

(2015) 12 DEL CK 0198

In the Delhi High Court

Case No : I.A. No. 4929/2012 in CS(OS) No. 1789/2006

Sunita Rekhi and Others

APPELLANT

Vs

Y.D. Puri and Others

RESPONDENT

Date of Decision : 02-12-2015

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 151

Citation : (2015) 225 DLT 689

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : T.K. Ganju, Senior Advocate, Abhishek Bhardwaj and Manik Ahluwalia, Advocates, for the Appellant; Imran Ali, Advocate, for the Respondent

Judgement

Manmohan Singh, J.—By way of this order, I propose to decide the abovementioned application under Order VI Rule 17 read with Section 151 CPC filed on behalf of defendant No. 2 Mrs. Raj Puri who is the wife of Late Sh. Y.D. Puri who expired on 25th November, 2009 during the pendency of the suit.

2. Plaintiff No. 1, Mrs. Sunita Rekhi is the daughter of defendant No. 2/applicant who filed the suit seeking partition, declaration and permanent injunction. The claim in the plaint is that the three properties as referred to in the plaint belong to Joint Hindu Family and as such, the plaintiffs are entitled to relief for partition of the subject properties. The defendants No. 3 and 4 are the sons of defendants No. 1 and 2 and defendant No. 5 is also the daughter.

3. The suit was contested by the defendants by filing their written statements. It is submitted that joint written statement was filed on behalf of defendant Nos. 1 and 2 which was duly signed by them. Paras 4, 5 and 6 of the joint written statement filed by them are reproduced here as under:-

"4. Contents of para 4 are incorrect and are denied. The plaintiffs are put to strict proof of their allegation that the Joint Family took over the business of Film

Distribution under the name and style of All India Film Distributors in 1955. Hereto annexed and marked as Annexure-B is copy of FORM A of the Registrar of Firm which shows complete strangers as partners in 1954/55.

The Partnership Deed filed by the Plaintiffs shows that the Partnership Deed for the business in the name and style of All India Film Distributors was entered into only in December 1963 and therefore the allegation that the Joint Family took over the business of All India Film Distributors in 1955 is obviously false.

It is also clear from the Partnership Deed that the partners did not belong exclusively to the family of the plaintiffs as per the family tree set out at para 1 and alleged to be Joint Hindu Family in the said para and also paras 2 and 3 of the plaint. The said Partnership Deed also confirms that the plaintiff and defendant Nos. 3 and 4 were minors on the said date and admitted to the benefits of the said Partnership.

It is also pertinent to mention that the property situated at 10-A Ring Road, Lajpat Nagar-IV, New Delhi-1100 24 was purchased by defendant No. 1 from his own funds in 1959 i.e. much before the partnership (in which the plaintiffs were admitted to the benefits as minors) had commenced and therefore the plaintiffs cannot claim any right, title or interest on the same in any capacity including that of members of an alleged Joint Hindu Family which Joint Hindu Family was non-existent.

It is also submitted that defendant No. 1 was working and earning his own income since 1945 in the form of salary, dividends and interest and was assessed in the status of an individual by the Income Tax Authorities (since 1945). It is also pertinent to mention that the said property at 10-A Ring Road, Lajpat Nagar-IV, New Delhi-1100 24 was purchased by defendant No. 1 from his income in his individual name.

5. Regarding para 5 it is not denied that defendant Nos. 1 and 2 were not partners in the partnership business. It is however denied that the income for the family was through the profits of the said partnership firms. It is submitted that the family was supported from the individual and independent income of defendant No. 1 who has been earning and filing his individual returns since 1945. Hereto annexed and marked as Annexure-C (Colly) are the Income Tax Assessment forms of defendant No. 1 from assessment year 1945-46 to 1975-76. Annexure-D (colly) are the relevant wealth tax orders. The plaintiffs' contention that they have been Income Tax payees since 1955-56, are denied for want of knowledge. The plaintiffs are put to strict proof of this assertion. The averment that defendant No. 1 did not have any independent source of income and was not an Income Tax payee at the relevant period i.e. 1955-56 is false and contrary to the record. The allegations that the funds of the partnership firm was the income of the joint family or that defendant No. 1 was controlling the funds in his capacity as Karta of the joint family business is incorrect and is denied. It is submitted that even as per the Partnership Deed there are other partners

which do not find mention in the family tree set out by the plaintiffs in their suit and thus the said partnership cannot be passed off as joint family business as sought to be done by the plaintiffs. The other averment about the status of the business of the Partnership needs no reply.

6. Contents of para 6 are incorrect and are denied. The allegation that the property at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 was purchased from the alleged funds of the so called joint family business-"All India Film Distributors" is fallacious in as much as the property at 10-A, Ring Road was purchased in 1959 while the partnership business of "All India Film Distributors" commenced only in 1963. It is submitted that the property at 10-A Ring Road, Lajpat Nagar-IV, New Delhi-1100 24 was purchased by defendant No. 1 from his independent and individual earnings in his individual name. It is pertinent to mention that the plaintiffs were minors (six years old) at the relevant time. The averment that defendant No. 1 did not have an independent source of income and did not file income tax returns is false to the knowledge of the plaintiffs. The averment that the said property at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-1100 24 was purchased from joint family funds and/or that all members of the alleged HUF had a share in the same is obviously incorrect. It is submitted that the property was purchased by defendant No. 1 and was his exclusive property. Defendant No. 1 had the exclusive right to deal with the said property and has dealt with the same by executing a Gift Deed dated 10.10.2005 in favour of defendant No. 3 by virtue of which defendant No. 1 has gifted the said property exclusively to defendant No. 3. Hereto annexed and marked as Annexure-E is a copy of the Gift Deed and Annexure-F is a copy of letter dated 11th November, 2005 received from L & DO mutating the property in the name of defendant No. 3 as per the wishes of defendant No. 1.

The averment that the construction on the property at 10-A Ring Road, Lajpat Nagar-IV, New Delhi-1100 24 was completed in 1961 negates the assertion that the funds for construction were from the income of the alleged joint family (income of the plaintiffs, their siblings and their grandmother) from the partnership as the partnership started doing business only in 1963 i.e. two years after the construction was completed as per the plaintiff's own statement."

4. The applicant/defendant No. 2 seeks to amend her written statement as per the details mentioned below:

"A. To amend sub-paras 4 and 5 of para 4 of reply on merits (though not so numbered in said para 4) of the written statement which after amendment shall read as below:

sub-para 4 -- "It is also pertinent to mention that the property situated at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 was purchased from the joint funds of Defendant No. 1 and 2 in 1959 i.e. much before the partnership (in which the Plaintiffs were admitted to the benefits as minors) had commenced and therefore the Plaintiffs cannot claim any right, title or interest on the same in

any capacity including that of members of an alleged Joint Hindu Family which Joint Hindu Family was non-existent. It is stated that the property situated at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 was purchased jointly by Defendant No. 1 and 2 though sale deed was made in the name of Defendant No. 1. It is stated that entire consideration amount of Rs. 36,750/- was paid from joint account No. 8618 which Defendant No. 1 and 2 were maintaining with Punjab National Bank, Minto Road, New Delhi."

sub-para 5 -- "It is also submitted that Defendant No. 1 and 2 were working and earning their own income. Defendant No. 1 was earning his own income since 1945 in the form of salary, dividends and interest and was assessed in the status of an individual by the Income Tax Authorities (since 1945). It is further submitted that Defendant No. 2 was earning her own income since 1955, amongst others, by way of interest, insurance agency commission, share dividend, director fee and she was also involved in distribution business of pictures. Defendant No. 2 was an income tax assessee since 1960-61 and was assessed and filed her returns as an individual and continues to do so. It is also pertinent to mention that the said property at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 was purchased by Defendant No. 1 and 2 jointly as stated above, it is further stated that the construction on the said plot was completed in 1963 and for the said purpose substantial funds were withdrawn from the aforesaid joint account. It is further submitted that Defendant No. 2 was and continues be the owner of 50% share of the property bearing No. 10-A, Ring Road, Lajpat Nagar, New Delhi."

B. To amend first nine lines of para 5 of reply on merits of the written statement which after amendment shall read as below:

"Regarding para 5 it is not denied that Defendant Nos. 1 and 2 were not partners in the partnership business. It is however denied that the income for the family was through the profits of the said partnership firms. It submitted that the family was supported from the individual and independent income of defendant No. 1 and 2 who were earning and filing their individual returns since 1945 and 1960 respectively. Hereto annexed and marked as Annexure-C (Colly) are the Income Tax assessment forms of Defendant No. 1 from assessment year 1945-46 to 1975-76. Annexure-D (Colly) are the relevant wealth tax orders. Statutory returns/records of Defendant No. 2 by way her income tax returns, assessment orders and otherwise are also placed on record. The plaintiffs..... "

C. To amend first sub-para of para 6 of reply on merits (though not so numbered in the said para 6) of the written statement which after amendment shall read as below:

"Contents of para 6 are incorrect and denied. The allegation that the property at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi- 110024 was purchased from the alleged funds of the so called joint family business- "All India Film Distributors" is fallacious in as much as the property at 10-A, Ring Road purchased in 1959 while

the partnership business of "All India Film Distributors" commenced only in 1963. It is submitted that the property at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 was purchased by Defendant No. 1 and 2 jointly as detailed herein above. It is pertinent to mention that the Plaintiffs were minors (six years old) at the relevant time. The averments that Defendant No. 1 and 2 did not have independent source of income and did not file Income Tax Returns is false and the same are denied. The averment that the said property at 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 was purchased from the joint family funds and/or that all members of the alleged HUF had a share in the same is obviously incorrect. It is submitted that property was purchased by Defendant No. 1 and 2 and was their exclusively property belonging to both Defendant No. 1 and 2 in equal share. In these circumstances Defendant No. 1 did not have exclusive right to deal with the said property though no doubt to the extent of his 50% share. The alleged gift deed dated 10.10.2005 executed in favour of Defendant No. 3 is un-lawful. In alternate it is submitted that Defendant No. 1 did not have any right to gift the said built property over and above his 50% share as detailed above. Mutation in the name of Defendant No. 3 has no legal footing as Defendant No. 1 was owner equally with Defendant No. 2 of the said property."

D. To amend para 7 of reply on merits of the written statement which after amendment shall read as below:

"Contents of para 7 need no reply. It is however denied that Defendant No. 1 and 2 did not have any independent source of income or that the said Defendant No. 1 and 2 were not Income Tax Payee."

E. To amend para 11 of reply on merits of the written statement which after amendment shall read as below:

"Contents of para 11 are incorrect and are denied. It is denied that the income from the partnership firm constituted joint family business of the Y.D. Puri Family. It is denied that the income from this partnership was the source of income of the alleged joint family. It is denied that Defendant No. 1 and 2 did not have independent source of income. It is denied that Defendant No. 1 and 2 were not Income Tax Payee. It is submitted that Defendant No. 1 and 2 were assessed to Income Tax in their individual capacity as stated above. It is submitted that the property at 10-A Ring Road, Lajpat Nagar-IV. New Delhi was purchased from the joint funds of Defendant No. 1 and 2 as stated above and substantial amounts for construction thereupon were withdrawn from the joint account of Defendant No. 1 and 2 as stated above. It is reiterated the property No. 10-A, Ring Road, Lajpat Nagar-IV, New Delhi -110024 and the construction raised thereon was from the income of Defendant No. 1 and 2 as stated above and not from any alleged joint family business."

F. To delete first sub-para of para 12(a) of reply on merits (though not so numbered in the said para 12(a) of the written statement which after amendment shall read as below:

"Contents of the para under reply as stated are incorrect and are denied. True and correct position is that M/s. Jai Hind Picture Co. (Private) Ltd. initially was the owner of Raj Cinema (which was earlier known as Kiran Cinema). On 28.10.1960 Defendant No. 2 had purchased 16 shares of the said company for a consideration of Rs. 4,800/- from Sh. Rajeshwar Prashad by withdrawing money from her personal bank account No. 8863 which she had with Punjab National Bank, Minto Road, New Delhi. Defendant No. 2 otherwise was rich women as she belonged to rich family even prior to her marriage and was given substantial dowry. Even otherwise Defendant No. 2 was earning her personal income since 1955-56, amongst others, by way of interest, insurance agency commission, share dividend, director fee and she was also involved in the distribution business of pictures. Defendant No. 2 sold the said 16 shares to Smt. Yashwant Kumari for Rs. 1,15,555.52 on 14.3.67 in cash on which she earned capital gain. The said transaction was duly reflected in her individual income tax return for the year ending 31.3.1967. Further, it is submitted that the Defendant No. 2 had deposits with said M/s. Jai Hind Picture Co. (Private) Ltd. and she was earning interest there upon, which is reflected from her tax returns/assessment orders. Defendant No. 2 encashed the said deposits and received Rs. 42,167.74 on 14th March 1967. Accordingly on 14th March 1967 Defendant No. 2 received in all Rs. 1.57 Lacs (approx). Defendant No. 2 purchased Raj Cinema with land there under for Rs. 1.50 Lacs from her own income as stated above. Defendant No. 2 purchased Raj Cinema with land there under by means of Sale Deed dated 14th March, 1967 which was registered with concerned Sub-Registrar on 14th March 1967 itself. It is relevant to mention here that in the Income Tax Return of 1967-68 (Financial Year) of Defendant No. 2 it is duly reflected/explained that Defendant No. 2 had purchased Raj Cinema as detailed herein above by selling her shares and encashment of her deposits."

G. To amend para 12(b) of reply on merits of the written statement which after amendment shall read as below:

"Contents of the para under reply as stated are incorrect and are denied. True and correct position is that the Defendant No. 2 had purchased the said 15 bighas of land at Gurgaon vide sale deed dated 28th July, 1970 from her funds only. As stated above Defendant No. 2 was having substantial income which was duly reflected in her statutory returns which were filed in the capacity of an individual. It is submitted that the Defendant No. 2 has always been the owner of Raj Cinema and 15 bighas of land at Gurgoan as the same are her self-acquired and absolute properties which she purchased from her own funds only. It is denied that the property was purchased from the income of the partnership or any joint family funds. It is denied that the property was purchased for the benefit of the joint family or was owned by the joint family. The Plaintiff are put to strict proof of this averment. It is denied that Annexure gives details of any property owned by the family. It is reiterated that no joint family ever existed and thus there was no question of joint family or joint family property."

H. To amend 6th to 9th line in first sub-para 16 of reply on merits (though not so numbered in the said para 16) of the written statement which read as under:

"Defendant No. 1 has out of his free will and in consideration of the support given to him by Defendant No. 3 at all times during his old age has gifted the said property bearing No. 10-A, Ring Road, Lajpat Nagar-IV, New Delhi-110024 to his elder son defendant No. 3."

The said lines after amendment shall read as below:

"As stated above, the subject Lajpat Nagar property was purchased jointly by Defendant No. 1 and 2. The alleged gift deed dated 10th October, 2005 executed in favour of Defendant No. 3 is unlawful. In alternate it is submitted that Defendant No. 1 did not have any right to gift the said built property over and above his 50% share. Even otherwise the said gift deed is a result of manipulations done by Defendant No. 3."

I. To delete para 17 of reply on merits of the written statement which after amendment shall read as under:

"Regarding para 17, it is submitted that Defendant No. 1 and 2 have been the sole and exclusive owner of the property bearing No. 10-A, Ring Road, Lajpat Nagar-IV, New Delhi. The alleged gift deed dated 10.10.2005 executed in favour of defendant No. 3 is un-lawful. In alternate it is submitted that defendant No. 1 did not have any right to gift the said built property over and above his 50 % share as detailed above. Detailed submissions made herein above are reiterated."

J. To delete para 19 of reply on merits of the written statement which after amendment shall read as under:-

"Contents of para 19 are incorrect and denied. In reply to the contents of this para detailed submissions made herein above in respect to subject Lajpat Nagar property are reiterated."

K. To delete para 22 of reply on merits of the written statement which after amendment shall read as under:-

"Contents of para 22 are incorrect and denied. In reply to the contents of this para detailed submissions made herein above in respect to the subject Lajpat Nagar property are reiterated."

5. It is submitted that defendant No. 1, the deceased husband of the applicant was an ailing person who died on 25th November, 2009. Defendant No. 1 was diabetic from the year 2000 which worsened with passing years. Defendant No. 1 also suffered from hypertension for more than thirty years.

6. It is inter alia, stated in the application that the deceased defendant No. 1 and the Applicant were depending upon defendant No. 3 to contest the present litigation who has misused his position. It is submitted that in respect to property bearing No. 10-A, Ring Road, Lajpat Nagar-IV, New Delhi (hereinafter referred to

as the "Lajpat Nagar property") the said written statement was got drafted in a manner to secure the interest of defendant No. 3 in the said property and that too by alleging in the said written statement that the said property was purchased from the alleged funds of defendant No. 1 only which in fact was untrue on the part of defendant No. 3 as he got a Gift Deed of the said property executed in his favour from his deceased father, defendant No. 1. The written statement on behalf of defendant No. 1 and 2 was got drafted under instructions of defendant No. 3 through the Advocate appointed by him. When I.A. No. 15062 of 2010 was being looked into by the applicant she came to know the conduct of defendant No. 3. Immediately, defendant No. 3 changed the Advocate and this was done by him only to prevent true and correct facts to come to surface as to how things were manipulated. The applicant is exclusive owner of the aforesaid two subject properties at Gurgaon and also is the owner of 50% undivided share in the property bearing No. 10-A, Ring Road, Lajpat Nagar-IV, New Delhi. The controversy between the parties to the suit is to whether the subject three properties vest in HUF or not. It is stated in the application that there is no HUF and the version averred in the plaint is false. The basic controversy is as to who is the real owner of the three subject properties. No doubt written statement was filed though unconsciously rather on account of the faith and trust which defendant Nos. 1 and 2 had on defendant No. 3. The written statement of defendant No. 4, Sh. Chetan Puri and defendant No. 5, Smt. Gita Naik were also got drafted by defendant No. 3 in a manner that the said written statements are also on the same lines as that of written statement of defendant Nos. 1 and 2. Therefore, the present application is being filed seeking permission of this Court to amend the written statement filed by the applicant in order to decide the real controversy between the parties.

7. It is averred in the application that the present application is filed at this stage as the vital documents were kept away from the applicant by defendant No. 3 which were revealed only three to four months back. Since the record pertains to the period 30-40 years back from the date of filing the application. The parties to the suit were also trying to settle the matter, though affidavit in evidence has been tendered by the plaintiff but the examination in chief has not BEEN concluded and the plaintiff is yet to be cross-examined.

8. The defendant No. 2/applicant has also referred various documents in support of her claim on merits of the case and the same are mentioned in para 2 to 4 of the application.

9. Counsel for the applicant has referred the following decisions in support of his submission:

"i) Amendment of written statement allowed after trial commenced - Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.,

ii) Inconsistent pleas can be taken in written statement - Basavan Jaggu Dhobi v. S. Ramdas, 1995 Suppl. (3) SCC 179

iii) Admission can be withdrawn or explained by additional facts - Akshaya Restaurant Vs. P. Anjanappa and Another, - Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another,

iv) Delay in filing application for amendment - Pankaja and Another Vs. Yellappa (D) by Lrs. and Others, - Delay of 6 years was condoned.

v) Additional document can be filed after start of trial and even at appeal stage - Billa Jagan Mohan Reddy and Another Vs. Billa Sanjeeva Reddy and Others, - Vijay Kumar Goel Vs. Delhi Development Authority and Another, "

10. Reply by plaintiff

Reply on behalf of the plaintiff to the application under Order 6 Rule 17 read with Section 151 CPC has been filed stating that the amendment sought is in contradiction and inconsistent with the written statement filed earlier. The application in the garb of amendment to the written statement cannot be allowed to set up entirely different case as the applicant filed her earlier written statement supporting the stand taken by defendant No. 1 to the extent that the Lajpat Nagar property at was purchased from the funds of defendant No. 1 whereas in the application for amendment of written statement the applicant has taken a stand that the said property was purchased from the joint funds of the applicant and her deceased husband. It is the case of the plaintiff that the entire property which is the subject matter of the suit was purchased from the income generated from the business of joint family in which the plaintiff was a partner.

However, it is admitted that the funds which were used for purchase of Lajpat Nagar property did not belong exclusively to deceased defendant No. 1, but as far as fact regarding the contribution of defendant No. 2 for purchase of property is concerned, the same is wrong and denied, rather it is joint family funds from which subject property was purchased.

Submission of Defendant No. 3

11. The defendant No. 3 has strongly opposed the prayer. On merit of application, it is submitted that it is settled law, that pleading(s) filed by a person in his life time, cannot be amended/alterd after his death. If at all it is to be amended, it can be only by consent of his legal heirs and not otherwise. Defendant No. 1 (Mr. Y.D. Puri) and defendant No. 2 (Mrs. Raj Puri) has on 16th January, 2007, filed a joint written statement. Unfortunately, on 25th November, 2009, defendant No. 1 (Mr. Y.D. Puri) passed away, leaving behind 2 sons and 3 daughters and his wife.

12. The defendant No. 2 having accepted the factum and existence of gift deed dated 10th October, 2005 since beginning, now defendant No. 2 is estopped in law from seeking the amendment in the Joint Written Statement to plead to the contrary. After acceptance of the gift deed and acknowledging the same for about 7 years, it is now not open for the defendant No. 2 to plead to the contrary. The defendant No. 2 in fact is resiling from her earlier position causing

serious prejudice to the defendant No. 3 more so when one of the witnesses has been cross-examined in view of the stand taken by defendant No. 2. Therefore, the proposed amendment is liable to be refused as the proposed amendment would cause an injury which could not be compensated in costs.

13. It is stated by the defendant No. 3 that the defendant No. 2 has wrongly mentioned that she was joint owner of the Lajpat Nagar property and had funds to purchase the same. Reference is drawn to her own balance Sheet as on 31st March, 1960 annexed at Page 37 of defendant No. 2's own application being I.A. No. 5476 of 2012, where she has not mentioned any advances or money paid to defendant No. 1 to purchase the house. Further, the said property was purchased on 15th December, 1959, when defendant No. 2 was not even filing her income tax returns. On the other hand, the entire money from which the said property is purchased is well accounted for in the income tax returns of defendant No. 1 and she cannot take different stand before tax authorities and before Court.

The Lajpat Nagar property is given to his client on valid gift, there was a consent order dated 5th February, 2009, passed in the present proceedings, which was even acted upon by the defendant No. 2 and all the other defendants. It is now not open for the defendant No. 2 to plead to the contrary.

14. Law of limitation to seek declaration is 3 years as provided in the Limitation Act, 1963, however, the defendant No. 2 has sought to raise an issue of joint ownership after more than 53 years i.e. from the date of purchase of the Lajpat Nagar property. She is now seeking to raise the issue of Gift Deed being unlawful after 7 years.

15. It is submitted on behalf of the defendant No. 3 that all the family members have accepted the Gift Deed in their respective written statements. This position of parties in their pleadings goes on to prove that there was no misuse of trust and/or unconscious signing of the written statement as is alleged by defendant No. 2 now.

16. In rejoinder, it is denied that consent order dated 5th February, 2009 was passed which was acted upon and no plea can be raised to the contrary as alleged. It is reiterated that the subject Lajpat Nagar property was purchased from joint funds of defendant Nos. 1 and 2. It is denied that the entire money from which the Lajpat Nagar property was purchased is well accounted for in the income tax returns of defendant No. 1 as there is no evidence whatsoever on record to substantiate the said plea.

It is denied by the defendant No. 2 that the subject Lajpat Nagar property was purchased from the income generated from the business of joint family as mentioned by the plaintiff in her reply.

17. Having considered the pleadings of the application and the submission of the parties to the suit who have made submissions from time to time. The defendant No. 2 has also personally appeared in person for the purpose of settlement. She

is the mother of the plaintiff and other defendants. She is living separately in an independent house.

18. Admittedly, the plaintiff filed the present suit in 2006. Summons were issued to the defendants (including Defendant No. 2) on 18th September, 2006 for 9th November, 2006. However, the defendant No. 2 despite service chose not to appear and was proceeded ex-parte. At that time, the same counsel was already representing the defendant No. 1 and 3. After proceeded ex-parte, the defendant No. 2 through counsel preferred an application being I.A. No. 13193 of 2006 for recalling of the ex-parte order, which was allowed by this Court on 27th November, 2006. In 2007 the defendant No. 2 engaged the services of counsel and on 16th January, 2007 defendant No. 2 filed the joint written statement along with deceased defendant No. 1.

In February, 2008 the defendant No. 1 and 2 changed their counsel who did not raise the grievance as raised now by the defendant No. 2. In May, 2011, the defendant No. 2 changed her counsel again and engaged the services of present advocate. The defendant No. 4 is also being represented through the same counsel.

19. It appears from record that the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. The proviso to Order VI Rule 17 , Code of Civil Procedure, 1908 is quoted below:

"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."

20. The defendant No. 2 in her application in para 2 has mentioned that in fact defendant No. 3 used to contact the advocates and replies, affidavits, pleadings etc. were got drafted accordingly. Both deceased and the applicant no doubt had signed the same, even without going into the contents of the same as desired by their son Sh. Vinod Puri (defendant No. 3), while relying on their said son that he will protect the interest of every one.

21. It is stated in the application that on going through the said papers and on digging out the old records and on deliberations with the new counsels the applicant found out real and true facts which have not been brought out in her/ their defence. Therefore, it might be the valid ground to file the application. The defendant No. 2 is an old lady; she might have relied upon the counsel. She has also alleged that the litigation was being looked after by the defendant No. 3 on her behalf. Thus, the plea of due diligence cannot be ruled out. As far as limitation part is concerned, it is settled law that the amendment cannot be disallowed solely on the ground of delay, if the same has been explained in the present case. The delay has been explained in the application. Thus, the objection of defendant No. 3 has no force.

22. Let me now decide the main issue as to what is sought by the defendant No. 2 is to be allowed or not and if allowed, to what extent. It is evident that the defendant No. 2 by virtue of amendments sought is trying to make inconsistent pleas already taken in the joint written statement. The main case of the defendant No. 3 is that he would be displaced from the admissions already made in the written statement. It would also cause prejudice and injustice if defendant No. 2 is allowed to withdraw the admissions and to allow now to take the contrary stand/plea and the present case is not a case where defendant No. 3 is compensated by cost. As the rights are accrued in favour of defendant No. 3 by virtue of document which was executed by his father and the same was not challenged when he was alive, thus, there is a force in the submissions of defendant No. 3 and this Court agrees that as far as the prayer made in the application is concerned, the admissions already made cannot be allowed to be withdrawn. Learned counsel for defendant No. 3 has rightly relied/ referred the various judgements which supported the plea of defendant No. 3.

23. The Supreme Court who was dealing with the similar issue of amendment of the written statement has dealt with the issue in hand in great extent in the case of Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others, . Relevant paras 14, 18, 19, 24 to 27 are reproduced here as under:

"14. Having heard the rival submissions of the learned counsel for the parties and after considering the written statement as well as the amendment of the written statement and the orders passed by the High Court and the trial court in detail, we are of the view that the High Court had fallen in error in rejecting the application for amendment of the written statement.

18. It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

19. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case [see B.K.N. Narayana Pillai Vs. P. Pillai and Another, and Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.,]. Even the decision relied on by the plaintiff in Modi Spinning (supra) clearly recognises that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary (Dead) [1995 Supp (3) SCC 179]. In that case, the defendant had initially taken up the stand that he was a joint tenant along with

others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in Basavan Jaggu Dhobi's case (supra) as follows:-

"As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6 Rule 17 CPC by taking a contrary stand than was stated originally in the written statement. This is opposed to the settled law open to a defendant to take even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action."

24. Coming back to the facts of the present case regarding amendment of the written statement, we find that the appellants had stated in para 8 of their original written statement "that plaintiff and defendant Nos. 1 to 7 have got 1/2 share and defendant Nos. 8 to 14 have got 1/2 share in all the family properties" and that the maternal aunts have also got share. By seeking incorporation of paras 8A and 8B and substitution of para 8 in the written statement, the appellants have maintained the admissions made by them in para 8 of the written statement but added a proviso or condition to the admission. Therefore, it was not a case of withdrawal of the admission by the appellants by making the application for the amendment of the written statement but in fact such admission was kept intact and only a proviso has been added. This, in our view, is permissible in law and the question of withdrawing the admission made in para 8 in its entirety in the facts as noted herein above, therefore, cannot arise at all.

25. Since we have already held that in the case of amendment of a written statement, the defendant is entitled to take new defence and also to plead inconsistent stand and in view of our discussions made herein above that by making the application for amendment of the written statement, admission was not at all withdrawn by the appellants nor a totally inconsistent plea was taken by the appellants in their application for amendment of the written statement, the High Court had failed to appreciate that by the proposed amendment, the appellants were not withdrawing their admission in respect of the half share in the ancestral property rather they only added that the plaintiff and defendant Nos. 3 to 8 could be entitled to such share if they proved to be the legitimate children of Appasao (since deceased) who was entitled to half share in the property of late Veersangayya. That apart, it appears from the record that the written statement filed by the appellants was before the death of defendant No. 1 (first wife of Appasao). After the death of defendant No. 1, when plaintiff and defendant Nos. 2 to 8 claimed themselves as heirs and legal representatives of defendant No. 1, the appellants sought amendment of the written statement challenging the legitimacy of plaintiff and defendant Nos. 2 to 8. In view of the

discussions made herein above, we do not think that it was impermissible in law for the appellants to seek amendment of the written statement in the manner it was sought for.

26. Therefore, it was neither a case of withdrawal of admission made in the written statement nor a case of washing out admission made by the appellant in the written statement. As noted herein earlier, by such amendment the appellant had kept the admissions intact and only added certain additional facts which need to be proved by the plaintiff and defendant No. 2 to 8 to get shares in the suit properties alleged to have been admitted by the appellants in their written statement. Accordingly, we are of the view that the appellants are only raising an issue regarding the legitimacy of plaintiff and defendant Nos. 3 to 7 to inherit the suit properties as heirs and legal representatives of the deceased Appasao. Therefore, it must be held that in view of our discussions made herein above, the High Court was not justified in reversing the order of the trial court and rejecting the application for amendment of the written statement.

27. As noted herein earlier, Mr. Lalit while inviting us to reject the application for amendment of the written statement as was done by the High Court had placed strong reliance on the case of *Modi Spinning* (supra). In that case, a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000 against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7th April, 1967 the plaintiff worked as their stockists-cum distributor. After three years the defendants by application under Order 6, Rule 17 of the Code sought amendment of written statement by substituting paras 25 to 26 with a new para in which they took the fresh plea that plaintiff was a mercantile agent cum purchaser, meaning thereby that they sought to go beyond their earlier admission that the plaintiff was a stockist-cum-distributor. In our opinion, the present case can be distinguished from that of *Modi Spinning* case. In that case, the pleadings that were being made by the plaintiff for amendment were not merely inconsistent but were resulting in causing grave and irretrievable prejudice to the plaintiff and displacing him completely. In paragraph 10 of this decision this Court also appreciated that inconsistent pleas can be made in the pleadings but the effect of substitution of paragraphs 25 and 26 in that decision was not making inconsistent and alternative pleadings but it was seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. In the facts of that decision this Court further held that if such amendments were allowed, the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. That apart in that decision the High Court also rejected the application for amendment of the written statement and agreed with the trial court. This decision in the case of *Modi Spinning* would not stand in the way of allowing the application for amendment of the written statement as the question of admission by the defendants made in the written statement, more particularly in paragraph 8 of the written statement, was not at all withdrawn by the amendment but certain paragraphs were added inviting the plaintiff and

defendants 1 to 7 to prove their legitimacy on the death of Appaso. That being the position, we do not think that Modi Spinning case will at all stand in the way of allowing the application for amendment of the written statement. It is true that in the case of Basavan Jaggu Dhobi this Court, in the facts of that case, held that it would not be open to a party to wriggle out of admission as admission is a material piece of which would be in favour of a person who would be entitled to take advantage of that admission. In the present case, admission made in Para 8 of the written statement was not at all withdrawn but only a rider and/or proviso has been added keeping the admission intact. In that decision also this Court has appreciated the principle that even the admission can be explained and inconsistent pleas can be taken in the pleadings and thus amendment of the written statement can be allowed. In our opinion, as noted herein earlier, in the present case, the amendment would not displace the case of the plaintiff, as it would only help the court to decide whether the respondents are eligible to the said share in the property on proof of their legitimacy for which no irretrievable prejudice would be caused either to the plaintiff or to defendant Nos. 2 to 8. Accordingly, we do not think that Basavan Jaggu Dhobi could be applied in the facts of this case, which is clearly distinguishable."

24. In the case of B.K.N. Narayana Pillai Vs. P. Pillai and Another, , the Supreme Court held as under:

"4.....The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original I's was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be avowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating s legal right accruing to the opposite part on account of lapse of time..... "

25. As far as the admissions made on behalf of defendant No. 2 by filing of joint original written statement are concerned, the same cannot be allowed to be withdrawn. The same have to be intact. However, the party cannot be refused to raise new grounds of defence or substitution of a new ground of the defence or taking inconsistent pleas in the written statement while considering the application for amendment and the parties raising the same has to prove it in

evidence as per law. It is settled law that while considering the application for amendment, merit cannot be gone into.

26. It is also settled law that even if party has a weak case on merit, the amendment sought cannot be refused on this sole reason. If the application for amendment is read, it is clear that by virtue of amendment, the defendant No. 2 wishes to add sub-paras of para 4 to 6 of the original written statement where the admissions are made. But at the same time, if defendant No. 2 intended to withdraw the admissions already made, the same cannot be withdrawn.

27. The defendant No. 2, under these circumstances, is not allowed to withdraw the said admissions already made in the original written statement. The same would be kept intact, however, the application for amendment is disposed of to the extent of allowing defendant No. 2 to raise the alternative pleas in the amended written statement. The said proposed pleas raised by defendant No. 2, however, have to be proved as per law in evidence. The Court is not expressing any opinion on the evidence filed in support of grounds of additional plea in the amendment application on merit.

28. Under these circumstances, the application is partly allowed to the extent as mentioned above. Amended written statement in view of the observations made is to be filed by defendant No. 2 accordingly within four weeks from today. Thereafter, the plaintiffs and other defendants would be entitled to file their replication.

29. The application is disposed of.

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List the matter before Joint Registrar on 8th January, 2016 for further proceedings.