

(2014) 11 BOM CK 0166
In the Bombay High Court
Case No : Writ Petition No. 7996 of 2014

Sanjay Suganchand Kasliwal	Vs	APPELLANT
Jugalkishor Chhaganlal Tapadia and Others		RESPONDENT

Date of Decision : 25-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 2(1)(e), 2(e), 34 — Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17 — Constitution of India, 1950 - Article 226, 227

Citation : (2015) 4 ABR 427 : (2015) 5 ALLMR 101 : (2015) 3 MhLj 121

Hon'ble Judges : R.V. Ghuge, J.

Bench : Single Bench

Advocate : P.M. Shah, Senior Advocate instructed by S.V. Adwant, for the Appellant; R.F. Totla, for the Respondent

Final Decision : Partly Allowed

Judgement

R.V. Ghuge, J.?Heard. Rule. Rule made returnable forthwith, by the consent of the parties. Heard finally. I have heard learned Advocates for the respective sides in extenso on 28-10-2014, 31-10-2014, 12-11-2014, 13-11-2014 and 25-11-2014.

2. During the course of submissions of the learned Advocates for the respective parties, since it was requested that a final hearing at a later stage would consume substantial time looking at the pendency of final hearing cases, that this matter was heard and the Rule was made returnable forthwith by the consent of the parties. Needless to state that the controversy raised in this petition deserved to be addressed to expeditiously.

3. Issue is as regards two applications filed by the petitioner herein, under Order VI, Rule 17 of the Civil Procedure Code (CPC). The First Application is Exh. 35 and the second Application is Exh. 36.

4. The petitioner has preferred an Application MARJI No. 198/2014 before the

learned District Judge at Parbhani under section 9 of the Arbitration and Conciliation Act, 1996. Prior to the filing of this petition, both these petitioners were before this Court in Arbitration Appeal No. 3/2014. Application MARJI No. 103/2014 filed before the learned Principal District Judge, Aurangabad was rejected by order dated 17-4-2014 holding therein that the said proceedings were not maintainable on account of lack of territorial jurisdiction. By Judgment dated 9-5-2014 delivered by this Court, the Arbitration Appeal No. 3/2014 was dismissed concluding therein that the impugned order was neither erroneous, nor perverse. The petitioner herein, thereafter preferred MARJI No. 198/2014 before the learned District Judge, at Parbhani.

5. The contentions of the petitioner are summarised as follows:--

- a) The partnership deed gives the partnership firm the name and title of M/s. Kasliwal Empire.
- b) The partnership deed is signed at Aurangabad.
- c) Addresses of both the partners are at Aurangabad.
- d) Object of the partnership deed is to construct and develop housing project at village Satara, district: Aurangabad.
- e) Registered office of the firm is at Aurangabad.
- f) Clause 16(e) prohibits withdrawal of any amount by any partner for his own profit, benefit or use or otherwise except remuneration.
- g) Clause 17 of the partnership deed provides for referring any dispute or difference between the parties touching the business of the firm or interpretation of any provision thereof or otherwise relating to the firm and its business, to Arbitration under the Arbitration Act.
- h) A joint account in the name of the appellant and the respondent is opened with the Buldana Urban Co-operative Credit Society Limited, Aurangabad branch.
- i) Rs. 500/- were credited in the said account on 12-8-2010 by cash for opening the account.
- j) On 12-8-2010, an amount of Rs. Nine crores were deposited in the said account by the Buldana Urban Co-operative Credit Society Limited, Aurangabad branch as a loan amount.
- k) The firm M/s. Kasliwal Empire has stood security for the project, for which the loan of Rs. Nine crores has been taken.
- l) On 12-8-2010, an amount of Rs. Seven Crores was debited by RTGS transfer and again on 12-8-2010 an amount of Rs. One crore was debited to the firm's account. Same are credited to the SBI Account of M/s. Tapadia Construction Ltd.
- m) There are several other entries as regards crediting crores of rupees in the

said account and withdrawal of several crores on single dates like 31-8-2010, 8-9-2010 and 9-9-2010.

n) The said Buldana Urban Co-operative Credit Society Limited, Aurangabad branch has informed the appellant on 7-9-2012 that the respondent has withdrawn Rs. Eight crores on a single date 12-8-2010 by RTGS transfer to the SBI Bank Account of Tapadia Construction Limited, respondent No. 2.

o) By sale deed dated 30-12-2013, a property was purchased at Hingoli from the money siphoned off by the respondent from the partnership account on 12-8-2010.

p) The said property is purchased in the name of Tapadia Constructions Limited.

q) Arbitration Proceedings were initiated by the Buldana Urban Cooperative Credit Society Limited, Aurangabad Branch, at Aurangabad, in which Kasliwal Empire is respondent No. 4.

r) An award has been delivered by the Arbitrator on 9-2-2013.

s) The definition of "Court" is found under section 2(e) of the Act of 1996 and which reads as under:--

""Court" means the principal civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of small causes."

t) Section 9 of the Act of 1996 provides for interim measures by the Court for preservation of any property or thing which is subject-matter of the dispute in arbitration or as to which any question may arise therein and issue interim injunction.

u) The petitioner filed MARJI No. 198 of 2014 under section 9 of the Act of 1996.

v) In the proceedings before the competent Court, Schedule "A" indicates the property of Hingoli and which is owned by Tapadia Constructions Limited.

w) Applications Exhs. 35 and 36 both have been filed on 27-8-2014 in MARJI proceedings which were preferred by the petitioner herein on 26-6-2014.

x) Contesting respondent M/s. Tapadia Constructions Limited filed their Written Statement on 25-7-2014.

y) In Application Exh. 35, the proposed paragraphs 20-A up to 20-L are set out below paragraph 16.

z) The proposed amendment was felt necessary for effective adjudication of the dispute between the parties under section 11 of the Arbitration Act, 1996 which

is pending adjudication.

aa) The amendment was felt necessary since the mortgage document which is a registered document by which the loan was taken and which is genesis of the claim of the petitioners, was not traceable on the date of filing of the MARJI application.

ab) The above contention of the petitioners set out in paragraph No. 19 of the Application Exh. 35 has not been denied by the respondent.

ac) The handwritten reply to application Exh. 35 is primarily based upon the allegations that the petitioners are indulged in dilatory tactics and the petitioner does not desire to have the proceedings adjudicated upon with promptitude.

ad) The objection of the respondent was also on the ground that the application for amendment has been filed at a delayed stage and since the application under section 9 of the Arbitration Act is not a suit, Order VI, Rule 17 of the Civil Procedure Code would not become applicable.

ae) While rejecting both the applications Exh. 35 and Exh. 36, by the impugned order dated 5-9-2014, the learned Principal District Judge, Parbhani has not delved upon the aspect of, whether the Civil Procedure Code could be said to be applicable to the proceedings.

af) Since the respondents had raised the issue of applicability of the Civil Procedure Code, 1908 and the same having not been considered by the Competent Court, leads to the conclusion that the said contention stands negated and the respondents have not preferred any challenge in that regard against the said order.

ag) In application Exh. 36, the petitioner desired to delete the words "individual capacity" from paragraph No. 13 of the MARJI Application and replace the same by the words "capacity as partners".

ah) A mistake that had crept into paragraph No. 13 of the application MARJI, the said mistake ought not to continue in perpetuity.

ai) The impugned order is based upon the merits of the proposed amendment and the same is impermissible in law.

aj) The mortgage deed is a registered document and indicates as to who is the borrower.

ak) The prayer clause in MARJI Application are not sought to be deleted or added.

al) Cause of action is not likely to be changed or altered.

am) Any inconvenience or hardship caused to the respondents can be compensated with costs.

an) The amendment sought is only to ensure that the petitioner succeeds in

putting forth his best case and completes the pleading in all respects so as to enable the Court to decide the real controversy.

ao) Any error or inadvertent mistakes in the pleading of the MARJI Application are likely to seriously affect the rights of the petitioner and would lead to a Judgment in the matter which would be based upon either insufficient/deficient averments or on account of lack of pleadings.

ap) Neither new pleadings are sought to be introduced, nor a new cause of action would be given rise to.

aq) The learned District Judge, while hearing the applications, has gone into the merits of the matter as well as the pleadings, has transgressed its jurisdiction and has used harsh words which amounts to condemnation of the petitioner when in fact, no allegations were set out in the Say of the respondents which would justify such conclusion of the learned District Judge.

6. Shri Totla learned Advocate, on behalf of the First Respondent has strenuously canvassed his submissions, which can be summarized in brief as follows:--

(a) In the earlier MARJI proceedings at Aurangabad, the Court had concluded that it had no jurisdiction to entertain the proceedings under section 9 of the Act of 1996.

(b) Clause 17 of the partnership deed permits the reference of a dispute between the parties to the Arbitrator if the said dispute touches the business of the firm or is in relation to the firm.

(c) Though the appellant had raised a dispute as regards the business of the firm, section 9 of the Act of 1996 enables only that Court to entertain the dispute and protect and preserve the subject-matter of the dispute or the property concerning the dispute at the place it is situated.

(d) Section 2(1)(e) defines the Court to mean the principal civil Court in a particular district to have jurisdiction to decide questions forming the subject-matter of the arbitration.

(e) The subject-matter of the proceedings initiated by the appellant is the property situated at Hingoli and which is owned by M/s. Tapadia Constructions Limited.

(f) This Court has concluded that there is a "Court" at Hingoli as understood under section 2(1)(e) of the Act of 1996.

(g) No Bank Account has been opened by the partners in the name of the partnership firm.

(h) The account mentioned by the appellant is a joint account in the names of the appellant and the respondent and is not an account in the name of M/s. Kasliwal Empire.

(i) The petitioner by Application Exh. 35 and 36, seeks to retract a statement made in the MARJI Application and improvise his case.

(j) Unless there is a jurisdictional error committed by the Court, in the impugned order, no interference is called for.

(k) The High Court has made certain observations in paragraph No. 33 of the judgment dated 9-5-2014 in Arbitration Appeal No. 3/2014 which would prevent the petitioner from amending his MARJI Application.

(l) This writ petition is not maintainable under section 37 of the 1996 Act as an appeal is maintainable.

(m) An interlocutory order could not be challenged before this Court and instead the petitioner can prefer a comprehensive challenge after the District Court decides the MARJI application.

(n) Submission is being made on instructions that whatever may be the submissions of the petitioner regarding the sale deed of M/s. Tapadia Constructions, the petitioner is at liberty to advance such arguments and rely upon such documents as may be filed on record. The respondent will controvert the said submissions, but will not oppose the advancing of such submissions only because there are no pleading in the MARJI Application.

(o) When Paragraphs No. 15 and 20 in the MARJI Application contain sufficient pleadings, there is no need for the petitioner to delete the said two words from paragraph No. 13 and add the proposed paragraphs from 20-A to 20-L.

(p) The District Court has properly considered the application within the ambit of Order 6, Rule 17 of Civil Procedure Code and no interference is called for.

7. Shri Bajaj learned Advocate representing Respondent No. 2 has drawn support from the submissions of Mr. Totla and further submits as under:--

a) Section 5 provides for a minimal interference of this Court in the matters falling under Arbitration and Conciliation Act, 1996. The petitioner should not be permitted to challenge different orders at different stages in the proceedings under section 9.

b) The petitioner should allow the District Court to decide the section 9 proceedings and thereafter raise a comprehensive challenge.

c) The jurisdiction of this Court is limited under Articles 227 read with Article 226.

d) Proposed paragraph 20-A to 20-F form a different set of pleadings and are argumentative in nature.

e) Proposed paragraph No. 20-G up to 20-L raise a new cause of action as against respondent No. 2.

f) Application MARJI is filed under section 9 and it is in the nature of summary

proceedings wherein there is no recording of evidence.

g) Instead of introducing proposed paragraph Nos. 20-A to 20-L, the petitioner is at liberty to advance oral submissions on the same lines as the petitioner claims to have set out basic pleadings in paragraph No. 15 and paragraph No. 20 of the MARJI Application.

8. It needs a mention that besides the submissions which I have recorded hereinabove, the litigating parties have advanced their submissions for hours together. I do not wish to advert to all these submissions in the light of the order that I propose to pass and on account of the reasons which I would be assigning to my conclusions. Needless to state, I have set out only those submissions of the litigating parties in a concise form hereinabove, which I find are germane to the issue raised before me.

9. Shri Shah, senior advocate has relied upon several reported Judgments. The relevant Judgments cited are as follows:--

a) State of Maharashtra Vs. Hindustan Construction Company Ltd., , b) Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, , c) Bharat Sanchar Nigam Limited and Ors. vs. BMW Industries Limited and others, 2007 (5) AKAR (NOC) 725 (CAL) (DB) , d) Arasmeta Captive Power Company Private Limited and Another Vs. Lafarge India Private Limited, , e) Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, .

10. Shri Totala, learned Advocate for the respondent No. 1 has placed reliance upon the following Judgments:--

a) Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil, , b) S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and c) Municipal Council Vs. Sanjay Dhanraj Yenorkar, .

11. Shri Bajaj, learned Advocate has placed reliance upon the following Judgments:--

a) The Sangli Bank Ltd. Vs. Kanishka Investments Pvt. Ltd. and others, , b) Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, , c) Escorts Limited vs. Knorr Bremse-Aq on 21 November, 2007 (Punjab and Harayana HC).

12. I find that the partnership deed dated 7-3-2007 is the foundation in this case. The borrower of the loan amount of Rs. 9 crores is a firm by name Kasliwal Empire. This firm signed the said partnership deed through the partners M/s. Jugalkishor who is respondent No. 1 and Mr. Sanjay who is the petitioner. Both these persons came together to form the said partnership firm by name M/s. Kasliwal Empire. The sale deed mentions the name and style of the said firm. The object of the partnership firm was to carry out construction and development of housing project at Satara, District Aurangabad.

13. The registered mortgage deed which is an agreement signed on 11-8-2010

with Buldana Urban Credit Co-operative Society Limited for taking a loan of Rs. 9 crores, indicates that the agreement was signed between M/s. Kasliwal Empire which is the mortgagor/borrower/first party and the Buldana Urban Credit Co-operative Society which is the mortgagee/second party. The said document indicates that M/s. Kasliwal Empire entered into the said agreement for mortgage through its partners Viz. Mr. Jugalkishor and Mr. Sanjay.

14. Clause 1 of the above stated agreement indicates that the First Party approached the Second Party and requested for a loan. For the said business loan facility, the First Party has mortgaged their properties. It was also agreed that if the First Party failed to repay the loan, the properties mentioned by way of mortgage as prime security for the loan facility shall stand as sureties.

15. There are several other conditions set out in the said agreement which indicate that the firm has entered into the said agreement with the Second Party society. The properties mortgaged were mentioned in Schedule A and B in the agreement. Finally, the said agreement was signed by M/s. Kasliwal Empire, a registered partnership firm, as a mortgagor through its partners Mr. Jugalkishor and Mr. Sanjay with the Mortgagee Buldana Urban Credit Co-operative Society.

16. I find that several such agreements which are placed on record pertain to the partnership firm Kasliwal Empire.

17. It has been the contention of the petitioner that the amount of Rs. 9 crores was withdrawn by respondent No. 1 Partner of the firm Kasliwal Empire and he had utilized the said amount to buy a property at District Hingoli in the name of the second respondent. It is contended that the second respondent is a firm in which the close relatives of respondent No. 1 Mr. Jugalkishor are partners and therefore, has been termed as a closely held Company.

18. The petitioner, has therefore, canvassed that the dispute between the petitioner and the first respondent is as regards siphoning off the loan amount and utilizing the same to purchase a property at Hingoli. Since the registered mortgage document was not available at the time of filing MARJI Application as the litigating parties are involved in several Court cases, at various places, it could not have laid its hands to the said document. The fact is that the said document became available to the petitioner which has prompted the filing of the amendment application.

19. The petitioner submits that by the proposed amendment, such facts which either were left out inadvertently or such points which the petitioner could formulate only after recovering the registered document, have led to the filing of the applications for amendment. An inaccurate statement was sought to be corrected in paragraph No. 13 in the light of paragraph Nos. 15 and 20 available in the MARJI application and at the same time, certain paragraphs which threw light upon the main controversy between the parties were sought to be introduced.

20. Shri Shah, learned senior Advocate has submitted today that in the light of the statement made by both the respondents made on instructions, enables the petitioner to give up some of the proposed paragraphs and also in the light of they being argumentative in nature. It is, therefore, stated that in application Exh. 35, the proposed paragraph Nos. 20-D to 2-G and 20-J to 20-L can be deleted. Proposed paragraph Nos. 20-A to 20-C and 20-H are pressed by the petitioner.

21. Mr. Totla, learned Advocate has submitted that the question is not about the costs or inconvenience. The salient feature is that an admission once given cannot be restricted. He further states that unless there is a jurisdictional error in the impugned order, no interference is called for. The proceedings under section 9 are summary in nature and have to be concluded at the earliest since section 9 is in tune with the object and scheme of the Arbitration and Conciliation Act, 1996; whereby the legislature desires a speedy resolution of the dispute between the parties. If amendment applications are entertained, the whole object and purpose of the Act would be defeated.

22. He further contends that a Writ Petition would not be maintainable under section 37 of the said Act since any order passed by the District Court including rejection of an amendment, would render an appeal maintainable and not a writ petition. It is canvassed that the property purchased by the second respondent cannot be said to have been purchased by the first respondent as the property is in the name of a firm.

23. Shri Totla and Shri Bajaj rely upon paragraph 45 of the SBP Judgment (supra) to support the contention that the Apex Court has concluded that the High Court should not interfere with any orders passed by the Arbitral Tribunal during Arbitration proceedings. The aggrieved party has avenues available and should not resort to filing writ petitions in the High Court.

24. I have gone through paragraph Nos. 13, 15 and 20 of the Application MARJI. In order to avoid making any specific observation which is likely to affect the outcome of the MARJI Application, I refrain from drawing any specific conclusion with regards to the merits of the said pleading. However, I am required to draw a conclusion on one aspect in paragraph No. 13 lest, I would not be able to support my conclusion.

25. In paragraph No. 13, it appears that the words "in their individual capacity" appear to be set out erroneously or inadvertently. It is seen from the registered mortgage deed that the loan was sanctioned by the second party Buldhana Urban Co-operative Society Limited to Kasliwal Empire which is the First Party mortgagor. As such, the loan amount obtained by Kasliwal Empire appears to have been sanctioned by the second party mortgagee in favour of the first party Mortgagor Kasliwal Empire.

26. Paragraph No. 20 of the MARJI application also indicates that the property of the partnership firm was mortgaged by the partners for raising the loan and the

said amount was received on behalf of the firm and not in their individual capacity.

27. As such, in my view, deletion of the word "in their individual capacity" and for amending the said paragraph for replacing the said sentence with the sentence "the loan amount which was sanctioned in the joint names of the parties to the proceedings i.e. The applicant and the respondent No. 1 in their capacity as partners" needs to be permitted. I have arrived at this conclusion in the light of the ratio laid down by the Apex Court through reported Judgments which have been cited before me.

28. Insofar as the proposed paragraphs Nos. 20-A to 20-C are concerned, in the light of the petitioner having given up proposed paragraph Nos. 20-D to 20-G, I find that paragraph No. 20-C is unwarranted since this aspect would be borne out by the registered Deed dated 11-8-2010 signed by the parties while representing the First Party Kasliwal Empire.

29. The said agreement indicates that the partners of the firm i.e. Petitioner and respondent No. 1 have received the amount on behalf of the said firm and the promise to repay the debt is also evident from the said agreement. As such, I do not find that the proposed paragraph No. 2-C is required. The petitioner can be permitted to add paragraph Nos. 20-A and 20-B to the MARJI Application.

30. Insofar as proposed paragraph No. 20-H is concerned, the petitioner having given up proposed paragraph No. 20-J to 20-L, the same pertains to the description of the second respondent. I do not wish to scrutinize as to what would be the effect on the merits of the proceedings, by the said proposed paragraph, in order to give a fair opportunity to both the parties.

31. Nevertheless, the proposed paragraph No. 20-H is an attempt on the part of the petitioner to establish the proximity between the first respondent and the second respondent, since it is the contention of the petitioner that the first respondent has siphoned of Rs. 9 crores obtained as loan by the firm Kasliwal Empire for purchasing a property in district Hingoli in the name of second respondent of which he is an important and prominent partner. The contention of the petitioner that respondent No. 2 is a closely held Company in view of blood relations of the first respondent being Directors of the said Company, I am of the view that the petitioner can be permitted to introduce paragraph No. 2-H in the MARJI Application.

32. In the 2010 Apex Court Judgment in case of Hindustan Construction Company (supra), paragraph Nos. 16 to 21 are of assistance and as such, I find it necessary to reproduce the said paragraphs hereinbelow:--

"16. Pleadings and particulars are required to enable the Court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the Court. But like any other discretion, such discretion has to be exercised consistent with settled legal

principles. In *Ganesh Trading Co. vs. Moji Ram*, this Court stated: (SCC p. 93, para 2)

"2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."

17. Insofar as Code of Civil Procedure, 1908 (for short "CPC") is concerned, Order VI, Rule 17 provides for amendment of pleadings. It says 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.

18. The matters relating to amendment of pleadings have come up for consideration before Courts from time to time. As far back as in 1884 in *Clarapade and Company vs. Commercial Union Association* - an appeal that came up before Court of Appeal, Brett M.R. stated:

".....The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made....."

19. In *Charon Das and Others vs. Amir Khan and Others*, Privy Council expounded the legal position that 11 Vol. XXXII The Weekly Reporter 262 12 (1920) LR 47 IA 255 although power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

20. A four-Judge Bench of this Court in *L.J. Leach and Company Ltd., vs. Jardine Skinner and Co.* while dealing with the prayer for amendment of the plaint made before this Court whereby plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of Privy Council in *Charan Das and others*; granted leave at that stage and held:

"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."

21. Again, a three-Judge Bench of this Court in Pirgonda Hongonda Patil in the matter of amendment of the plaint at appellate stage reiterated the legal principles expounded in L.J. Leach and Company Ltd. and Charon Das and others. This Court observed:

"8. Recently, we have had occasion to consider a similar prayer for amendment in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., , where, in allowing an amendment of the plaint in an appeal before us, we said:

"16. It is no doubt true that Courts would, as a rule, decline to allow amendments, if afresh 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." These observations were made in a case where damages were originally claimed on the footing of conversion of goods. We held, in agreement with the learned Judges of the High Court, that on the evidence the claim for damages on the footing of conversion must fail. The plaintiffs then applied to this Court 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 resisted by the respondents and one of the grounds of resistance was that the period of limitation had expired. We accepted as correct the decision in Charon Das vs. Amir Khan, (1920) LR 47 IA 255 which laid down that "though there was full power to make the amendment, such a power should not as a rule be exercised where the effect was to take away from a defendant a legal right which had accrued to him by lapse of time; yet there were cases where such considerations were outweighed by the special circumstances of the case".

9. As pointed out in Charan Das case the power exercised was undoubtedly one within the discretion of the learned Judges. All that can be urged is that the discretion was exercised on a wrong principle. We do not think that it was so exercised in the present case. The facts of the present case are very similar to those of the case before Their Lordships of the Privy Council. In the latter, the respondents sued for a declaration of their right of pre-emption over certain land, a form of suit which would not lie having regard to the proviso to section 42 of the Specific Relief Act (1 of 1877). The trial Judge and the first appellate Court refused to allow the plaint to be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce the right. Upon a second appeal the Court allowed the amendment to be made, there being no ground for suspecting that the plaintiffs had not acted in good faith, and the proposed amendment not altering the nature of the relief sought. In the case before us, there was a similar defect in the plaint, and the trial Judge refused to allow the plaint to be amended on the ground that the period of limitation for a suit under O. XXI, Rule 103 of the Code of Civil Procedure, had expired. The learned Judges of the High Court rightly pointed out that the mistake in the trial

Court was more that of the learned pleader and the proposed amendment did not alter the nature of the reliefs sought."

33. The observations made by the Apex Court in paragraph No. 16 (by relying upon Moji Ram's Judgment) and the observations in paragraph Nos. 18, 19, 20 and 21 as reproduced hereinabove, indicate that the basic issue is to ensure that a litigating party is not deprived of an opportunity to bring on record, by amendment, such pleading as would be necessary for the purpose of determining the real question in controversy between the parties.

34. In paragraph No. 22 of Hindustan Construction Judgment (supra), the Apex Court while relying on Jai Jai Ram Manohar Lal's case has observed as follows:

"22. In Jai Jai Ram Manohar Lal, this Court was concerned with a matter wherein amendment in the plaint was refused on the ground that the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. It was held:

"5....Rules of procedure are intended to be a handmaid to the administration of justice. 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."

This Court further stated:

"7.... The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations."

35. The Apex Court in Rajeshkumar Aggarwal case (supra) has observed in paragraph Nos. 18 and 19 as follows:--

"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."

36. It is thus clear that the Court dealing with an application for amendment should ensure that the larger interest of the litigants needs to be taken care of and the discretionary power of amendment should be exercised in order to do full and complete justice. In dealing with an application for amendment, the Court ought not to go into the correctness or falsity of the case in the amendment. No finding needs to be recorded on the merits of the amendment as any attempt to adjudge the same at the stage of allowing the amendment is likely to lead to prejudging the case before it is subjected to the adjudicatory process, unless it introduces a totally new cause of action.

37. In the Venture Global Engineering's case (supra), the Apex Court has noted that the Court concerned with the amendment application ought not to go into the aspect as to what would be the effect of the amendment on the merits of the case. The end result is not to be prejudged. The observations of the Apex Court in paragraph 45 read thus:--

"45. Whether the award will be set aside or not is a different question and that has to be decided by the appropriate Court. In this appeal, this Court is concerned only with the question whether by allowing the amendment, as prayed for by the appellant, the Court will allow material facts to be brought on record in the pending setting aside proceeding. Judging the case from this angle, this Court is of the opinion that in the interest of justice and considering the fairness of procedure, the Court should allow the appellant to bring those materials on record as those materials are not wholly irrelevant or they may have a bearing on the appellant's plea for setting aside the award."

38. The Apex Court in case of Arasmeta Captive Power Company Private Limited (supra) has considered the scheme under the Arbitration Act. Shri Shah, learned Sr. Advocate has placed reliance on the said Judgment especially the observations made in para No. 17 as regards the issues which the Arbitrator may look into and the issues which need to be left out of his jurisdiction. I need not go into the said aspect at this stage in view of the controversy before me.

39. Insofar as the contentions of the learned Advocate Mr. Totla and learned Advocate Mr. Bajaj, placing reliance on SBP Judgment (supra) are concerned, it appears from the said Judgment that the Apex Court desired to curtail the indulgence of this Court in such matters which can be dealt with under section 37 of the Arbitration and Conciliation Act, 1996. Paragraph No. 45 of the said Judgment reads thus:--

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible...."

40. It is crystal clear from paragraph No. 45 as reproduced above that the party aggrieved by any order of the Arbitral Tribunal, will have a right to appeal under section 37 of the Act and as such a party shall have to wait until the award is passed by the Tribunal, rather than rushing to the High Court on every order that may be passed by the Arbitral Tribunal. In short the Apex Court expects the litigating parties to ensure that the arbitral tribunal is allowed to perform its duty in accordance with the object and purpose of the Act and judicial intervention needs to be minimized by causing no interference in "in-between-orders" that would be passed by the Arbitral Tribunal under section 16 of the Act.

41. In the instant case, the impugned order has not been passed by an arbitral tribunal. It is an order passed by the Principal District Judge under section 9 of the Act which is meant for passing interim orders so that the subject-matter of the dispute in arbitration which can be a property, needs to be preserved.

42. Learned Advocate for the respondents have also placed reliance upon the Judgment of the Apex Court in Shalini Sham case (supra). Paragraph Nos. 33, 34, 47, 50, 56, 62, 80 to 82 have been relied upon. In my view, the issue as regards an application for amendment need not be expanded to an extent whereby the main issue pending before the Principal District Judge is relegated to the background. Similarly, the controversy raised by the respondent as regards the jurisdiction of this Court while entertaining an application for amendment is put to rest in view of the conclusions arrived at in this judgment.

43. In my view, orders passed by an arbitral tribunal are to be treated differently in comparison with the impugned order passed by the Principal District Court under section 9 proceeding. The case on hand is one such wherein, if the amendment is not allowed, the petitioner would be precluded from canvassing

certain material aspects and which would never be a part of the proceedings any time thereafter. If the contention of the respondent is accepted, it would lead to a situation, wherein application MARJI filed by the petitioner would be subjected to adjudication without the inclusion of the proposed paragraphs.

44. If the petitioner is precluded from amending his Application, and after the final decision in the section 9 proceedings is delivered, in the event the petitioner succeeds in making out a case for amendment in the High Court, the proceedings would have to be remanded back to the District Judge on that count. In my view, it would lead to multiplicity of litigation and would impose rigours of litigation on the contesting parties.

45. Having gone through the impugned order, I find that the learned District Judge has delved upon the merits of the proposed amendment and is likely to affect the pending application under section 9 of the Act. It is well settled that the merits of the proposed amendment vis-a-vis the merits of the proceedings cannot be gone into by the Court dealing with the application for amendment.

46. The trial Court has also observed in paragraph No. 14 of the impugned order that the petitioner has admitted that the status of the borrower of Rs. 9 crores is in the individual capacity of the partners. Neither do I find any such admission, nor was it appropriate for the Court to come to the said conclusion as it would have a direct impact on the outcome of the pending proceedings.

47. Several documents have also been gone into by the trial Court which it should have refrained from. As long as a new cause of action is not set out by the amendment and a completely different case is not presented through the amendment, the Court is expected to refrain from going into the merits of the proposed amendment as also the merits of the proceedings.

48. In *Revajeetu Builders and Developers*" case (supra), the Apex Court, while dealing with the case of amendment has considered the law almost from 1884 onwards. Paragraph Nos. 27 to 47 read as under:--

"27. We are tracing the legislative history, objects and reasons for incorporating Order VI, Rule 17 not because it is necessary to dispose of this case, but a large number of applications under Order VI, Rule 17 are filed and our Courts are flooded with such cases. Indiscriminate filing of applications of amendments is one of the main causes of delay in disposal of civil cases. In our view, clear guideline may help disposing off these applications satisfactorily.

28. We deem it appropriate to give historical background of Rule 17 of Order VI corresponds to section 53 of the Old Code of 1882. It is similar to Order 21 Rule 8 of the English Law. Order VI, Rule 17, Civil Procedure Code reads as under:

"Amendment of Pleadings.--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:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

29. In our considered view, Order VI, Rule 17 is one of the important provisions of the Civil Procedure Code, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian Courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.

30. It may be pertinent to mention that with a view to avoid delay and to ensure expeditious disposal of suits, Rule 17 was deleted on the recommendation of Justice Malimath Committee by the Code of Civil Procedure (Amendment) Act, 1999 but because of public uproar, it was revived. Justice C.K. Thakker, an eminent former Judge of this Court in his book on Code of Civil Procedure (2005 Edition) incorporated this information while dealing with the object of amendment.

31. In a recently published unique, unusual and extremely informative book "Justice, Courts and Delays", the author Arun Mohan, a Senior Advocate of the High Court of Delhi and of this Court, from his vast experience as a Civil Lawyer observed that 80% applications under Rule VI, Order 17 are filed with the sole objective of delaying the proceedings, whereas 15% application are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. His experience further revealed that out of these 100 applications, 95 applications are allowed and only 5 (even may be less) are rejected. According to him, a need for amendment of pleading should arise in a few cases, and if proper rules with regard to pleadings are put into place, it would be only in rare cases. Therefore, for allowing amendment, it is not just costs, but the delays caused thereby, benefit of such delays, the additional costs which had to be incurred by the victim of the amendment. The Court must scientifically evaluate the reasons, purpose and effect of the amendment and all these factors must be taken into consideration while awarding the costs.

32. To curtail delay in disposal of cases, in 1999 the Legislation altogether deleted Rule 17 which meant that amendment of pleading would no longer have been permissible. But immediately after the deletion there was widespread uproar and in 2002 Rule 17 was restored, but added a proviso. That proviso applies only after the trial has commenced. Prior to that stage, the situation remains as it was. According to the view of the learned author Arun Mohan as observed in his book, although the proviso has improved the position, the fact remains that amendments should be permissible, but only if a sufficient ground

therefore is made out, and further, only on stringent terms. To that end, the rule needs to be further tightened.

33. The general principle is that Courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our Courts have been following the basic principles laid down in those cases.

34. In the leading English case of *Cropper vs. Smith*, (1884) 29 Ch. D 700, the object underlying amendment of pleadings has been laid down by Browne, L.J. in the following words:

"It is a well established principle that the object of the Courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

35. In *Tildersley vs. Harper*, (1878) 10 Ch. D 393 which was decided by the English Court even earlier than the *Cropper's* case (*supra*), in an action against a lessee for setting aside a lease, in the statement of claim it was alleged that the power of attorney of donee had received specified sum as a bribe. In the statement of defence, each circumstance was denied but there was no general denial of a bribe having been given. A prayer for amendment of the defence statement was refused.

36. The Court of Appeal held that the amendment ought to have been allowed. Bramwell, L.J. made the following pertinent observations:

"I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."

(Emphasis added)

37. In another leading English case *Weldon vs. Neal*, (1880) 19 QBD 394 : 56 LI

QB 621. A filed a suit against B for damages for slander. A thereafter applied for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment.

On the date of the application, those claims were barred by limitation though they were within the period of limitation on the date of filing the suit. The amendment was refused since the effect of granting it would be to take away from B the legal right (the defence under the law of limitation) and thus would cause prejudice to him.

38. The rule, however, is not a universal one and under certain circumstances, such an amendment may be allowed by the Court notwithstanding the law of limitation. The fact that the claim is barred by law of limitation is but one of the factors to be taken into account by the Court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the Court if the amendment is required in the interests of justice. [Smt. Ganga Bai Vs. Vijay Kumar and Others, ; Arundhati Mishra (Smt) Vs. Sri Ram Charitra Pandey,

39. In *Steward vs. North Metropolitan Tramways Co.*, (1886) 16 QB 178, the plaintiff filed a suit for damages against the tramways Company for negligence of the company in allowing the tramways to be in a defective condition. The company denied the allegation of negligence. It was not even contended that the company was not the proper party to be sued. More than six months after the written statement was filed, the company applied for leave to amend the defence by adding the plea that under the contract entered into between the company and the local authority the liability to maintain tramways in proper condition was of the latter and, therefore, the company was not liable. On the date of the amendment application, the plaintiff's remedy against the local authority was time barred. Had the agreement been pleaded earlier, the plaintiff could have filed a suit even against the local authority. Under the circumstances, the amendment was refused.

40. In the said case, Pollock, J. quoting with approval the observation of *Bremwell, L.J.* rightly observed: "The test as to whether the amendment should be allowed is, whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise. According to him such an amendment ought not to be allowed."

41. *Kisandas vs. Rachappa Vithoba* is probably the first leading case decided by the High Court of Bombay under the present Code of 1908. There, A, plaintiff, averred that in pursuance of a partnership agreement, he delivered Rs. 4001 worth of cloth to B, defendant, and sued for dissolution of partnership and accounts. The trial Court found that A delivered the cloth worth Rs. 4001 but held that there was no partnership and the suit was not maintainable. In appeal, A sought amendment of adding a prayer for the recovery of Rs. 4001. On that

day, claim for recovery of money was barred by limitation. The amendment was allowed by the appellate Court and the suit was decreed. B challenged the decree. The High Court upheld the order and dismissed the appeal. Referring to leading English decisions on the point, Batchelor, J. stated:

"From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties."

42. In a concurring judgment ((1909) 33 Bom. 644), Beaman, J. observed:

"The practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs."

His Lordship proceeded to state:

"In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed."

43. In *Amulakchand Mewaram Vs. Babulal Kanlal Taliwala*, , the Bombay High Court again had an occasion to decide a case under Order VI, Rule 17. In that case, the Court approved the following observations of Beaumont, C.J. and observed:

"... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is in the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

44. In *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, , a suit for damages for "conversion of goods" filed by the plaintiff was decreed by the trial Court but the decree was set aside by the High Court. In an appeal before this Court, the plaintiff applied for amendment of the plaint by raising an alternative claim for damages for breach of contract for "non-delivery of goods". The amendment was resisted by the defendant contending that it sought to introduce

a new cause of action which was barred by limitation on the day the amendment was sought and, hence, it would seriously prejudice the defendant.

45. Though the Court noticed "considerable force" in the objection, keeping in view the prayer in the amendment which was not foreign to the scope of the suit" and all necessary facts were on record, it allowed the amendment.

46. In Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, , A obtained a decree for possession against B. He was, however, obstructed in obtaining possession by C in execution. A then filed a substantive suit against B and C. In the plaint, except saying that he had obtained a decree against B, nothing more was stated by A. Hence, he filed an application for amendment which was rejected by the trial Court but allowed by the High Court. C approached this Court.

47. Dismissing the appeal and confirming the order of the High Court, this Court observed that the discretionary power of amendment was not exercised by the High Court on wrong principles. There was merely a defect in the pleading which was removed by the amendment. The quality and quantity of the reliefs sought remained the same. Since the amendment did not introduce a new case, the defendant was not taken by surprise.

48. In Pursuhottam Umedbhai and Co. vs. Manilal and Sons a suit was instituted in the name of the firm by the partners doing business outside India. It was held that there was only mis-description of the plaintiff. The plaint in the name of the firm was not a nullity and could be amended by substituting the names of partners with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases."

49. I draw assistance from paragraph Nos. 33, 34, 42 and 47 from the Revajeetu Builders Case (supra). The Apex Court has thus crystallized the law. The petitioner herein, is not seeking more quantity of reliefs than those already prayed for. It is categorically stated by the petitioner that it is not amending its prayers and is not seeking anything more than that has been prayed for in the MARJI application. In my view, the case of the petitioner squarely falls within the two tests prescribed by Beaman, J. The amendment sought appears to be imperative for determining the real controversy between the parties.

50. Thus, the Apex Court has concluded that amendments should be allowed, if they do not impose injustice on the other side and are necessary for the purpose of determining the real questions in controversy between the parties. The test is as to whether the amendment is likely to cause injustice to the other side. If the amendment does not place the defense in such a position that they cannot be recouped by any allowance of costs or otherwise, then such an amendment can be rejected.

51. In the light of the above, this petition is partly allowed. The impugned order dated 5-9-2014 is quashed and set aside. The applications for amendment Exh. 35 and 36 stand allowed to the extent of permitting the petitioner to amend paragraph No. 13 in the MARJI Application and add the proposed paragraph Nos. 20-A, 20-B and 20-H. The amendment shall be carried out within a period of four weeks from today. The respondents, thereafter would be at liberty to file their additional written statement in view of the amendment.

52. The learned Principal District Judge, Parbhani is expected to decide the Application MARJI No. 198/2014 as expeditiously as possible and preferably within a period of three months from the date of filing of the additional written statement by both the respondents.

53. In order to reduce the gravity and rigours of litigation which appears to be delayed on account of the amendment applications filed by the petitioner, ends of justice would be met by directing the petitioner to pay costs @ Rs. 30,000/- to each of the two respondents.

54. Mr. Totala and Mr. Bajaj learned counsel for the respondents have graciously consented to donate Rs. 10,000/- each to the Advocates Association of the High Court, Aurangabad Bench. As such the petitioner shall deposit an amount of Rs. 20,000/- with the Advocates Association of High Court, Bench Aurangabad within a period of three weeks from today and shall deposit the remaining amount of Rs. 40,000/- before the Principal District Judge, Parbhani in the pending MARJI proceedings. Both the respondents are at liberty to withdraw the said amount in equal share without any condition.

55. In the light of the contentions of Shri Totla, learned Advocate, it is made clear that the observations made by this Court in paragraph No. 33 of Judgment dated 9-5-2014 in Arbitration Appeal No. 3/2014 are observations in relation to the cause of action that was presented before this Court in the said appeal proceedings. I, therefore, have not drawn any inference or conclusion from the said paragraphs in relation to the present cause of action.

56. It is made clear that this Court has not dealt with the merits of the pleadings as well as the controversy between the parties. It is left entirely to the Principal District Judge, Parbhani to decide the said proceedings on their own merits and in accordance with law without being influenced by any submissions made by the litigating parties in this matter or by the observations made by this Court in this judgment.

57. Needless to state that the ad interim protection granted by the learned District Judge and continued by this Court, shall further continue so as to enable the trial Court to decide the proceedings finally. Rule is accordingly made partly absolute in the above terms.