

(1959) 01 MP CK 0031
In the Madhya Pradesh High Court
Case No : C.R. No. 609 of 1957

Takhatmal Kaluram Mahajan

APPELLANT

Vs

Hiralal Pratapchand and anthor

RESPONDENT

Date of Decision : 22-01-1959

Acts Referred:

Contract Act, 1872 — Section 60
Limitation Act, 1963 — Article 85

Citation : (1959) MPLJ 575

Hon'ble Judges : Shiv Dayal Shrivastava, J

Bench : Single Bench

Advocate : M.B. Rege, for the Appellant; K. Saxena, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal Shrivastava, J.

This petition for revision arises out of an order passed by the learned Civil Judge, First Class, Ujjain refusing leave to amend the plaint.

On the 21st October 1955, the Petitioner brought the suit in the Court of the Civil Judge, First Class, Ujjain for the recovery of Rs. 2512-6-6. On the 25th February 1956, the Defendant filed his written statement and he disputed the allegation of the Plaintiff that there was an open and current account between the parties on which the suit was based. On the 15th April 1956, the Plaintiff filed a rejoinder and issues were framed on the 7th May 1956. Thereafter, one witness was also examined.

On the 15th July 1957, the Plaintiff made the application seeking leave to amend his plaint. In the plaint, as it stood originally, it was mentioned that Article 85 of the Limitation Act applied to the suit and the same was, therefore, within limitation. Now the Plaintiff wanted to add another ground for saying that the suit was within limitation. This ground was that according to the accounts filed by him with the plaint, all his dues upto the 29th April 1953 except Rs. 19-2-9 stood

satisfied by appropriation u/s 60 of the Contract Act. He, therefore, claimed a sum of Rs. 19-2-9 which was thus found due by the Defendant on the 29th April 1953 and all the sums after the last mentioned date.

The Defendant resisted the application dated the 15th July 1957 on the ground that the nature and character of the suit would be altered; that he would be deprived of a valuable right and that the application was not made in good faith.

The learned trial Judge came to the conclusion that the leave to amend could not be granted because the nature of the suit was being altered from one on the basis of open and current account to another of a debt; because the Defendant would be taken by surprise and would be deprived of a valuable right inasmuch as on the 15th July 1957, the amount which according to the Plaintiff was due on the 29th April 1953 and the amounts which fell due subsequently all became time-barred. The learned trial Judge further came to the conclusion that the petition for amendment was made after an inordinate delay.

Shri M.B. Rege learned Counsel for the Petitioner contends that although there is no dispute about the principles enunciated in the order of the trial Judge, they are not applicable to the facts of this case. According to him, the Plaintiff is only seeking to add a new ground for the same relief which he had initially claimed. Shri K.B. Saxena learned Counsel for the Respondents on the other hand, has vehemently contested this revision application on the ground that in the written statement the Defendant had from the very start taken the objection that there was no open and current account between the parties and that the suit was barred by time. Shri Saxena has also raised the grievance that the application for amendment was vague and indefinite and it was made after a lapse of two years from the institution of the suit.

On considering the arguments of the learned Counsel, I have come to the conclusion that this revision must be accepted. The principles on which an application for leave to amend a plaint is to be allowed or refused, are now well settled. Here is a case in which the Plaintiff claimed certain sum of money on the basis of his accounts. I find that with the plaint he filed a complete statement of the accounts which contained all the details, both of the credit side as also of the debit side. The Plaintiff was originally advised that the case fell within the purview of Article 85 of the Limitation Act inasmuch as there was an open and current account between the parties. It appears that subsequently the real position regarding open and current account came to light as the Defendant averred that at no time was any amount due to him as against the Plaintiff and therefore it was not a case of open and current account within the meaning of Article 85. This awakened the Plaintiff and he wanted to raise another ground to show that even if Article 85 were not applicable to his suit, his suit could not be thrown out as barred by time. The new ground taken in his application for amendment was that applying Section 60 of the Contract Act, he was entitled to appropriate all payments that were made to him from time to time towards the amounts due to him upto that date (i.e. the 29th April 1953). When that was

done it was found that the Plaintiff had to realise only Rs. 29-2-9 from the Defendant. The amount found thus due on the 29th April 1953 would be within three years preceding the 1st October 1953 and all the amounts which accrued payable to him after the 29th April 1953 were ipso facto within limitation. As I have said above, it has impressed me that the Plaintiff had filed a complete statement of accounts and the Defendant could not legitimately say that he was being taken by surprise. The accounts were there. He could himself find out whether the amount of Rs. 19-2-9 was really due as outstanding after deducting the amounts paid by him upto the 29th April 1953. However, that is not the question to be decided today. The merits of the case will be duly considered by the trial Judge. Similarly whether there has been a variation or not is a matter yet to be tried. May be that the Defendant may succeed in destroying the Plaintiff's case altogether on that basis, but as I have said these considerations are of no relevance today. Likewise whether the Plaintiff is entitled to exercise his right u/s 60 of the Contract Act, is also a question which may be considered by the lower Court. What I am concerned today is whether the Plaintiff should be allowed to amend the plaint so that he may show, on another ground, that his suit is within limitation. In fact this is a question of law and apart from that, if the Plaintiff wanted to correct himself that it was not only Article 85 of the Limitation Act that applied but he could also bring his case with three years limitation with the aid of Section 60 of the Contract Act, it was perfectly legitimate and permissible. The authorities on the subject, both English and Indian, are well-known.

In the leading case of *Weldon v. Neal* (1887) 19 QBD 394 the Court of Appeal laid down the guiding principles. Lopes L.J., observed:

I think the Court ought to give all reasonable indulgence with regard to amending and I quite agree with the rule that has been laid down, viz., that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed without injustice to the other side.

In another leading case of *Cropper v. Smith* (1884) 26 Ch. D. 700 Bowen, L.J., observed as follows:

It is a well established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of 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 of grace.

I recall here the observations of Shri Justice Sarkar (as he then was) in *Ahmad Hossain v. Mt. Chembelli* ILR 1950 (1) Cal. 608 where his Lordship observed:

The making of amendments is not really a matter of power of a Court but its

duty, so that substantial justice may be done for which alone Courts exist. As a fundamental principle the law strongly favours an amendment where it is necessary in the ends of justice and it would require the clearest language to alter this very beneficial legal principle.

In *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, their Lordships of the Supreme Court have also laid down that all amendments ought to be allowed which satisfy 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.

I have given above the facts which are material for applying the tests laid down in the above authorities. I do not see any injustice whatsoever being done to the Defendant by allowing the amendment.

Learned Counsel for the Defendant has cited to me a recent decision of this Court in *Mohammad Hussain Vs. Firm Andani Co.*, That case does not apply at all to the facts of this case. In that case their Lordships have held that where the Plaintiff sought to amend the plaint at the stage of appeal by seeking to introduce new allegations of fact which would entail retrial and in the second place even with the amendment the Plaintiff's case would not succeed the amendment would not be granted particularly when on the date of the application the Plaintiff's claim was barred by limitation. Here the case is not in appeal; the Plaintiff is not introducing new allegations of fact; no retrial will entail and it is too premature to say that the Plaintiff's case would not succeed on the amended plaint.

Another case cited by Shri Saxena is AIR 1958 AP 234. That case also recognised the principle that no amendment of pleading would be allowed which would work injustice to the other side. That was a case where the suit was for recovery of a loan and the plaint stated the grounds on which the loan was exempted from the operation of the Hyderabad Money Lenders Act. Subsequently the suit was sought to be altered as one on the basis of a dissolved partnership and the High Court held that such an amendment was not permissible. That case is obviously not in point here.

My view is further fortified by the decision in AIR 1948 334 (Nagpur) In that case it was also observed that such an amendment cannot be said to introduce a fresh cause of action or any substantial change in the cause of action on which the suit is based and therefore it should be allowed even at a late stage.

I am therefore, of the view that the learned trial Judge is in error when he holds that the character of the suit will be changed by allowing the amendment prayed for.

Similarly, he is in error when he thinks that leave to amend should be refused because if the Plaintiff had instituted a fresh suit on the 15th July 1957, his suit would have been barred by time. That is not the real test. This is a case where the Plaintiff is only adding an additional ground for showing that on the facts of

the case already prayed for by him, his suit would not be barred by time.

In L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., their Lordships of the Supreme Court laid down as follows:

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.

And I hold that this is a fit case for allowing the amendment.

There is no doubt that the Plaintiff has made the application a bit late but it is also settled that an amendment can be allowed at any stage and therefore when the suit is still at the stage of recording evidence, it cannot be said that the application was so much delayed and that it should be thrown out on that ground alone. I think that the Defendant can be compensated by allowing costs.

The result is that this revision petition is allowed, the Plaintiff's application dated the 15th July 1957 for leave to amend the plaint is allowed subject to the condition that he will pay to the Defendant a sum of Rs. 50 by way of costs. The plaint shall be amended and costs shall be paid to the Defendant or deposited in the trial Court on or before the 28th February 1959. The Petitioner shall get his costs of this revision from the Respondent.