SUPREME COURT OF INDIA

Usha Balashaheb Swami

Vs.

Kiran Appaso Swami

C.A.No.2019 of 2007

(Tarun Chatterjee and R.V.Raveendran JJ.)

18.04.2007

JUDGMENT:

TARUN CHATTERJEE, J.

Leave granted.

This appeal is directed against the order dated 3rd October 2005 of the High Court of Judicature at Bombay in Writ Petition No 2390 of 2005 whereby the order passed by the Civil Judge, Senior Division, Kolhapur in Special Civil Suit No. 503 of 1996 was set aside.

The plaintiff, who is the respondent no. 1 in the present appeal, (hereinafter called the "plaintiff") has instituted a suit for partition and separate possession of the suit properties as fully described in Para 1 of the plaint on the allegations stated in brief as follows :-

The suit properties originally belonged to one Veersangayya (since deceased). On his death, Appasao (since deceased) and Balasao (since deceased) came to inherit the suit properties. The appellants who are defendants 8 to 14 in the suit are the heirs and legal representatives of Balasao (since deceased). The Plaintiff inherited one half share of the suit properties jointly with defendant nos. 1 to 7, on the death of Appasao. Since the appellants had refused to partition the suit properties and deliver separate possession, the plaintiff filed the suit for partition and possession.

The defendant nos. 1 to 7 who are respondent nos. 2 to 8 in this appeal entered appearance in the suit and filed their written statement supporting the case of the plaintiff. After entering appearance in the suit, the appellants on 28th February, 2003 filed their written statement in which they admitted that the plaintiff with defendant No.1 to 7 were entitled to one half share in the suit properties.

Initially, an application for amendment of the written statement was filed by the appellants on 18th June, 2003, which was contested by the plaintiff. The said application was allowed by the Civil Judge, Senior Division, Kolhapur, but subsequently on a writ application filed before the High

Court at the instance of the plaintiff, the order allowing amendment was set aside and the application for amendment was rejected. However, liberty was given to the appellants to file a fresh application for amendment of the written statement.

Pursuant to such liberty, a fresh application for amendment of the written statement was filed on 12th March, 2004 by the appellants, which was also contested by the plaintiff.

In the application for amendment of the written statement the appellants had sought to add that the plaintiff and defendant Nos.2 to 7 could not acquire right, title and interest in the joint family properties, as they were the illegitimate children of the deceased Appasao. In the application for amendment, the appellants sought to allege that Appasao (since deceased) was initially married to defendant no. 1. As she had no issue, the said Appasao took defendant No.2 as his second wife after coming into force of the Hindu Marriage Act, 1955. The appellants alleged that since the marriage between Appasao and defendant No.2 was a nullity, neither defendant No.2 nor the plaintiff and defendant Nos. 3 to 7 were entitled to claim any share in the suit properties.

The plaintiff contested the application for amendment of the written statement by filing a written objection in which the plaintiff mainly sought rejection of the amendment of the written statement on the ground that since the appellants in their written statement had admitted that the plaintiff and defendant Nos.1 to 7 were jointly entitled to half share of the suit properties, they could not be permitted to withdraw such admission by amendment of the written statement. The learned Civil Judge, Senior Division, Kolhapur allowed the application for amendment of the written statement and the matter was carried in revision by the plaintiff by a writ petition before the High Court. The High Court, by the impugned order, had set aside the order of the trial court and rejected the application for amendment of the written statement, inter alia, on the ground that since the appellants had categorically admitted in their written statement that the respondents were entitled to half share in the suit properties, it was not permissible for them to withdraw such admission by an amendment of the written statement as that will amount to totally displacing the case of the plaintiff causing irretrievable prejudice to him.

In order to come to this conclusion, the High Court relied on a decision of this Court in the case of Modi Spinning & Weaving Mills Co. Ltd. v. Ladha Ram & Co. [1976(4) SCC 320]. According to the High Court, the decision in the case of Modi Spinning & Weaving Mills Co. Ltd. (supra) was a clear authority for the proposition that once a written statement contained an admission in favour of the plaintiff, by amendment, such an admission of the defendants, cannot be withdrawn and if allowed, it would amount to totally displacing the case of the plaintiff, causing irretrievable prejudice to him. Similarly relying on another decision of this Court in the case of Heera Lal v. Kalyan Mal & Ors. [1998 (1) SCC 278], the High Court held that the amendment, if allowed, would displace the case of the plaintiff and his right to get the partition decree and, therefore, amendment was impermissible in law.

Dissatisfied with this order of the High Court, this Special Leave Petition has been filed in respect of which leave has already been granted.

On behalf of the appellants, Mr. V.N. Ganpule, learned senior counsel contended, at the first instance, that the question of withdrawing admission made in written statement could not arise as the appellants even after the amendment, have kept the "admission" made in para 8 intact but only have added certain additional facts which need to be proved by the plaintiff and defendant nos. 1 to

7 to get their respective shares in the suit properties alleged to have been admitted by the appellants in the written statement. Secondly, it was contended that even assuming that by such amendment, appellants sought to withdraw the admission made by them in para 8 of the written statement then also the High Court was grossly in error rejecting the application for amendment of the written statement because by such amendment, the appellants had only sought to explain such admissions or in any case, the amendment would only amount to raising an inconsistent plea which is permissible in law in the case of amendment of written statement. In support of this contention, reliance was placed by Mr. Ganpule on the case of Baldev Singh & Ors. v. Manohar Singh [2006 [6] SCC 498]. It was also submitted by Mr. Ganpule that the High Court also fell in error in relying on the decision of this Court in the case of Modi Spinning & Weaving Mills Co. Ltd. (supra) as the said decision, in fact advances and supports the case of the appellants. Finally it was argued that since the trial court has allowed the amendment in its discretion, the High Court was not justified in reversing the discretionary order of the trial court in the exercise of its supervisory jurisdiction under Article 227.

The aforesaid submissions of the Learned Senior Counsel appearing for the appellants were contested by the Learned Senior Counsel Mr. Udey Lalit, appearing for the plaintiff. Mr. Lalit has contended that clear admissions made by the appellants in their written statement admitting the rights of the plaintiff cannot be allowed to be withdrawn by amendment of the written statement as that would amount to totally displacing the case of the plaintiff and cause the plaintiff irretrievable prejudice. In support of this contention, Mr. Lalit also relied on the decision of this court in the case of Modi Spinning &Weaving Mills Co. Ltd (supra) which was relied on by the High Court while rejecting the application for amendment of the written statement. He strongly contended that if such amendment was allowed, admissions made by the appellants in Para 8 of their written statement would be entirely washed out as a bare perusal of the written statement would clearly show that the appellants have admitted one-half share of the plaintiff and defendant nos. 1 to 7 in the suit properties in their written statement. Mr. Lalit also contended that the decision in Baldev Singh's case (supra) relied on by the learned counsel for the appellants in support of his contention would not be applicable in the facts of this case. Therefore Mr. Lalit contended that the amendment of the written statement introducing an entirely different and inconsistent case cannot be allowed as it would displace the admission made in para 8 of the written statement and deprive the plaintiff of a valuable right already accrued to him on account of the admission.

Relying on the decision in the case of Heera Lal (supra) as relied on by the High Court in the impugned order, Mr. Lalit contended that the admission made in para 8 of the written statement cannot be washed out by an amendment of the written statement. Accordingly, Mr. Lalit invited us to hold that the High Court was fully justified in rejecting the application for amendment of written statement of the appellant in the exercise of its power under Article 227 of the Constitution.

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.

Before dealing with the question whether the amendment sought for was rightly rejected by the High Court or not, we may first consider the principles under which amendments of pleadings can be allowed or rejected. The principle allowing or rejecting an amendment of the pleadings has emanated from Order 6 Rule 17 of the Code of Civil Procedure, which runs as under:

"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"

(Underlining is ours)

From a bare perusal of Order 6 Rule 17 of the Code of Civil Procedure, it is clear that the court is conferred with power, at any stage of the proceedings, to allow alteration and amendments of the pleadings if it is of the view that such amendments may be necessary for determining the real question in controversy between the parties. The proviso to Order 6 Rule 17 of the Code, however, provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. However, proviso to Order 6 Rule 17 of the Code would not be applicable in the present case, as the trial of the suit has not yet commenced.

It is now well-settled by various decisions of this Court as well as those by High Courts that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bonafide one. In this connection, the observation of the Privy Council in the case of Ma Shwe Mya v. Maung Mo Hnaung [AIR 1922 P.C. 249] may be taken note of. The Privy Council observed:

"All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit."

(Underlining is ours)

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.

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. Narayana Pillai v. Parameswaran Pillai (2000(1) SCC 712) and Baldev Singh & Ors. v. Manohar Singh (2006 (6) SCC 498)]. 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."

As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the Courts in the administration of justice between the parties. In the case of L.J. Leach and Co. Ltd. v. Jardine Skinner and Co. [AIR 1957 SC 357], this Court observed "that the Courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event". In that case this Court also held "that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice."

Keeping these principles in mind, namely, that in a case of amendment of a written statement the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed, we may now proceed to consider whether the High Court was justified in rejecting the application for amendment of the written statement.

As noted herein earlier, Mr. Lalit placed strong reliance on the case of Heera Lal (supra) to contend that the admission made by the appellants in the original written statement in the facts and circumstances of the case could not at all be taken away. In our view, the factual position of the case before us and the facts involved in that decision are different. In Heera Lal's case (supra) a definite stand was taken that the plaintiff had a share in seven out of the ten scheduled properties as they belonged to the plaintiff and the defendants 1 and 2 as joint family properties. However, the defendants moved an application for amendment of the written statement, which was not allowed by the trial court. While dealing with this nature of amendment, in that decision, this Court observed that it was wrong on the part of the High Court to assume that by taking an inconsistent stand, the respondents would prejudicially affect the appellant's case. The Court observed:

"In our view, the order passed by the High Court under Section 115, CPC, allowing withdrawal of earlier admissions of defendant nos. 1 and 2 in their original written statement about 5 out of 7 items of Schedule-A properties cannot be sustained. The reason is obvious. So far as Schedule-A properties were concerned, a clear admission was made by defendant nos. 1 and 2 in their joint written statement in 1993 that 7 properties out of 10 were joint family properties wherein the

plaintiff had l/3rd share and they had 2/3rd undivided share. Once such stand was taken, naturally it must be held that there was no contest between the parties regarding 7 items of suit properties in Schedule-A. The learned Trial Judge, therefore was perfectly justified in framing Issue No. 2 concerning only remaining three items for which there was dispute between the parties. In such a situation under Order XV Rule 1 of CPC the plaintiff even would have been justified in requesting the court to pass a preliminary decree forthwith qua these 7 properties. The said provision lays down that, 'where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce the judgment'. Even that apart, the defendants-respondent did not think it fit to move any amendment application for getting out of such admission till the plaintiff moved an application for appointment of receiver regarding admitted items of properties. It is only thereafter that the application for amendment was moved. Learned Trial Judge was right when he observed that even the ground made out in the application were not justified. Consequently, there is no question of taking inconsistent stand which would not have affected pre-judicially the plaintiff as wrongly assumed by the High Court."

Keeping the aforesaid observations and also the facts involved in Heera Lal's case (supra) in mind, we are of the view that the decision in that case may not be of any help to respondents.

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 = share and defendant nos. 8 to 14 have got = 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.

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.

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.

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 in tact. 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.

Again in the case of Akshaya Restaurant v. P. Anjanappa [1995 [Supp] (2) SCC 303] this Court held that even an admission in the pleadings can be explained and inconsistent pleas can be taken in amendment petition even after taking a definite stand in the written statement. However, in that decision the amendment of the written statement was rejected mainly on the ground that respondents had entered into an agreement for development of the land for mutual benefit of the parties and thereby the trial court came to a conclusion that it was not open to the respondent to explain whether the agreement was one of sale or for mutual benefit since the agreement was sub silentio in that behalf. In that decision this Court further held that the High Court in the exercise of power under Section 115 of the Code of Civil Procedure committed no material irregularity in permitting amendment of the written statement. This Court while considering the question whether the admission can be withdrawn or not observed as follows:

"It is settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. It is seen that in paragraph 6 of the written statement definite stand was taken but subsequently in the application for amendment, it was sought to be modified as indicated in the petition. In that view of the matter, we find that there is no material irregularity committed by the High Court in exercising its power under Section 115 C.P.C. in permitting amendment of the written statement."

(Underlining is ours)

For the reasons aforesaid, we are unable to sustain the judgment of the High Court rejecting the application for amendment of written statement on the ground that if such amendment was allowed it would seriously prejudice the plaintiff. There is yet another aspect of the matter. The trial court on consideration of the written statement as well as the application for amendment of the written statement, in its discretion allowed the application for amendment of the written statement. The High Court ought not to have reversed the said order of the trial court, rejecting the application for amendment of the written statement, when the trial court has exercised its discretion in allowing the amendment of written statement on consideration of the principles of law and the material on record.

For the reasons aforesaid, the appeal is allowed and the order of the High Court rejecting the prayer for amendment of the written statement is set aside. The application for amendment of the written statement thus stands allowed. The trial court is now directed to dispose of the suit at the earliest possible time preferably within six months from the date of communication of this order without granting any unnecessary adjournment to either of the parties.

There will be no order as to costs.