

(2018) 08 CAL CK 0077
In the Calcutta High Court
Case No : Civil OrderNo. 2787 of 2017

Md. Shahnawaz Khan And Another

APPELLANT

Vs

Shaik Shajahan Hossain And Others

RESPONDENT

Date of Decision : 29-08-2018

Acts Referred:

Specific Relief Act, 1963 — Section 15, 19
Code of Civil Procedure, 1908 — Section 35A, Order 6 Rule 17, Order 2 Rule 2, Order
7 Rule 11, Order 2 Rule 2(3)
Constitution Of Indian, 1950 — Article 227

Citation : (2018) 08 CAL CK 0077

Hon'ble Judges : SABYASACHI BHATTACHARYYA, J

Bench : Single Bench

Advocate : Rudradeb Choudhuri, Anup Kumar Mukhopadhyay, Tapas Kumar
Manna, Iswar Chandra Sharma

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J.

By the impugned order, the trial court allowed an application under Order VI Rule 17 of the Code of Civil Procedure, filed by the plaintiffs/opposite

parties for amendment of their plaint. The defendants/petitioners have challenged the said order in the present revision. The suit was filed originally for

declaration that plaintiffs are entitled to get back the suit property on making refund of premium of sub-lease to the defendants besides their right

to re-enter and right of taking re-possession in the case of sooner determination on forfeiture of lease or on the expiry of lease and for ancillary

reliefs.

Learned senior counsel for the petitioners argues that by virtue of the proposed amendment, the plaintiffs/opposite parties sought to change the nature

and character of the suit completely. Whereas originally the suit was for declaration asserting the plaintiffs' alleged entitlement to get back the suit property on making refund of premium of sub-lease to the defendants besides their right to re-enter and right of taking re-possession in the case of sooner determination on forfeiture of lease or on the expiry of lease, now the plaintiffs were attempting to introduce a prayer for recovery of possession on the basis of a purported notice dated January 24, 2015. This, according to learned counsel for the petitioners, amounted to a substantial change in the nature and character of the suit.

On this count, learned counsel cites a judgment of the Supreme Court reported at (2008) 13 SCC 658 [Bharat Karsondas Thakkar v. Kiran Construction Co.]. The relevant paragraphs of the said judgment, in this context, are as follows:

26. Having carefully considered the submissions made on behalf of the respective parties, and the decisions cited on their behalf, we are of the view that the Division Bench of the High Court erred in law in allowing the amendment of the plaint sought for by Respondent 1 herein as the plaintiff in the suit.

27. Even if the bar of limitation is not taken into account, the plaintiff, namely, Respondent 1 herein, is faced with the ominous question as to whether the amendment of the pleadings could have at all been allowed by the High Court since it completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement of sale entered into between its assignee and the vendors of the assignees.

28. Along with that is the other question, which very often raises its head in suits for specific performance, that is, whether a stranger to an agreement for sale can be added as a party in a suit for specific performance of an agreement for sale in view of Section 15 of the Specific Relief Act, 1963.

The relevant provision of Section 15 with which we are concerned is contained in clause (a) thereof and entitles any party to the contract to seek specific performance of such contract. Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of 'parties to the agreement'. The appellant also does not come

within the ambit of Section 19 of the said Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in Kasturi case [(2005) 6 SCC 733] . While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, Their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character.

29. In the instant case, the appellant obtained the consent decree on the strength of an agreement said to have been entered into between the Vaitys and K.L. Danani who brought the said agreement to the partnership which was formed by him with two other persons. Although this fact was brought to the notice of the learned advocates for Respondent 1 on 27-3-1984, no steps were taken by the said respondent to amend the plaint at that stage. Instead, Respondent 1 waited till a consent decree was passed before applying for amendment of the plaint.

30. The proper course of action for Respondent 1 would have been to challenge the consent decree not in its suit for specific performance, but in a separate suit for declaration that the consent decree ought not to have been passed and the same was not binding on the respondent. By seeking amendment of the plaint in its suit for specific performance, Respondent 1 has created its own difficulties by substantially changing the nature and character of the original suit, which is not permissible in law. If, as was held in Durga Prasad case [AIR 1954 SC 75] the impleadment of the appellant was only for the purpose of joining him in the conveyance if Respondent 1's suit ultimately succeeded, the ratio of the said decision would possibly have been applicable to the facts of this case.

Unfortunately, that is not the case here, since Respondent 1 has by amending the plaint prayed for a declaration that the consent decree obtained by the appellant was not binding on him and also for a declaration that the consent decree was null and void and was liable to be quashed.â??

[Although the plaintiffs had prayed for leave under Order II Rule 2 of the Code of Civil Procedure in the original plaint to add further relief based on the said notice, the notice was not even a notice to quit and could not, according to learned counsel, furnish any basis for recovery of possession and

hence the suit, which was filed mala fide and was harassing, ought to be nipped in the bud. In support of the proposition that the suit, being vexatious

and mala fide, ought to be nipped in the bud, learned counsel cites a judgment reported at AIR 1977 SC 2421 [T. Arivandandam & Anr. v. T. V.

Satyapal & Anr.], the relevant paragraphs of which read as follows:

“5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently

resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First

Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving complaints. The learned Munsif must remember that if on a

meaningful “not formal” reading of the complaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should

exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created

the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the

answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be

shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this

case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:

“It is dangerous to be too good.”

6. The trial court in this case will remind itself of Section 35-A CPC and take deterrent action if it is satisfied that the litigation was inspired by

vexatious motives and altogether groundless. In any view, that suit has no survival value and should be disposed of forthwith after giving an immediate

hearing to the parties concerned.”

It was thus argued on behalf of the petitioners that the impugned order ought to be set aside and the amendment of complaint sought by the

plaintiffs/opposite parties to be disallowed. In controverting the petitioners’ submissions, learned counsel for the defendants/opposite parties argues

that the merits of the proposed amendment could not be gone into at the stage of hearing the amendment application. Courts, learned counsel submits,

are liberal in granting amendments, in particular to avoid multiplicity of proceedings. In the event a fresh suit lies on the proposed amendment, generally courts permit such amendments to avoid multiplicity.

It is further submitted that in the event the plaintiffs claim that their title is under a cloud and the plaintiffs are not in possession, a suit for declaration, possession and injunction is the proper remedy. In case a suit for permanent injunction is based on title, the relief of eviction can be incorporated in such suit by amendment. For considering amendments, the plaint has to be read as a whole.

According to learned counsel for the opposite parties, the aforesaid principles are all applicable to the instant case and as such the trial court acted

well within its jurisdiction to allow such amendment. It would not, according to learned counsel, be proper for this court to interfere with such

discretion exercised by the trial court under Article 227 of the Constitution of India.

In support of his contentions, learned counsel for the opposite parties cites the following judgments:

(i) (2008) 4 SCC 594 [Anathula Sudhakar v. P. Buchi Reddy (Dead) by Lrs. & Ors.], wherein it was held inter alia that when a cloud is raised over

the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy.

Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction.

Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction

simpliciter. It was further held in the said case that the predicament of the plaintiffs was brought upon themselves by failing to convert the suit to one

for declaration even when the written statement was filed, and by not seeking amendment of issues to include an issue on the question of title. In the

absence of a prayer of declaration of title and an issue regarding title, let alone the pleadings required for a declaration of title, the parties cannot be

said to have an opportunity to have a full-fledged adjudication regarding title.

(ii) 2017 Supreme (Del) 593 [Ajay Dhingra & Anr. v. Raj Kumar Rajora & Ors.], rendered by a learned Single Judge of the Delhi High Court.

Particular reliance is placed on paragraph nos. 8 to 11 of the said judgment,

which are quoted below:

8. A perusal of the plaint would show that the suit is based on title. The respondents have claimed to be the owners of the property and have sought to restrain the petitioners who are described as the sons of the erstwhile tenant from selling, alienating or transferring the suit property or parting with possession of the same. All the necessary averments regarding termination of the tenancy of Sh. Jagdish Chander, and the fact that the petitioners, as per the respondents, have only year to reside in the property under the provisions of Section 2(I) of the DRC Act have also been averred in the plaint. The amendments which are sought are essentially in the relief clause, namely, addition of the prayer of eviction and mesne profits/damages. Hence, in the light of the above, it cannot be said that the nature of the suit has changed. It is a suit based on title and remains a suit based on title. Only addition is to the relief.

9. As far as the plea about the suit not being maintainable is concerned, keeping in view the averments of the parties, these are issues which are not to be adjudicated upon at the time of consideration of an application for amendment as the merits of the pleas sought to be raised by amendment are not to be gone into.

10. Reference may be had to the judgment of the Supreme Court in the case of Lakha Ram Sharma v. Balar Marketing Pvt. Ltd., (2008) 17 SCC 671,

where the court held as follows:

4. It is settled law that while considering whether the amendment is to be granted or not, the Court does not go into the merits of the matter and decide whether or not the claim made therein is bonafide or not. That is a question which can only be decided at the trial of the Suit. It is also settled law that merely because an amendment may take the suit out of the jurisdiction of that Court is no ground for refusing that amendment. We, therefore, do not find any justifiable reason on which the High Court has refused this amendment. Accordingly, the impugned order is set aside and that of the trial court is restored. We, however, clarify that as the appellant has now raised the claim from Rs. 1 Lakh to Rs. 10 Lakh, the trial court will determine, whether or not Court Fees are correctly paid.

11. Settled legal position is that normally the court should be liberal while granting amendments. Reference may be had to the judgment of the

Supreme Court in the case of B.K. Narayana Pillai v. Parameswaran Pillai & Anr., (2000) 1 SCC 712, where the court held as follows:-

“3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.”

(iii) AIR 2002 SC 3369 [Sampath Kumar v. Ayyakannu] . Paragraph nos. 7 to 12 thereof are relied upon by the opposite parties, which are as follows:

“7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the trial court, it was open to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the trial court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.

8. In Rukhmabai v. Lala Laxminarayan [AIR 1960 SC 335] this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well-settled rule of practice not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

9. Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on

such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma v. Mamtha Shenoy* [(2001) 8 SCC 561] .)

11. In the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for

amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

12. On the averments made in the application, the same ought to have been allowed. If the facts alleged by the plaintiff are not correct it is open for the defendant to take such plea in the written statement and if the plaintiff fails in substantiating the factual averments and/or the defendant succeeds in substantiating the plea which he would obviously be permitted to raise in his pleading by way of consequential amendment then the suit shall be liable to be dismissed. The defendant is not prejudiced, more so when the amendment was sought for before the commencement of the trial.â??

(iv) AIR 2006 SC 2832 [Baldev Singh v. Manohar Singh] . The opposite parties place particular reliance on paragraphs 8, 9 and 12 of the said judgment, which are quoted below:

â??8. It is well settled by various decisions of this Court as well as the High Courts in India that courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference can be made to

a decision of the Privy Council in Ma Shwe Mya v. Maung Mo Hnaung [(1920-21) 48 IA 214 : AIR 1922 PC 249] in which the Privy Council

observed: (IA pp. 216-17)

â??All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment,

the subject-matter of the suit.â??

9. Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil

Procedure deals with amendment of pleadings which provides that the court may at any stage of the proceedings allow either party to alter or amend

his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of

determining the real questions in controversy between the parties. From a bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code

of Civil Procedure consists of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings

and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore,

in view of the provisions made under Order 6 Rule 17 CPC it cannot be doubted that wide power and unfettered discretion has been conferred on the

court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. While dealing with

the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal

of suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act, 2002 a proviso has been

added to Order 6 Rule 17 which restricts the courts from permitting an amendment to be allowed in the pleadings of either of the parties, if at the time

of filing an application for amendment, the trial has already commenced. However, the court may allow amendment if it is satisfied that in spite of due

diligence, the party could not have raised the matter before the commencement of trial. So far as proviso to Order 6 Rule 17 of the Code of Civil

Procedure is concerned, we shall deal with it later. â?|

12. So far as the second ground for rejection of the amendment of the written statement is concerned, we do not like to delve in detail in view of the

decision of this Court in Ragu Thilak D. John v. S. Rayappan [(2001) 2 SCC 472] . In para 6, this Court observed: (SCC p. 474)

â??6. If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the

amendment is to minimise the litigation. The plea that the relief sought by way

of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.â?? â??

(v) AIR 2006 SC 1647 [Rajesh Kumar Aggarwal & Ors. v. K. K. Modi & Ors.] . Paragraph nos. 17 to 23 and 28 of this judgment are relied on by the opposite parties, which are quoted below:

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

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 have expressed certain opinions 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 the rights of both parties and to subserve the ends of justice. It is settled by a 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.

20. We shall now consider the proposed amendment and to see whether it introduces a totally different, new and inconsistent case as observed by the Hon'ble Judges of the Division Bench and as to whether the application does not appear to have been made in good faith. We have already noticed the prayer in the plaint and the application for amendment. In our view, the amendment sought was necessary for the purpose of determining the real controversy between the parties as the beneficiaries of the Trust. It was alleged that Respondent 1 is not only in exclusive possession of 57,942 shares of GPI and the dividend received on the said shares but has also been and is still exercising voting rights with regard to these shares and that he has used the Trust to strengthen his control over GPI. Therefore, the proposed amendment was sought in the interest of the beneficiaries and to sell the shares and have the proceeds invested in government bonds and/or securities. A reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to show that there was no question of any inconsistency with the case originally made out in the plaint. The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide.

There is a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The amendments sought for by the appellants have become necessary in view of the facts that the appellants being the beneficiaries of the Trust are not deriving any benefit from the creation of the Trust since 1991-92 and that if the shares are sold and then invested in government bonds/securities the investment would yield a minimum return of 10-12%. It was alleged by the appellants that Respondent 1 is opposing the sale in view of the fact that if the said shares are sold after the suit is decreed in favour of the appellants, he will be the loser and, therefore, it is solely on account of the attitude on the part of Respondent 1 that the appellants have been constrained to seek relief against the same.

21. We shall now consider the argument of the learned Senior Counsel for the respondent on Sections 60 and 61 of the Trusts Act. It was submitted by the appellants that since Respondent 1 did not act in a bona fide manner as a result of which the appellants were compelled to file the suit before the High Court in the capacity of the beneficiaries of the Trust and that the amended plaint is not alien and extraneous to the ambit and purview of Sections 60 and 61 of the Trusts Act.

22. We shall now consider the judgments cited by learned Senior Counsel for the appellants:

1. Ganesh Trading Co. v. Moji Ram [(1978) 2 SCC 91] This Court held that the main rules of pleadings in Order 6 CPC, 1908, show that the provision for the amendment of pleadings subject to such terms as to costs and giving to all parties concerned necessary opportunities to meet exact situations resulting from any amendment, are intended for promoting the ends of justice and not for defeating them. This Court further held that the amendment only sought to give notice to the defendant on facts which the plaintiff would and could have tried to prove in any case. Such notice was given only by way of abundant caution so that no technical objection can be taken that what was sought to be proved was outside the pleadings.

2. Jai Jai Ram Manohar Lal v. National Building Material Supply [(1969) 1 SCC 869 : AIR 1969 SC 1267]

It was held that a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.

3. Ragu Thilak D. John v. S. Rayappan [(2001) 2 SCC 472] Sethi, J. speaking for the Bench has observed that the amendment sought would change the nature of the suit originally filed was not a reason for refusing application for amendment and that the dominant purpose of Order 6 Rule 17 was to minimise litigation and that the plea that the relief sought for by way of

amendment was barred by time is arguable in the circumstances of the case.

This Court further observed in para 5 as under: (SCC p. 473)

“5. After referring to the judgments in Charan Das v. Amir Khan [(1920) 47 IA 255 : AIR 1921 PC 50] , L.J. Leach & Co. Ltd. v. Jardine Skinner

& Co. [1957 SCR 438 : AIR 1957 SC 357] , Ganga Bai v. Vijay Kumar [(1974) 2 SCC 393] , Ganesh Trading Co. v. Moji Ram [(1978) 2 SCC 91]

and various other authorities, this Court in B.K. Narayana Pillai v. Parameswaran Pillai [(2000) 1 SCC 712] held: (SCC p. 715, para 3)

“3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as

may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of

guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all

circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should

be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to

hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of

litigation.”

23. We shall now consider the judgments relied on by Mr Ganesh, learned Senior Counsel for the respondent.

1. K.K. Modi v. K.N. Modi [(1998) 3 SCC 573] This civil appeal was filed by K.K. Modi against K.N. Modi and others and this judgment was relied

on by Mr Ganesh to show that the parties are litigating before different forums and that the directions issued by this Court pending final disposal of the

suit in the Delhi High Court.

2. Kanda v. Waghu [(1949) 77 IA 15 : AIR 1950 PC 68] The Privy Council, in the above case, has observed as under: (IA pp. 21-22)The powers of

amendment must be exercised in accordance with legal principles. An amendment which involves the setting up of a new case and alters the real

matter in controversy between the parties cannot be allowed. (AIR p. 68)

3. Kumaraswami Gounder v. D.R. Nanjappa Gounder [AIR 1978 Mad 285 (FB)] Likewise, the above case was cited in regard to the permissibility of

amendment by introducing a new cause of action. This Full Bench decision of the Madras High Court was cited for the proposition that when the amendment sought for sets up a totally different cause of action which ex facie cannot stand in line with the original pleading, the courts cannot allow such application for amendment and that a pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of an amendment a new cause and a case cannot be substituted and the courts cannot be asked to adjudicate the alternative case instead of the original case.

28. Since the Court has entered into a discussion into the correctness or falsity of the case in the amendment, we have no other option but to interfere with the order passed by the High Court. Since it is settled law that the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing prayer for amendment, the order passed by the High Court is not sustainable in law as observed by this Court in *Sampath Kumar v. Ayyakannu* [(2002) 7 SCC 559] .

(vi) AIR 1966 SC 997 [*Nichhalbhai Vallabhai & Ors. v. Jaswantlal Zinabhai & Ors.*]. The relevant paragraphs of the said judgment, in the present context, are paragraph nos. 3, 4 and 5 which are set out below:

3. The trial court, however, rejected the application for amendment of the plaint and thereafter dismissed the suit in view of the decision of the Full

Bench in *Apaji v. Ramchandra* [ILR 16 Bom 29] . The plaintiff preferred an appeal before the High Court of Gujarat, being First Appeal No. 215 of

1961. The appeal was allowed by the High Court by its judgment dated April 17, 1963. The High Court set aside the decree of the trial court and

ordered that the application for amendment of the plaint should be allowed and the suit should be remanded for being retired in accordance with law.

4. The first question arising in this case is whether the High Court was right in taking the view that the suit brought by the plaintiff was merely a suit

for partition by metes and bounds and not a suit for severance of the joint family status. On behalf of the appellants Mr Purshotam Trikumdas

submitted that the High Court had not correctly interpreted the plaint. The learned counsel referred to the sentence â??We were and are members of

the joint and undivided familyâ? of para 3 of the plaint and said that this was a clear statement that the plaintiff had not effected severance of his

status from the joint and undivided family. We do not think there is any justification for this argument. On the question of interpretation of the plaint it is important to consider all the averments made by the plaintiff in paragraph 3 together and the other connected paragraphs and it is not possible to draw an inference from any isolated sentence in the 3rd paragraph without regard to its context. In the same paragraph there is a clear allegation by the plaintiff that there was separation of the three original branches and between the members of the branch of Nichhalbhai out of the original three branches.

It is further alleged that partition of goods and properties is not made separately and mutually between each branch or between the members of the branches according to the shares. It is evident from this sentence that the plaintiff himself has made a distinction between separation of the three original branches and between members of the branch of Nichhalbhai on the one hand and the partition of goods and properties on the other. This constitutes, therefore, a clear allegation of severance of status not only of the three branches but also of the members of the branch of the first defendant Nichhalbhai. In the same paragraph the plaintiff goes on to say that the properties of the family should be separately distributed and that his share of 1/105 of movable and immovable properties should be separated and delivered to him. It is also important to notice that in para 6 of the plaint the plaintiff has stated that the properties were and are held in common and in paras 8, 9, 10 and 12 of the plaint the word distribution is deliberately used. It is a well known canon of interpretation that it is the duty of the Court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument taken together. Having, therefore, regard to the statement of the plaintiff in all the paras of the plaint and interpreting the plaint as a whole we are satisfied that the High Court was right in holding that the suit was not a suit brought for severance of joint family status but was a suit merely for partition by metes and bounds.

5. We shall then proceed to consider the next question whether the High Court was right in allowing the application of the plaintiff for amending the plaint by deleting the words "and have" in "Nhs (and have)" in para 2 and the words "and are" in para 3 of the plaint. It was

contended by Mr Purshotam Trikumdas on behalf of the appellants that by allowing the amendment the High Court had permitted the plaintiff to convert the suit into another of a different and inconsistent character. It was submitted by Counsel that if the suit was one for severance of joint family status the plaintiff was bound to fail in limine in view of the decision of the Bombay High Court in *Apaji v. Ramchandra* [ILR 16 Bom 29] . It was contended that the plaintiff cannot be allowed to escape this consequence by amending a suit as one for partition by metes and bounds. We do not think that there is any warrant for this argument. We consider that the High Court was right in taking the view that the words "and have" and the words "and are" were put in paras 2 and 3 of the plaint by mistake and inadvertence and it was, therefore, a proper case in which the court should exercise its discretion under Order 6 Rule 17 of the CPC by allowing the amendment to be made. It was contended by Mr Purshotam Trikumdas that the plaintiff was introducing a new case by making the amendment. We do not accept this argument as correct. We have already given reasons for holding that even apart from the amendment the plaint should be properly construed as asking for relief for partition by metes and bounds and not for severance of joint family status. We are of opinion that the words "and have" and "and are" in para 2 and the words "and are" in para 3 of the plaint have been inserted on account of some mistake or misapprehension on the part of the plaintiff and it was, therefore, a proper case in which the Court allowed the plaint to be amended. The reason is that if the amendment is refused the plaintiff may have to bring another suit and the object of the rule for allowing amendments to the plaint is to avoid multiplicity of suits. The present case falls within the principle laid down by this Court in *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co.* [1957 SCR 438] . In that case the appellants had filed a suit for damages for conversion against the respondents on the allegations that the respondents were the agents of the appellants, that the appellants had placed orders for certain goods with the respondents, and that the respondents had actually imported the goods but refused to deliver them to the appellants. The suit was dismissed on the findings that the parties stood in the relationship of seller and purchaser, and not agent and principal and that the title in

the goods could only pass to the appellants when the respondents appropriated them to the appellants's contracts. In appeal before the Supreme Court, the appellants applied for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. The application was allowed by this Court on the ground that it was a fit case in which the amendment should be allowed and the fact that a fresh suit on the amended claim was barred by limitation is only a factor to be taken into consideration in the exercise of the discretion as to whether the amendment should be ordered or not, and does not affect the power of the court to order it, if that is required in the interests of justice. The case of the plaintiff for amendment in the present case stands on a stronger footing because there is no question of limitation involved and we are of the opinion that the High Court was right in permitting the amendment to be made and remanding the suit to the trial court for a fresh hearing in accordance with law.

Based on the above cited judgments, learned counsel for the opposite parties argues that the proposed amendment would only add a relief to the plaint, based on the facts pleaded in the original plaint, and not change the nature and character of the suit. It is also submitted that, in order to avoid multiplicity of proceedings, the amendment of plaint sought by the opposite parties was correctly allowed by the trial court. Hence, learned counsel prays for dismissal of the present revisional application.

Upon hearing both sides and perusing the necessary materials on record, certain salient features of the suit, as evident from the original plaint, prior to its amendment, are noticed, which are as follows:

(i) The original plaint case is that the plaintiffs are joint lessees in respect of the suit premises and they sub-let the suit property to the defendants / petitioner on the basis of an agreement.

(ii) (Para 13, Plaint) The defendants desired to transfer the suit flat to a third party defying the plaintiffs, despite being aware that the plaintiffs were in need of accommodation and that the plaintiffs are entitled to get back the suit flat on refund of premium. [so, the basis of suit is the alleged right of the plaintiffs to get back possession of the suit flat on refund of premium simpliciter - no whisper of any notice to quit]

(iii) (Para 14, Plaint) The plaintiffs issued notice through their advocate, dated

January 24, 2015, calling upon the defendants to restrict the use of the suit flat only for residence purpose and to remedy the breach of covenants of sub-lease, failing which the lease would be terminated and the plaintiffs

also called upon the defendants to inform the plaintiffs in advance if they intend to transfer the said flat. [So, not a quit notice, and not a basis or cause

of action of the suit, contemplating only future termination of the sub-lease]

(iv) (Para 23, Plaint) It is reiterated that the defendants should not have received any advance against transfer without informing the plaintiffs,

particularly when they were informed by notice dated January 24, 2015 instructing to give prior information and that apart they were aware of the

plaintiffs' need of accommodation.

(v) (Para 24, Plaint) The plaintiffs as original lessee can claim back the sub-lease on making refund of lease premium whenever the sub-lessee intends

to transfer. Therefore, the plaintiffs can claim re-conveyance of sub-lease from defendants on making refund of premium amount taken at the

time of sub-lease as lease is different from ownership right, in the lease, right to enjoy the property for a fixed term is transferred only, so the lessors

always have controlling power over the sub-lessees.

(vi) (Para 26, Plaint) A cloud is cast over the right of the plaintiffs-lessees in respect of the suit property which is sought to be dispersed and

accordingly the plaintiffs file this suit praying for decree for declaration that the plaintiffs are entitled to get back the suit property on making refund of

premium to the defendants apart from their right to re-enter and right of taking re-possession in the case of sooner determination on forfeiture of lease

or on the expiry of lease.

(vii) (Para 29) The cause of action for this suit arose at 24th January, 2015, 29th January, 2015 and 3rd February, 2015 as

pleaded above and on all consecutive days whenever the plaintiffs' lease-hold right is flouted and denied and wrongful acts were threatened to be

done and the cause of action for this suit is continuing day by day.

So, it is obvious that the cause of action of the suit was not the notice dated January 24, 2015, but the alleged right of the plaintiffs to re-enter into

possession of the suit premises on refund of the premium. This is indicated from the cause of action disclosed in para 29 of the plaint as well as

paragraph nos. 13, 24 and 26.

In fact, it is evident from paragraph nos. 14 and 23 of the plaint itself that the notice dated January 24, 2015 was not a quit notice at all, but apparently a hybrid notice calling upon the defendants to restrict the use of flat only for residence purpose and to remedy the breach of covenants of sub-lease, failing which the lease would be terminated and plaintiffs also called upon defendants to inform the plaintiffs in advance if they intend to transfer the said flat (Para 14 of the plaint) and instructing to give prior information (Para 23 of the plaint). As such, in any event, the said notice dated January 24, 2015 could not be a basis or cause of action of the suit at all, as per the frame of the suit.

However, by the proposed amendment, the plaintiffs sought to incorporate specifically the said notice dated January 24, 2015 as the cause of action and basis of the suit, thereby introducing a paradigm shift in the cause of action and, resultantly, the very basis of the suit.

Moreover, the original suit was primarily for declaration that the plaintiffs are entitled to get back the suit property on making refund of premium of sub-lease to the defendants besides their right to re-enter and right of taking re-possession in the case of sooner determination on forfeiture of lease or on the expiry of lease, which relied solely on the right to re-enter into possession merely by making refund of premium of sub-lease, which was apart from the right to re-possession in case of sooner determination or expiry of lease, meaning thereby that sooner determination or expiry of lease was not the basis of the suit but a future prospect at best. Such a suit, based on a vague right of re-entry on "refund of premium of sub-lease", was ex facie not maintainable. The same was arguably a vexatious suit disclosing no cause of action and deserved to be nipped in the bud.

By virtue of the amendment, the plaintiffs sought to convert the suit into a full-fledged eviction suit on the basis of the notice dated January 24, 2015,

although the same was admittedly not a notice to quit, by introducing:

"The defendants after receipt of notice dated 24th January, 2015 did not comply with the requisition and/or restore the exterior position of the suit property in its original position within the time given in the said notice;"

And

"that the defendants therefore are liable to be evicted from the suit property

and as such the plaintiffs pray for decree for eviction of defendants

from the suit property upon declaration that the defendants have no right to remain in occupation in the suit propertyâ??

and to value the suit on the basis of 12 monthsâ?? rental as per the lease deed and to introduce to the cause of action paragraph (Paragraph 29,

Plaint) the following:

â??and on or about 28th February, 2015 when the notice period expired and the defendants failed to remedy the breach and did not vacate the suit

propertyâ??

and, in the prayer portion, to incorporate â??(c) Decree for eviction of the defendants from the suit property upon declaration that the defendants

have no right to remain in occupation in the suit propertyâ??.

Hence, it is palpably clear that, by virtue of the amendment, the plaintiffs attempted to change the very premise of the suit and the entire nature and

character thereof.

While originally the suit was apparently not maintainable, being based on some vague entitlement to get back the suit property on making refund of

premium of sub-lease to the defendants, by virtue of the amendment, such cardinal error in the basic frame of the suit was sought to be rectified by

converting the same to be a regular eviction suit on the basis of the notice dated January 24, 2015, which was now sought to be made out as a quit

notice, ex facie contrary to the pleadings in the original plaint as to its nature.

Not only was this an attempt to change the entire cause of action of the suit from some vague entitlement to get back possession on refund of the

premium of sub-lease (which premium itself might have been unlawful), but to rectify a basic error in the frame of the suit, thereby rendering a non-

maintainable suit to one perhaps maintainable in law. Such an attempt would frustrate the basic tenets of justice, more so since the well-settled juristic

view is stricter in case of amendment of plaints than written statements. As to the judgments cited on behalf of the opposite parties in support of the

amendment, those do not quite help the opposite parties in supporting and sustaining the amendment in question.

In *Anathula Sudhakar* (supra), the issues involved were different than the present case. In the said *lis*, the question as whether and if so, how far, the

question of title was involved in a suit for prohibitory injunction was under discussion. It was held that in the event such question was involved, a declaration of title had to be claimed in such a suit. The facts and scope of the present suit are entirely different, inasmuch as in the case at hand, a declaration was initially sought with regard to an alleged right to re-enter the suit premises merely upon refund of the premium of sub-lease. A notice was mentioned and leave under Order II Rule 2 of the Code of Civil Procedure was sought to claim eviction later. However, such notice was not a notice to quit at all and, if made the cause of action of the suit, would entail a paradigm shift in the tenor of the suit.

In *Ajay Dhingra & Anr. (supra)*, a learned Single Judge of the Delhi High Court held that where a suit was based on title, the relief of eviction could be brought in by way of amendment. It was also reiterated inter alia that courts are generally liberal in allowing amendments, particularly to avoid multiplicity of proceedings, and the merits of the amendment cannot be looked into at the stage of deciding the amendment application. In the present case, however, the suit was not based on title but on an apparently non-existent entitlement to re-enter the suit premises merely by refund of the premium for sub-lease. The amendment now sought was outright eviction, based on a different cause of action, that is, a notice dated January 24, 2015. These two causes of action were incompatible and the amendment would amount to a complete alteration of the cause of action of the suit. The two bases of the filing of the suit, pre and post amendment, were irreconcilable and hence the amendment would change the very nature and character of the suit.

In *Sampath Kumar (supra)*, it was found by the Honâ??ble Supreme Court that the basic structure of the suit was not altered by the proposed amendment. In the said case, the cause of action, sought to be incorporated by amendment, arose during pendency of the suit and was on the same basic facts as the original pleadings. However, in the instant lis, the amendment was intended to incorporate a pre-suit event, which was not only on a different axis than the original cause of action, but would change the basic structure of the suit.

In *Baldev Singh (supra)*, substituting one distinct cause of action for another, as well as change, by means of amendment, in the subject-matter of the

suit itself, were deprecated. However, in the instant case, precisely such a course of action was sought to be taken by amendment. The proposed

amendment, in the present case, would substitute the notice dated January 24, 2015 as the cause of action in place of the original vague entitlement to

re-enter possession upon payment of the sub-lease premium amount. That would change the entire subject matter of the suit even apart from

substituting the cause of action, since a mere declaration as to re-entry on the basis of refund of an amount was sought to be replaced by eviction on

an entirely different notice.

Rajesh Kumar Aggarwal & Ors. (supra) was rendered in the context of an amendment of incidents allegedly arising during pendency of the suit. The

real controversy test was reiterated in the said judgment. However, in the case at hand, the alleged factum of notice and consequential amendments

arose admittedly prior to the institution of the suit. Moreover, the proposed amendments in the present case are not, in any manner, necessary for

determination of the real controversy in the original suit. Whereas the original suit revolves around the alleged right of the plaintiffs to re-enter the suit

premises upon payment of a premium amount and consequential permanent injunction, the amendment would change the centre of gravity of

controversy to an entirely different aspect, that is, a notice on which eviction was now sought. That would bring in a totally different and new case,

inconsistent with the original plaint case.

Nichhalbhai Vallabhai & Ors.(supra) was rendered in a case where the original suit was held to be essentially for partition by metes and bounds and

not for severance of joint family status, the latter being barred by law. In such context, it was held that the amendment would not convert the suit to

one of a different and inconsistent character and thus ought to be allowed. However, in the present case, as discussed above, the amendment would

convert the suit to one of a different and inconsistent character than the original suit.

Apart from the aforesaid judgments cited by the opposite parties, which are not applicable to the present case, the effect of the leave sought by the

petitioners under Order II Rule 2 of the Code of Civil Procedure, to add further relief or reliefs based on the notice dated January 24, 2015 for

recovery of possession and other consequential reliefs, in paragraph no. 28, as

well as relief (a), of the original plaint, is to be considered for a proper and complete adjudication on the issue at hand.

A perusal of Order II Rule 2 of the Code of Civil Procedure would be apt in this context:

2. Suit to include the whole claim.â?" (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause

of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.â?" Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not

afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.â?" A person entitled to more than one relief in respect of the same cause of action may sue for all or

any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.â?" For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same

obligation shall be deemed respectively to constitute but one cause of action.
Illustration

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only

for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

It is seen that Rule 2 (3) of Order II of the Code is applicable to the present case. The said Rule contemplates leave to sue for a relief, which a

person, though entitled to sue for along with other reliefs in respect of the same cause of action, omits to sue for.

In the present case, however, the amended relief of eviction is based on an entirely different cause of action than the original plaint, inasmuch as the

original plaint sought for a declaration and permanent injunction on an entitlement to re-enter the suit premises on refund of an amount of premium,

whereas the amendment envisages recovery of possession on the premise of a notice dated January 24, 2015. The latter cause of action is not only

foreign to the original one, but takes the vortex of controversy entirely beyond the scope of the original claim.

As such, Order II Rule 2 of the Code is not applicable in terms and is a misnomer in the present case, since the causes of action for the original reliefs

claimed and the relief omitted are different and contra-distinct. Moreover, the relief claimed in the original plaint is vexatious and mala fide insofar as

the same is moonshine and ex facie not supported by the chain of events leading to the cause of action, resulting in non-disclosure of cause of action,

which attracts the principle laid down in T.Arivandandam & Anr. (supra), justifying even nipping such vexatious suit in the bud by rejection of the

plaint. The said fundamental defect in the suit ought not to be permitted to be rectified by permitting a cardinal transposition of the cause of action,

thereby allowing novation of the cause of action and the plinth of the suit itself.

Even the other judgment of the Supreme Court cited by the petitioner, being that of Bharat Karsondas Thakkar (supra), is squarely applicable to the

present case, since here, like the said reported judgment, the proposed amendment would completely change the nature and character of the suit. In

such view of the matter, the amendment of plaint sought by the plaintiffs/opposite parties, as allowed by the trial court, cannot stand the scrutiny of

judicial review under Article 227 of the Constitution of India, since the same would alter the basic framework, nature and character of the suit and

substitute an entirely new cause of action for the bundle of facts leading to the suit, as framed, in the original plaint.

Accordingly, C.O. No. 2787 of 2017 is allowed on contest, thereby setting aside the impugned order, bearing Order No. 28 dated June 29, 2017 passed

by the Judge, Ninth Bench, City Civil Court at Calcutta, District: Calcutta in Title Suit No. 180 of 2015, and dismissing the application filed by the

plaintiffs/opposite parties for amendment of the plaint in the said suit. There will, however, be no order as to costs. Urgent certified website copies of

this order, if applied for, be made available to the parties upon compliance of the requisite formalities.