
(2006) 05 P&H CK 0033
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 1206 of 2004

Milkha Singh

APPELLANT

Vs

Parshotam Dass

RESPONDENT

Date of Decision : 24-05-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35B
Constitution of India, 1950 — Article 227

Citation : (2007) 2 CivCC 319 : (2007) 1 RCR(Civil) 495

Hon'ble Judges : S.S. Saron, J

Bench : Single Bench

Advocate : Gursewak Singh Singhpuria, for the Appellant; R.L. Gupta, for the Respondent

Final Decision : Allowed

Judgement

S.S. Saron, J.—This revision petition has been filed by the defendant-petitioner under Article 227 of the Constitution of India against the order dated 24.01.2004 (Annexure P-1) passed by the learned Civil Judge (Junior Division), Mansa, whereby the application filed by him under Order 6 Rule 17 of the CPC ("CPC - for short) for amendment of his written statement for claiming set-off in respect of the crop sold to the plaintiff has been dismissed.

2. The plaintiff-respondent filed a suit for recovery of Rs.13,18,000/- etc. against the defendant-petitioner on the basis of pronote. The defendant-petitioner contested the suit and he filed his written statement dated 12.08.2002 (Annexure P/2). The issues in the case were framed on 10.09.2002 and on 14.10.2002 the plaintiff concluded his evidence. The defendant despite being given as many as eight opportunities did not conclude his evidence and on 07.05.2003 he was given last opportunity to lead his evidence subject to payment of Rs.100/- as costs. It was also ordered that in case the defendant does not conclude his evidence, his evidence would be deemed to be closed. The case was adjourned to 14.05.2003 on which date the defendant filed an

application seeking amendment of the written statement in terms of Rule 6 Order 17 CPC. The defendant-petitioner sought amendment for raising the plea of set-off in the following terms:

Para No. 11 (a) Set off That the plaintiff is the commission agent of the defendant. The defendant sold his winter crop for the year 1999 on the shop of plaintiff, which was 95 quintals in weight @ Rs.520/- per quintal. Plaintiff did not make the payments till today and defendant is entitled for the recovery payments of Rs.49,400/- along with interest @ 2% per month from the plaintiff, if in any case the suit for recovery of the plaintiff is decreed in his favour then in that case and circumstances the defendant is entitled to recover/deduct the amount of Rs.49,400/-along with interest since 1999 as a set-off.

Para No.12 : It may kindly be added after the last words that "If in any case the suit of the plaintiff is decreed then as a set-off the amount of Rs.49,400/- alongwith interest @ 2% per month since April 1999 which is due with the plaintiff for the payments of 95 quintal of wheat @ Rs.520/- per quintal may kindly be deducted from the decreed amount.

3. The said application was considered by the learned Civil Judge (Junior Division) Mansa who by her order dated 24.01.2004 (Annexure P/1) has dismissed the same, inter alia observing that the application cannot be accepted and the defendant cannot be allowed to add the plea of set-off in the written statement being a time barred relief. It was observed that it was clear from the pleadings of the applicant-defendant made in the application that he sold 95 quintals of wheat to the plaintiff which was the Harri crop pertaining to year 1999. It was further observed that this relief could be claimed by the applicant-defendant within three years from Harri (Rabi) 1999. Even otherwise, the defendant has failed to mention the date on which he sold the wheat to the plaintiff. Accordingly, the application seeking amendment of the written statement was declined by the impugned order, which is assailed by the petitioner in the present-petition.

4. Learned counsel appearing for the petitioner has contended that in fact a plea regarding set-off had already been made in the written statement that was filed on 12 08.2002 (Annexure P/2) which is evident from its perusal. As such, it is contended that it cannot be said that these facts were not pleaded or that without leading evidence, the defendant-petitioner has filed the application as an excuse to gain time by taking the plea of set-off. It is further contended that the relief which he has claimed as a set-off is by way of equitable set-off for which there is no period of limitation as there is a fiduciary relationship between the parties, which is also already pleaded in the written statement (Annexure P/2). Therefore, the application was not liable to be dismissed on the ground that it is barred by limitation. In support of the contention with regard to the plea of equitable set-off, learned counsel has referred to the commentary from the CPC by Justice C.K. Thakkar and submitted that a claim of equitable set-off may be allowed as it cannot be time bared when there is a fiduciary relationship between

the parties.

5. In response, learned counsel appearing for the respondent has raised strong objection to the allowing of the application for amendment and has opposed the stand taken by the learned counsel for the petitioner. It is submitted that the conduct of the petitioner by itself disentitles him to the grant of relief of set-off inasmuch as he took more than three years to file his written statement after the institution of the suit and thereafter, despite time having been granted he took eight opportunities and even last opportunity to lead his evidence, which he has failed to lead. It is, therefore, submitted that his said conduct by itself disentitles him to seek amendment of his written statement. As such, he is not entitled to amend his written statement. Even otherwise, it is contended that the application seeking amendment was in fact only a ruse to seek further adjournment in the case, as he did not have his evidence ready on 14.05.2003 and on the said date his evidence is deemed to have been closed. In any case, it is submitted that the plea that is sought to be taken by way of amendment in the written statement regarding set-off is clearly time barred and where the relief is barred by time, the petitioner cannot claim amendment of the written statement. It is also contended that the plea of set-off in terms of Order 8 Rule 6(1) CPC could have been taken only at the first date of hearing, he is not liable to be allowed to take such a plea at any subsequent stage. Therefore, the petition is liable to be dismissed.

6. I have given my thoughtful consideration to the contentions of the learned counsel for the parties. Two aspects which have impelled the learned trial Court to decline the amendment of the written statement are that the application has been filed by the petitioner with the sole motive that his evidence is not closed by order on the date fixed i.e. 04.05.2003 and that the claim, which was sought to be raised by the defendant-petitioner by way of amendment of the written statement is time barred. In the circumstances, from the contentions that have been raised and from the observations of the learned trial Court, the questions that required to be considered are whether the claim of the petitioner can be said to be time barred by limitation or whether it is a debatable issue; besides, what is the effect of not filing the claim for set-off on the first date of hearing; further as to what is the effect of not paying the costs that were ordered to be paid and whether the conduct of the petitioner by itself disentitles him for the amendment of his written statement by raising the claim of set-off. The case law on the point of a claim made in pleadings being barred by time may be noticed. In "*Pronoy Kumar Sanyal v. Beni Madhav Sanyal*", 2000(2) PLJ 384 (SC), the Supreme Court set aside the order of the High Court where the High Court had held that the question of limitation was not to be gone into at the stage of amendment of pleadings. The High Court was considering the validity of an order passed by the trial Court allowing the amendment of the plaint filed by the plaintiff. It was observed that the High Court should have considered at the said stage itself whether the amendment of the plaint that was sought, was barred by time. The matter was remitted to the High Court to be heard afresh. In *Radhika Devi Vs.*

Bajrangi Singh and others, in a partition suit that had been filed, the defendants took a stand by pleading that there was a registered gift deed executed in their favour bequeathing the properties covered therein and they became owners of the land. Pending the suit the plaintiffs filed an application for amendment of the plaint so as to seek declaration that the said gift deed was obtained illegally and fraudulently and, therefore, it was ineffective and did not bind them. It was held that where a party acquires right by bar of limitation and if the same is sought to be taken away by amendment of the pleadings, amendment in such circumstances would be refused. Such an amendment if allowed would defeat the right that had accrued in favour of the defendant. In *K. Raheja Constructions Ltd. Vs. Alliance Ministries and others*, a suit was filed for relief of permanent injunction restraining respondent from alienating, encumbering, selling, disposing of, or in any way dealing with property. Subsequently amendment of plaint was sought so as to claim the relief of specific performance of contract. It was pleaded that amendment was necessary in view of the subsequent knowledge being granted by the Charity Commissioner for alienation. It was held that the plaintiffs therein had expressly admitted that the defendants had refused to abide by the terms of the contract, therefore, they should have asked for the relief for specific performance in the original suit itself. They had allowed a period of seven years to elapse from the date of filing of the suit and the period of limitation was three years. As such it was held that any amendment on the grounds as set out, would defeat the valuable right of limitation that had accrued to the defendants therein. In *Banta Singh Ganga Singh and Others Vs. Harbhajan Kaur and Others*, a Full Bench of this Court observed that no amendment of the plaint should be allowed if its effect is to take away valuable right that has accrued to the opposite party by lapse of time. In the said case, when the application for amendment was made in the Lower Appellate Court, the time for filing the suit for preemption had already expired and a valuable right had accrued in favour of the plaintiff. It was observed that a right of limitation which had accrued in favour of the party could not be taken away by way of amendment.

7. This Court in *Suraj Mal v. State of Haryana*, 1999(2) CCC 549 (P&H) : 1999(2) PLJ 303 observed that all amendments are to be allowed. Besides, it is the duty of the Court to determine the rights of the parties and not to punish them for the mistakes if any. However, amendment is to be disallowed when : (1) the application is filed mala fide, (2) withdraws admissions made without explaining them, (3) takes away vested rights of the other party and the other party cannot be compensated into terms of cost and (4) claim has become time-barred when amendment is sought. In *Punjab National Bank v. Indian Bank*, 2003(1) PLJ 458, it was observed that amendment of a plaint is generally not to be disallowed except : (i) where a time barred claim is sought to be introduced, or (ii) where it changes the nature of suit itself, or (iii) it is mala fide, or (iv) the other party cannot be placed in the same position had the plaint been originally filed correctly i.e. the other side has lost right of a valid defence by subsequent

amendment.

8. The above said law reports show that wherever a claim is barred by time, an amendment is not to be allowed. However, it may be noticed that in *Dondapati Narayan Reddy Vs. Duggirddey Venkatanarayana Reddy and Others*, it was held that rules governing pleadings and leading of evidence have been incorporated to advance the interest of justice and to avoid multiplicity of litigation and amendment, should generally be allowed unless it is shown that permitting amendment would be unjust and result in prejudice against opposite side, which cannot be compensated by costs or would deprive him of a right which has accrued to him with lapse of time. Besides amendment may also be refused, if such a prayer made separately is shown to be barred by time. Besides, the Hon'ble Supreme Court in *Pankaja and Another Vs. Yellappa (D) by Lrs. and Others*, in respect of amendment of a plaint when relief sought to be added by amendment is allegedly barred by limitation held that there is no absolute rule that amendment in such a case should not be allowed. The Court's discretion in that regard depends on the facts and circumstances of the case and has to be exercised on a judicious evaluation thereof. An amendment subserving the ultimate cause of justice and avoiding further litigation should be allowed. There can be no strait jacket formula for allowing or disallowing an amendment of pleadings and each case depends on the factual background of that case. The following observations in the case of *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, were referred and quoted:-

16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice.

This view was followed by Hon'ble Supreme Court in *T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board and Others*, and it was held that the Court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it. In an earlier judgment in the case of *Ragu Thilak D. John v. S. Rayappan*. 2001(2) CCC 298 (S.C.) : (2001) 2 SCC 472, it was observed that the dominant purpose of allowing the amendment is to minimize the litigation. The plea that the relief sought by way of amendment was barred by time is arguable 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. In *M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.*, the plaintiff therein filed a suit for eviction of the defendant from the suit property on the ground of reasonable requirement for building or re-building and on the ground of default in payment of rent. The defendant therein filed an application raising certain contentions

including that there was no relationship of landlord and tenant between the parties. Thereafter, the said defendant filed an application under Order 6 Rule 17 CPC for seeking amendment of his written statement so as to say that the plaintiff landlord therein was a permissive occupier instead of owner. The further amendment sought was based on the entries made in the revenue records. It was held that it was not the case of the plaintiff-landlord therein that any accrued right to it was tried to be taken away by the proposed amendment. Besides, assuming that there was some admission indirectly made it was open to the defendant-tenant therein to explain the same. It was further observed that looking to the proposed amendment it was clear that they were required for proper adjudication of the controversy between the parties and to avoid multiplicity of judicial proceedings. Besides, from the records it could not be said that any new defence was sought to be introduced and even otherwise it was open to the defendant to take alternate or additional defence. Merely because there was delay in making the application, when no serious prejudice has been shown to have caused to the plaintiff so as to take away any accrued right, the application could not be rejected. At any rate, it could not be said that allowing amendment caused irretrievable prejudice to the plaintiff. Therefore, the proposed amendment would not have the effect of displacing the plaintiff from the admission made by the defendant in his initial application raising certain contentions including that there was no relationship of landlord and tenant between the parties. In *Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala and Others*, , it was observed as follows:

It is, no doubt, true that, save in exceptional cases, leave to amend under Order 6 Rule 17 of the Code will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. But this rule can apply only when either fresh allegations added or fresh reliefs sought by way of amendment. Where, for instance, an amendment is sought which merely clarifies an existing pleading and does not in substance add to or alter it, it has never been held that the question of a bar of limitation is one of the questions to be considered in allowing such clarification of a matter already contained in the original pleading. The present is a fortiori so. The defendants here were not seeking to add any allegation nor to claim any fresh relief which they had prayed for in the pleading already filed.

9. In the background of the above observations, it is evident that there is no strait-jacket rule with regard to allowing or disallowing an application seeking amendment of the pleadings. The question whether an application seeking amendment of pleadings is to be allowed or not depends on the facts and circumstances of each case. The consensus of the judicial opinion which appears is that where there is a specific bar of limitation and the same is apparent on the face of the record a prayer for amendment of the pleadings is not to be allowed so as to take away an accrued right that had vested in the opposite party. However, where the question of limitation which is sought to be taken by way of amendment of the pleadings is an arguable point, the question of allowing or

disallowing the application for amendment is to be considered in exercise-of judicial discretion of the Court depending on the facts and circumstances of each case and on judicial evaluation of the facts and circumstances in which the amendment is sought. Besides, where by allowing an application for amendment of pleading, the cause of justice is subserved and further litigation is avoided, the amendment sought for is to be allowed.

10. In the case in hand the plea that has been raised by the defendant-petitioner in his written statement is that there was a fiduciary relationship between the parties inasmuch as the plaintiff-respondent is a Commission Agent and the defendant-petitioner was the customer of plaintiff and he used to go the shop of the plaintiff to sell his crops. Besides it is alleged that the defendant had full faith in the plaintiff and he made signatures on papers without any hitch and inquiry so that his crops could be sold without any delay or problems. It is also stated that the defendant is an aged person and he can sign in Urdu only and generally puts he his thumb impression. The ingredients of the plea of set-off that has been sought to be taken by way of amendment in fact have been pleaded in the written statement (Annexure P/2) by stating that the defendant had sold his entire winter crop (i.e. Rabi Crop) for the year 1999, which were 100 bags of 95 kgs. each (weighing 95 quintals of wheat) at the shop of the plaintiff and till date of filing the written statement, the plaintiff did not make payment for this crop. The claim that has been raised by way of set-off in terms of the application dated 14.05.2003, therefore, is for the purpose of only elaborating the plea that had already been taken in the defence. It is sought to be pleaded by way of amendment in the written statement that in case the suit of the plaintiff is ultimately decreed in his favour, in that case the defendant is entitled to recover/ deduct the amount of Rs.49,400/- alongwith interest since 1999 as a set-off. The question whether there was fiduciary relation between the parties is a matter of evidence. In fact, the defendant-petitioner has referred to the cross-examination of the plaintiff recorded during the proceedings of the case wherein it is stated that he has relation with the defendant-petitioner-Milkha Singh for the last 15-20 years and he came to sell his crops. It is also stated that Milkha Singh sold his winter crop (Rabi) in the year 1999. It was approximately 100 bags weighing 95 Kg. each and he made payment of this crop on 28.04.1999 to the defendant-petitioner. This aspect and evidence regarding there being a fiduciary relationship between the parties is to be considered and gone into by the trial Court. In the commentary on CPC by Justice C.K.Thakker, the distinction between a legal set-off and an equitable set-off has been explained in the following terms:

Legal set-off and equitable set-off: Distinction

Equitable set-off differs from legal set-off. The following are the points of difference between the two:

(a) Legal set-off must be for an ascertained sum of money. Equitable set-off may be allowed even for an unascertained sum of money,

(b) Legal set-off can be claimed as of right and the court is bound to entertain and adjudicate upon it. Equitable set-off, on the other hand, cannot be claimed as of right and the court has discretion to refuse to adjudicate upon it.

(c) In a legal set-off it is not necessary that the cross-demands arise out of the same transaction. Equitable set-off can be allowed only when the cross-demands arise out of the same transaction.

(d) In a legal set-off, it is necessary that the amount claimed as set-off must be legally recoverable and must not be time barred. A claim by way of equitable set-off may be allowed even if it is time barred when there is fiduciary relationship between the parties.

(e) A legal set-off requires a court-fee, but no court-fee is required in the case of an equitable set-off". (Emphasis added).

The above commentary is helpful for the purpose of consideration in respect of a claim made by a party by way of equitable set-off in a case where there is a fiduciary relationship between them. In such a case it would be a matter to be considered on the appreciation of evidence whether there is a fiduciary relationship between the parties. In case there is one the question whether an equitable set-off may be allowed even if it is time barred when there is a fiduciary relationship between the parties would also have to be gone into. In *Nathan Prasad Shah Vs. Kali Prasad Shah*, it was held that a time barred debt may be claimed by way of equitable set-off. Therefore, evidently these questions are debatable and would have to be gone into on appreciation of evidence. In the circumstances, it is not a case where the relief claimed by way of setoff can be said to be *ex facie* barred by limitation. These disputed questions, therefore would require to be determined by making them a subject matter of issue on the basis of the pleadings. In this view of the matter and in the light of observations in the case of *Ragu Thilak D. John* (supra) to the effect that where it is arguable that relief sought by way of amendment would be barred by law of limitation, the amendment should still be allowed and the disputed matter made the subject matter of an issue, the question whether the plea which is sought to be raised by way of amendment is barred by time or not, is liable to be subject matter of an issue before the trial Court and it cannot be said at this stage whether the plea is out rightly barred by time.

10. The next question that requires to be considered is as regards the plea of set-off being not taken at the first date of hearing as contemplated by Order 8 Rule 6(1) CPC The said provision reads as under:-

6. Particulars of set-off to be given in written statement. -

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiffs demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiffs

suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off".

A reading of the above shows that normally the plea of set-off is to be raised at the time of filing of the written statement at the first hearing of the suit unless permitted by the Court. Therefore, the Court can always grant permission at a subsequent stage to the defendant to raise a plea of set-off. In the case in hand, it is the stand taken by the petitioner that he is illiterate and generally thumb marks the documents when required. Besides, he can sign in Urdu. Therefore, evidently in the adversary legal system, he is heavily dependent on his lawyer for the defence of his case and after having engaged a counsel and briefed him, he remains content and confident that his lawyer would look after his interest. A plea has been taken as regards the non-payment for the produce of Rabi 1999. The plaintiff has been cross-examined also in that regard. Therefore, it is only for the purpose of elaborating the pleadings that a claim regarding set-off is to be made in case the suit is ultimately decreed. This Court in the case of *Vinod Kumar v. Jagmohan*, 2003(1) CCC 163 (P&H) : (2002)132 PLR 511 in a case where a counter-claim had been made in terms of Order 8 Rule 6-A of the CPC observed that the said provision does not in terms impose any period of limitation on the contrary, the wide language used in the order shows that any claim could be set up which may be subject matter of an independent suit and it further shows that the counter-claim need not have any nexus with the cause of action pleaded by the plaintiff in his suit. The ratio of the judgment in the case of a counter-claim would also apply equally to a case where set-off is claimed or is sought to be claimed by way of amendment. There is no limitation provided even in a case of a claim for set-off. In fact in Rule 6-A of Order 8 it is provided that a defendant in addition to his right to pleading a set-off under Rule 6, set-up, by way of counter-claim against the claim of the plaintiff,, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. In both the cases i.e. in the case of set-off or counterclaim the claim for set-off or counter-claim is to be made at the first hearing of the suit or before the defendant has delivered his defence respectively. However, with the permission of the Court it can be claimed even subsequently. Therefore, the plea of set-off even if not taken at the first hearing of the suit can with the permission of the Court be taken subsequently. In the case in hand the basic ingredients of the plea of set-off have already been pleaded in the written statement (Annexure P/2) and the claim is only to be specifically pleaded. It may also be appropriately noticed that in such a situation, the opposite party can always be compensated in terms of costs.

11. The next question that requires to be considered is the effect of the failure of the defendant to pay the costs of Rs.100/- on 14.05.2003. Section 35-B of the CPC provides for payment of costs for causing delay. In case a party on the date

fixed for hearing of a suit fails to take steps that he was required to take or obtains adjournment for taking such steps or producing evidence or any other ground, the Court may make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date. The payment of such costs on the date next falling the date of such order is a condition precedent to the further prosecution of the defence by the defendant where he was ordered to pay such costs. The claim for costs so as to invoke the condition of further prosecution of the defence by the defendant where he has failed to pay the costs is on the date following the date on which the order imposing the costs has been passed. A Full Bench of this Court in Prem Sagar and Others Vs. Phul Chand and Others, has held that if on the date next following the date of the order of payment of costs the issue as to payment of costs is not raised by either of the parties or taken notice of by the Court, it cannot be said that thereafter on all or any subsequent dates same can be resuscitated or that Section 35-B would continue to apply with all its rigour thereafter as well. Indeed if on the crucial date fixed for the payment of costs i.e. the date next following the date of order of payment of costs the question is not raised at all, then impliedly the waiver of the right would arise in favour of the party entitled to costs which would necessarily follow. Therefore, on subsequent dates it would not be open to the parties to re-open the issue at their will and seek barring of further prosecution of the suit or the defence u/s 35-B afresh. It has not been shown by the plaintiff that after the imposition of costs of Rs.100/- on 14.05.2003 he had raised the issue on the date next following the date of the order imposing the costs. Therefore, there has been a waiver on his part to claim costs and he cannot seek the barring of further prosecution of defence by the defendant-petitioner.

12. Insofar as the conduct of the petitioner is concerned, the same though has not been very good and he has delayed the trial of the case. However, the claim whether he is entitled to set-off in case the suit of the plaintiff is decreed to the extent of wheat crop which he is stated to have sold during the season of Rabi 1999 is a matter which requires consideration. In this respect the opposite party i.e. the plaintiff can be compensated by costs.

13. In the circumstances, the Civil Revision is allowed. The impugned order dated 24.01.2004 is set aside. The defendant-petitioner may file his amended written statement in terms of this application dated 14.05.2003 so as to claim set-off. This shall, however, be subject to payment of Rs.5,000/- as costs by the defendant to the plaintiff. The plaintiff- respondent shall also be allowed to re-examine himself as regards the claim raised by the defendant-petitioner regarding set-off. The case being considerably delayed, it is hoped that the trial Court shall proceed with the case and dispose of the same as expeditiously as possible and preferably within one year from receipt of certified copy of the order. Nothing stated here shall be taken as an expression on the merit of the controversy between the parties.