for damages for breach of contract for no delivery of goods. The defendants resisted the request and contended that the amendment introduced a new cause of action; that a suit on that cause of action would be barred by limitation: that the plaintiffs had ample opportunity to amend their plaint but they had failed to do so and owing to lapse of time, defendants would be seriously prejudiced if the new claim was allowed to be raised. The Supreme Court, however, observed that although there was considerable force in the objections but after giving weight to them the Court was of the opinion that this was a case in which amendment ought to be allowed. This is, how the amendment was justified by the Supreme Court:

"THE plaintiffs do not claim any damages for wrongful termination of the agreement Ex. A I by the notice dated June 33, 1945. What they claim is only damages for no delivery of goods in respect of orders placed by them and accepted by defendants prior to the termination of the agreement by that notice. Clause 14 of the agreement expressly reserves that right to the plaintiffs. The suit being founded on Ex.A, a claim based on clause 14 thereof, cannot be said to be foreign to the scope of the suit. Schedule F to the Plaint mentions the several indents in respect of which the defendants had committed default by refusing to deliver the goods and the damages claimed were also stated therein. The plaintiffs seek by their amendment only to claim damages in respect of those consignments. The prayer in the plaint is itself general and merely claims damages. Thus, all the allegations which are necessary for sustaining a claim for damages for breach of contract are already in the plaint. What is lacking is only the allegation that the plaintiffs are in the alternative entitled to claim damages for breach of contract by the defendants in not delivering the goods".

(32) There is another strong reason which would justify the grant of leave to the respondent to amend the plaint. According to the respondent there is relationship of licensor and licensee while according to the petitioner, there is relationship of landlord and tenant and on the case set up by the petitioner himself, issues have been framed on the question whether the petitioner is a tenant or a licensee and this has a bearing on the other issues as to the maintainability of the suit for the dispossession of the petitioner because once the petitioner is held to be a tenant, the suit in so far as it-seeks relief of dispossession would have to be dismissed,

because of the bar to such relief being granted by the civil Court under the provisions of the Delhi Rent Control Act, 1958. The real questions in controversy between the parties, Therefore, are as to the true relationship between the parties with regard to the premises in dispute, the amount to which the respondent is entitled on account of the petitioners occupation of the premises and as to the liability of the petitioner to dispossession. The addition by amendment of the plea that the petitioner is in the alternative liable to pay the amount as rent is based on the assumption that the petitioner is liable even if it be held that the petitioner was a tenant in respect of the premises. The plea is, Therefore, necessary for the determination of the real question in controversy between the parties and is in aid of the existing issues framed by the Court.

(33) It may be useful to remember that the rules of Court are intended to secure the proper administration of justice and it is, Therefore, proper that they should be made to subserve and be subordinate to that purpose. It may also be mentioned that object of the Courts and the rules of procedure as indeed of the principles and provisions of law is to decide the rights of the parties and to do justice between the parties and. not to punish them for their mistake.

(34) The next contention of the petitioner that the claim for future mesne, profits should not have been allowed to be added because such a claim was not sustainable in law, is untenable. In considering the question whether leave to amend the pleadings should or should not be allowed, the Court may be concerned with the question if the plea sought to be added is maintainable apart from the question as to the propriety of granting leave but does not concern itself with the question as to the sustainability of such a plea. There is a clear distinction between the maintainability of a plea and its sustainability in law or on facts. A plea is not maintainable in law when it cannot be said but whether or not a plea is sustainable in law or on facts is a question that concerns the merits of the plea. I do not, Therefore, see how in allowing this plea, the trial Court has exercised its discretion on any wrong principle of law.

(35) A faint suggestion was made on behalf of the petitioner that in view of the delay in seeking leave to amend the plaint, the leave should have been turned down. It is true that delay in seeking leave is a matter which ought to be considered by the Court in. deciding the question as to the propriety of granting leave but it is difficult to conceive how it could be said in the present case that there has been undue delay on the part of the respondent. It is no doubt true that the suit was filed in October, 1969 and the application for leave to amend the plaint was made in May, 1972. But that becomes inconsequential when one finds that partly on account of clumsy drafting of the plaint and partly for other reason with which I am not concerned, the suit though filed in the year 1969 has only crossed the stage of framing of issues and there has been practically no progress in the suit since the issues were framed. The Courts have allowed amendment of pleadings not only at the fag end of the trial of the suit but even at the appellate stage and in the case of *L.J. Leach & Co. v. Jardine Skinner & Co.*

(supra), leave to amend the plaint was granted at the Supreme Court stage. That being so, it cannot be said that there was such delay which would disentitle the respondent to seek leave to amend the plaint particularly where such leave was otherwise justified.

(36) For all these reasons, I am of the view that the trial Court was justified in granting leave to the respondent to amend the plaint. The petition Therefore, fails and is hereby dismissed but leaving the parties to bear their respective costs.