

## ALLAHABAD HIGH COURT

Kisan Co-op. S.F. Ltd.

Vs.

Rajendra Paper Mills

Civil Revn. No. 234 of 1981

(N.N. Sharma, J.)

05.10.1983

### ORDER

**N.N. Sharma, J.**

1. This is plaintiffs revision against the order dated 16-12-1980 recorded by Sri P.C. Joshi, Civil Judge, Pilibhit, in Original Suit No. 16 of 1974. Application for amendment paper No. 43-Kha was rejected by the impugned order.

2. It appears that original Suit No. 16 of 1974 was filed by revisionist on 15-2-74 against the respondents for recovery of Rs. 33,500/- along with costs and interest pendente lite and future at the rate of Rs. 6% per annum.

3. Respondent 1 is M/s. Rajehdra Paper Mills, Faridabad, Gurgaon, Haryana.

4. Respondent 2, Sri Prag Dass is a partner in the aforesaid Mill.

5. According to the averments made in the plaint respondents proposed to purchase 1500 metric tones of Baggass (crush sugar cane) at Rs. 26/- per metric tone which was to be paid in advance along with the amount of sales tax. This proposal was accepted on 4-1-1971 by plaintiff in district Pilibhit.

6. On 17-2-1971 a fresh proposal for supply of additional quantity of 1500 metric tonnes on the same terms and conditions was agreed upon. In between 5-2-1971 and 6-3-1971 plaintiff supplied 234.806 metric tones Baggass, respondents paid Rs. 10,000/- on 19-1-1971 and 5-4-1971 towards the value of Baggass, As a sum of Rs. 62,537.67 was the balance price recoverable by plaintiff which remained unpaid, so plaintiff served a notice of demand of the said amount on respondents. Out of the said amount a sum of Rs. 47,525.17 was

sought to be paid by the respondents to revisionist through a cheque; however as the cheque was dishonored, so the said amount was paid through a bank draft. This payment did not wipe out the entire liability of respondents, so the revisionist again served a notice of demand in the sum of Rs. 18,162/- on 10-12-1973. No payment was made so the present suit was filed by the revisionist on 15-2-1974.

7. Meanwhile respondents filed suit No. 17 in January, 1974 against the revisionist in the Court of Sub-Judge, Ist Class, Ballabgarh. That suit was contested by the revisionist who in written statement put forward the plea that Rajendra Paper Mills (respondent 1) was not in existence at the time of institution of the suit in Ballabgarh as its liabilities and assets had been taken over by Raj Garhia Paper Mills Pvt. Ltd. incorporated on 14-6-1973. This amendment was allowed by Sub Judge Ist Class, Ballabgarh, on 20-1-1976. The said suit in Ballabgarh was dismissed on 12-8-1977 vide copy of certified judgment filed per list 29-C dated 27-9-1977. The proceedings of Suit No. 16 of 1974 which had been stayed on account of cross suit at Ballabgarh recommenced,

8. 43 Kha was filed on 6-4-1978 by the revisionist seeking leave to implead M/s. Raj Garhia Paper Mills Pvt. Ltd., through its Director Sri Prag Dass as respondent 3 in this suit. It was alleged that this amendment was necessitated on account of the allegations made by the respondents that the partnership business carried on by defendants 1 and 2 in the name of Rajendra Paper Mills had been changed to the style M/s. Raj Garhia Paper Mills through its Director Sri Prag Dass and so the leave should be allowed, This prayer was opposed by the respondents who had applied on 15-3-1978 vide application paper No. 36-C that the suit of plaintiff be dismissed with costs as M/s. Rajendra Paper Mills was not in existence on the date of institution and the suit against non-existent firm was not maintainable.

9. The proposed leave was opposed by the respondents vide objection paper No. 46-Kha alleging that the proposed amendment was *mala fide* it was moved after more than 2 years and tend to deprive M/s. Raj Garhia Paper Mills Pvt. Ltd. of the benefit of law of limitation.

10. Learned Civil Judge found that the suit for recovery of balance price due for the period from 7-3-1971 up to 17-7-1971 was clearly barred by time against M/s. Raj Garhia Paper Mills on 6-4-1978 as a period for more than three years had already expired since the date of purchase of the goods for which the price was being claimed and the proposed amendment was clearly barred by limitation. If the amendment is allowed it shall take away valuable right accrued to proposed defendant 3 who had not been impleaded as defendant within time. In the result application papers Nos. 36-C and 44-C and 43-Kha of respondents (revisionists) were rejected and objection papers Nos. 46-C and 47-C of respondent were allowed,

11. Aggrieved by thus decision this revision has been preferred.

12. I have heard learned counsel for the parties and perused the record.

13. The simple point which falls for consideration is whether the proposed amendment was barred by limitation on 6-4-1978.

14. A preliminary objection has been raised before me by Sri R.R. Agarwal, learned Advocate for respondents that the impugned order was not revisable as it did not amount to "case decided" within the meaning of Section 115, Civil Procedure Code In thus connection reliance was placed upon *Mst. Indrajit Kaur v. Mst. Ram Kumari reported in* <sup>1</sup> and *Sita Ram v. Suddhoo reported in*, <sup>2</sup> where it was held that the scope of Section 115, Civil Procedure Code was limited. It was not open to this Court to sit in revision over the decision of a question of fact in a case decided under Small Cause Courts Act as the revising powers of this Court under Section 25 of the Small Cause Courts Act, were limited. Obviously, the impugned order was not recorded by learned Civil Judge under Section 25 Small Cause Courts Act, and so these authorities are not in point.

15. In *Rama Shanker Tiwari v. Mahadeo reported in* <sup>3</sup> (Full Bench), it was decided that an order passed under Order 6, Rule 17, Civil Procedure Code, allowing or refusing to allow amendment is "case decided" within the meaning of that expression in Section 115. It is correct that Section 115, Civil Procedure Code, has appended a proviso by which High Court will not interfere except where-

"(a) The order, if it had been made in favor of the party applying for revision, would have finally disposed of the suit or other proceeding, or  
(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

16. In the instant case, the rejection of the leave to amendment may occasion an irreparable injury to the revisionist as it is alleged that the assets and liabilities of M/s. Rajendra Paper Mills and another have been taken over by the proposed respondent 3 Raj Garhia Paper Mills Pvt. Ltd. incorporated on 14-6-1973. So this preliminary objection is brushed aside.

17. Sri U.S. Awasthi, learned Advocate for revisionist, relied upon *Indian Cable Co. Ltd. v. Union of India, reported in.*<sup>4</sup> In that case hearing was not commenced. Amendment of the plaint was sought to introduce a case that the first drum was simply offered to the plaintiff and it refused to take the delivery as it was in a state of highly damaged and injured condition and that other drums were not at all offered. The plaintiff claimed a sum of Rs. 27,417.17 on account of the price of 200 metres of cables consigned in the two drums. It was observed (at p. 78):-

"Held that the amendment did not alter the fundamental character of the suit and the foundation of the plaintiff's claim remained still intact. The basis of the claim being the same, namely, the loss suffered by it on account of misconduct or negligence of the defendant in carrying its consignment, the case with respect to one drum as originally made on the assumption that it had taken the delivery thereof to one of non-delivery did not make any material change in its case."

18. Reliance was placed upon *Siya Ram Das v. State of Bihar reported in* <sup>5</sup> where it was observed that amendment was not to be refused merely on the ground of delay or negligence. It appears that in that case a suit for declaration was filed at the stage of hearing arguments, plaintiff sought amendment for an alternative relief for recovery of possession which was allowed.

19. The next authority relied upon has been reported in *Shambhu Nath Seth v.*

*Madan Lal*, <sup>6</sup> (Lucknow Bench). In that case which related to a suit for ejectment, defendant moved an application for amendment of written statement with a view to take a plea that the house in dispute belonged jointly to the plaintiffs and their father and, therefore, the notice served upon the defendant was invalid because father had not joined in it. It appears that one of the plaintiffs who was examined as a witness, admitted in cross-examination that the house in dispute was purchased by the plaintiffs out of part of the money which belonged to a shop being jointly run by the plaintiffs and their father and partly from money received from their mother. Under such circumstances, it was held that the delay in making the application for leave to amend was not mala fide.

20. Reliance was next placed upon *A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation reported in* <sup>7</sup> which posited (Paras 7 and 8):-

"In the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred. Where, however, the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts the amendment is to be allowed even after expiry of the statutory period of limitation."

21. I have carefully perused all these authorities none of which is in point. In none of these cases, the prayer was to add a new party against whom limitation had already run out.

22. Sri U.S. Awasthi, learned Advocate for revisionist, further argued that it was open to the plaintiff to implead the proposed respondent 3 as a necessary party to the suit. Such right was available to the plaintiff under Order 1, Rule 10, Civil Procedure Code, read with Order 6 Rule 17 irrespective of efflux of time.

23. In the instant case, it is obvious from the perusal of paper 44-Ga that plaintiff sought the benefit of proviso of Section 21, Limitation Act. Section 21, Limitation Act, reads as below:-

"21 (a) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date."

24. Thus, it was incumbent on plaintiff-revisionist to establish that the omission to include the proposed respondent amongst the defendants in the plaint was due to a mistake made in good faith. Surprisingly no affidavit was annexed with the application paper 44-Ga dated 6-4-1978. The facts detailed above go to disclose that M/s. Raj Garhia Paper Mills Pvt. Ltd. came in existence from 14-6-1973 and this objection was raised by respondent (revisionist) himself in Ballabharh which led to the dismissal of the suit filed by respondent on 12-8-1977. Thus, all these facts were well within the knowledge of plaintiff when he filed the suit on 15-2-1974. He waited up to 15-3-1978 and thus wanted to implead M/s. Raj Garhia Paper Mills Pvt. Ltd. as respondent 3 against whom the claim was already barred by limitation. Such amendment about addition of a new party is impermissible vide. *Dipchand Doulatram v. Firm of Parmanand Chimandas reported in* <sup>8</sup> which posited:-

"Civil Procedure Code, Order 6, Rule 17 Amendment taking away defendant's legal right to plead bar of limitation should not be allowed unless there are special considerations."

25. The principles established by judicial decisions in respect of amendment of plaint are as follows vide *Kanailal v. Jiban reported in* <sup>9</sup> at page 191:-

(i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit.

(ii) All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject-matter of or controversy in the suit is not permissible.

(iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent

pleas on the admitted position can be introduced by way of amendment.

(iv) In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs.

(v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is outweighed by the special circumstances of the case."

26. Thus, the proposed amendment which was clearly barred by time was rightly refused by the learned Civil Judge as being mala fide.

27. In this view of the matter, the revision is dismissed. However, under the circumstances of the case, I make no order as to costs.

Revision dismissed.

Cases Referred.

1. 1978 All CJ 41
2. 1978 All CJ 310
3. 1968 All LJ 109
4. AIR 1976 Pat 76
5. AIR 1979 Pat 98
6. AIR 1976 All 220
7. AIR 1967 SC 96
8. AIR 1924 Sind 144
9. AIR 1977 Cal 189