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**(1984) 01 AHC CK 0027**  
**In the Allahabad High Court**  
**Case No : F.A.F.O. No. 454 of 1982**

Ram Dev and Others

APPELLANT

Vs

Ram Badan

RESPONDENT

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**Date of Decision :** 19-01-1984

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

**Citation :** AIR 1984 All 206

**Hon'ble Judges :** B.D. Agarwal, J

**Bench :** Single Bench

**Advocate :** B.B. Paul, for the Appellant; R.N. Singh and S.N. Singh, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

B.D. Agarwal, J.—This appeal under Order 43, Rule 1 (t) of the Civil P. C. is directed against the decision of the lower appellate Court dated May 31, 1982. The dispute in the appeal is with respect to a piece of land. The plaintiff asserted his title over this land claiming that this has been his Sehan and in his possession as such over which he had had miscellaneous user including a Nabdan (gutter). For the defendants it was claimed, on the other hand, that the plaintiff has had no right, title or interest to this land, nor has he been in possession thereof and that the land has throughout been possessed by the defendants. The trial Court came to the finding that the land is held as Sehan by the defendants and not the plaintiff. The suit was accordingly dismissed on 4-2-1981. In the appeal filed by the plaintiff, there was an application made to amend the plaint. The amendment sought was twofold, namely, that the wall existing on the land in dispute belonged to one Ganesh and that the same had been acquired later by the defendants and the other amendment sought was that, in the alternative, the plaintiff had acquired prescriptive right of easement to flow water of the Nabdan over the said land. The amendment has been allowed by the lower appellate court and the suit remanded to the trial court for decision afresh on merit.

Aggrieved, the defendants have preferred this appeal.

2. In this appeal twofold points have arisen for decision, one is in respect of the legality of the order whereby the amendment in the plaint was allowed and the other is about the justification for the remand made by the lower appellate court to the trial court for decision afresh. In so far as the question concerning amendment relates, as I mentioned above, the amendment granted is two-fold. The trial Court made an observation to the effect that the plaintiff-respondent did not clarify the position with respect to the wall existing on a part of the Sehan, while the defendants claimed that the said wall belonged to them. In order to clarify this the plaintiff-respondent has sought an amendment saying that this wall belonged to one Ganesh and the same was acquired later by the defendant appellants. It does not appear that this may, in any manner, cause prejudice to the defendants appellants and the amendments made in that behalf may not, therefore, be seriously taken exception to. As regards the other part of the amendment allowed, however, the position is different.

3. From the averment contained in paragraph 3 of the plaint to which the respondent's learned counsel made reference, it will be manifest that the plaintiff asserted himself to be the proprietor of the Sehan land. The contention is that he has been in possession over this land and the same has been used by him for various miscellaneous purposes including the flow of Nabdan up to the Rasta existing to the north. The plaintiff alleges in other words that the Nabdan has flowed over the Sehan land in order to reach up to the Rasta existing to the north. In the entire plaint there is no whisper with regard to his claim in the alternative or otherwise of having a prescriptive right of easement to flow water over the disputed land. In *Chapsibhai Dhanjibhai Danad Vs. Purushottam*, it was held that a party to a suit can plead inconsistent pleas in the alternative such as the right of ownership and a right of easement, but where he has pleaded ownership and has failed, he cannot subsequently turn round and claim that right as an easement by prescription. To prove the latter it is necessary to establish that it was exercised on someone else's property and not as an incident of his own ownership of that property. For that purpose, his consciousness that he was exercising that right on the property treating it as someone else's property is a necessary ingredient in proof of the establishment of that right as an easement. In the instant case, the plaintiff not merely asserted the proprietary right to flow the Nabdan over the disputed land, but this was also the stand that he took in the course of the evidence including the statement on oath given by him. It does not appear to me that by introducing the amendment at this stage the plaintiff can import into the plaint the requisite consciousness required for the purpose of establishing the prescriptive right of easement, namely, that even though the land had belonged to the defendants appellants, he has exercised the right to flow the Nabdan as a dominant tenement-holder. The power to amend the pleadings is very wide indeed, as provided under Order 6, Rule 17, C P. C. but even so the same is not without certain limitations. In *Ganpat Singh Vs. Sher Bahadur Singh and Others*, cited for the respondent for instance it was observed

that the general rule is that a party is not allowed by amendment to set up a new case or new cause, of action particularly when a suit on the new cause of action is barred. In face of the contention in the plaint as originally drawn to the effect that the land vests in the plaintiff, the contention now introduced in the alternative, namely, that even if the land belongs to the defendants, the plaintiff has had the right of easement introduces a new cause of action that has not existed in the pleadings up to this time. In Beni Shankar Sharma and Others Vs. Surya Kant Sharma and Others, also cited for the respondent in this connection, the question was merely that of correct, and full description of certain properties which had not been precisely described before the preliminary decree for partition was made and this clearly was a distinct issue. The discretion of the lower appellate court in the matter of amendment being granted is not to be lightly interfered with as held in Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon AIR 1969 SC 127 , but in the instant case the objection raised is not based on technical ground. It is substantive for the reason that there has to be the requisite animus in order, to assert and claim the prescriptive right of easement and the same has been lacking, as is evident from the averments contained in the plaint and also the conduct of the plaintiff in making his statement and adducing other evidence on the subject. In Ganga Prasad Sarraf Vs. Smt. Sukra and Another, the plaintiff claimed in the alternative for dissolution and accounting in addition to his claim that dissolution and accounting had already taken place before of the partnership. This also, therefore, stood on different facts, and even though the application for amendment was beyond time, the same was allowed, to be incorporated. In Bhubaneswar Patel Vs. Janak Patel and Others, cited for the appellants in this behalf the observation is that where facts were available to the plaintiff when the suit was brought but were not mentioned in the original plaint, there was no justification for "amendment to be allowed to incorporate a new case and in support thereof reliance was placed also on the decision reported in Bhagavatula Gopalakrishnamurthi and Others Vs. Dhulipalla Sreedhara Rao and Another, . In the present case there can be no denying that the plaintiff-respondent had all along been aware of the relevant facts including the position with regard to the flow of the Nabdan.

4. For the reasons given above, I am of the view that the application for amendment in the plaint in so far, as the question of Nabdan is concerned, could not be allowed even though there can be no serious objection to the said objection being granted as regards the clarification for the wall found to exist on a portion, of the Sehan in dispute.

5. As regards the other question, namely, whether there was justification to remand the case to the trial court, the lower appellate court has done this for the simple reason that the application for amendment was allowed. Since the amendment concerning the Nabdan has failed, there remains little justification for the case being remanded to the trial court. The lower appellate court itself is competent to give its decision on the merits of the appeal taking also into consideration the position with respect to the wall. For the purpose of

determining the question regarding the wall alone, the parties may be permitted to adduce additional evidence before the lower appellate, court. Remand in the situation would be altogether unwarranted

6. For the reasons given above, the appeal is allowed in part. The order of remand made by the lower appellate court is set aside. The lower appellate court shall, decide the appeal on merits according to law after hearing the parties and in the light of the observations made above. Costs of this appeal on parties.