BOMBAY HIGH COURT

Kisandas Rupchand

Vs

Rachappa Vithoba Shilvant

(Batchelor and Beaman, JJ.)

02.07.1909

JUDGMENT

Batchelor, J.

1.On 20th March 1905 the suit out of which this appeal arises was instituted, the plaintiffs claiming an order for the dissolution of an alleged partnership and accounts. It was stated in the plaint that, in pursuance of the partnership agreement, the plaintiffs had brought in Rs. 4,001 as capital which was repayable, as to Rs. 3,001, on 1st November 1902, and, as to the remaining Rs. 1,000, on 8th November 1904.

2. The substantial defences were that the alleged partnership was never agreed to or undertaken, and that the plaintiffs never contributed Rs. 4,001 or any other sum as capital.

3. The Court of first instance raised several issues, and dismissed the suit on the grounds that no partnership was created and that the suit as framed would not lie. The learned Subordinate Judge found as a fact that the plaintiffs did deliver to the defendants Rs. 4,001 worth of cloth; "but" he says, "that is no reason why plaintiff should get relief in this suit. He made an experiment about his being a partner probably to avoid the payment of larger Court-fees, as is suggested by the defendant in his written statement; he has failed to prove his cage as brought, and did not ask to amend it, and I have no alternative but to dismiss it with all costs." From this determination the plaintiffs appealed, grounding their appeal on the contention that the partnership had been created and that the suit was in order. But this contention was abandoned when the appeal came on for hearing, and the plaintiffs, then represented by a new pleader, admitted that the facts stated in their plaint did not constitute a partnership, and prayed for leave to amend by adding a prayer for the recovery, of the Rs. 4,001. The learned Subordinate Judge of the lower appellate Court, being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their pleader, allowed the amendment to be made and ultimately decreed the plaintiffs' claim for the Rs. 4,001 and a portion of the interest. His judgment allowing

the amendment is dated 7th October 1907, and at this date the claim for the Rs. 4,001, or at least for the greater part of it, was barred by the law of limitation.

4. From this decision the defendants have preferred the present appeal, and the only question involved is whether the lower Court's order allowing the amendment of the plaint should be disturbed. For the appellants it is urged that the amendment should have been refused because the effect of allowing it was to deprive the defendants of their defence of limitation, the debt, as I have said, being barred at the date of the amendment. But in order to pronounce upon the validity of this contention it is, I think, necessary to examine a little more closely the particular facts of this case in the light of the accepted principles which govern the admissibility of amendment.

5. As to the principles I think there is no room for doubt: they are contained in Order VI, Rule 17 of the Code, which is substantially identical with Order XXVIII, Rule 1 of the English rules of the Supreme Court. From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, all amendments ought to be allowed which satisfy the two conditions (a) of not working in justice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Upon the record before us there can be no doubt that this second condition is satisfied here, nor was this point challenged for the appellants. It remains to consider whether the allowance of the amendment worked injustice to the defendants. Upon this question *Weldon v. Neal*[1] was cited for the appellants. Reference may also be made to *Tildesley v. Harper*[2] *Clarapede and Co. v. Commercial Union Association*[3] and *Steward v. North Metropolitan Tramways Co*[4]. but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test, therefore, still remains the same: can the amendment be allowed without injustice to the other side, or can it not? And this becomes clearer if the cases are examined. For the reason already given I shall notice only two. In *Weldon v. Neal*[5] the original action was simply for slander, and the plaintiff was non-suited. Later she sought to amend her claim by setting up, in addition to the claim for slander, fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by limitation though not barred at the date of the writ. Here, then, the amendment sought to setup fresh claims, claims which had never been heard of until they had become barred; yet even in so strong a case as this

Lord Esher M.R. refusing leave to amend intimated that the decision might have been the other way if there had existed special circumstances to justify it. *Steward v. North Metropolitan Tramways Co*[6]. seems to me to proceed on the same principle: there the defendants sought to amend their written statement, as we should call it in India, by pleading that the liability for the plaintiff's injuries rested, not with them, but with a third party, the vestry, against whom the plaintiff's right of action was by that time barred. Leave was refused because the application was too late: no such plea had even been brought to the plaintiff's notice until his action against the vestry was barred, and Lord Esher observes that "if the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants and then have given notice of action and brought an action against the vestry." Lindley, L.J. uses language to the same effect. The principle is the same as in Weldon's case (1887) 19 Q.B.D. 89.4; 66 L.J.Q.B. 621; 35 W.R. 820,(Supra) leave is refused because the plea sought to be added is not heard of until rights have accrued under the law of limitation.

6. If this is a right view of the cases, they have, in my opinion, no bearing on the present facts; or, rather, they bear against the appeal. In order that these decisions should serve the appellants' turn, it would be requisite that the allowance of the amendment should prejudice them by barring the defence of limitation otherwise fairly open to them; but how can that be said of a claim which, before the bar of limitation had arisen, had been regularly pleaded to by them, had been formally put in issue, and had been decided against them after consideration of all the evidence which they had offered in defence? If at the time of the amendment the appellants had any show of argument based on the law of limitation, that seems to me to have been occasioned less by the incompleteness of the plaint than by the excessive technicality of the trying Court. In other words, the defence of limitation was a defence to which the appellants were never fairly entitled, and the allowance of the amendment only withdraws from them an advantage which they ought never to have received.

7. If that is so, the cases quoted do not assist the appellants in the particular facts of this appeal, but rather tend the other way. Falling back, then, upon the words of the rule, I cannot follow the argument that there would be any injustice to the appellants in allowing the amendment, for the only effect of it is to enforce their liability for a debt which was claimed, disputed, and found to be due long before the defence of limitation was available. It is true that, though the Subordinate Judge found the sum to be due he refused to decree it because in his opinion the suit was wrongly framed and the plaintiffs had not been asked to amend; but I cannot regard this circumstance as of sufficient weight to displace the other considerations to which I have referred. In my opinion the Subordinate Judge would have exercised a sounder discretion if he had awarded the sum found due, notwithstanding the inexpertness of the pleadings, and sufficient warranty for that procedure might have been found in the principal plaintiff's own statement, which, as cited by the

Subordinate Judge himself, was as follows: "I had nothing whatever to do with the dealings of the shop. All I was to have was Rs. 351 yearly in lieu of good will and interest on my Rs. 4,001. If my Rs. 4,001 are returned, and if I am paid Rs. 351 as agreed, I have no dispute." It is difficult to imagine how the plaintiff could have more clearly professed that, whatever may have been the attitude of his obstinately unskillful pleader, he for his part had no concern with the alleged partnership, but was suing simply to recover his debt. I think, therefore, that the Subordinate Judge would have been well advised if he had paid more attention to the substance, of the suit before him, and taken command of it himself rather than handed over the conduct of the suit to a manifestly inexpert pleader; had he taken, this view of his duty as presiding Judge the slight technical difficulty which stood in his way would have been "easily removed. Be that as it may, it was open to the lower appellate Court to allow the amendment; and that has been done in England whether leave to amend was asked for in the Court below or not, and even where the Court below offered leave to amend, and the offer was declined: See Ecklin v. Little. In this context it is important to observe that the lower appellate Court which is the ultimate Court of fact did not adopted the Subordinate Judge's view as to the plaintiffs' desire to sue cheaply at whatever risk; on the contrary it found "it clear that the plaintiffs wished to sue for their money only, and had no desire to evade payment of proper stamp duty but they were induced to sue for the dissolution of a supposed partnership and account by the ill-advice of their Vakils." I do not use this finding as essential to my question, though it is at least arguable that facts of this sort would suffice to constitute the peculiar circumstances" which Lord. Esher excepted in his judgment in. Weldon v. Neal (1887) 19 Q.B.D. 89.4; 66 L.J.Q.B. 621; 35 W.R. 820(Supra) for in my. opinion the Court below in allowing the amendment was perfectly right in the strictest view of the principles and practice of the Courts. In my opinion not only was there no injustice to the defendants in allowing the amendment but there would have been injustice to the plaintiffs in refusing it.

8. I must add that the case appears to me to afford an instance of that undue technicality, that excessive attention to form and deficient attention to the real questions in controversy between the parties," which occasionally besets our subordinate Courts, and hampers the success of their work in a country where competent legal advice is not always readily obtainable. I do not for a moment suggest that forms should be disregarded, and I admit that no hard and fast line can be drawn for all cases, but it does seem to me that the importance of forms is sometimes set in very incorrect perspective so that on occasions the trial of a suit is act to wear too much the appearance of a game of skill in points of procedure and too little the appearance of a resolute attempt by the presiding Judge to come at justice on the real questions in controversy between the parties." There must, of course, be no overreaching or surprise of one party by the other and it is very important that parties should be kept to their pleading and not allowed to niter their case

according to their shifting interest in Courts of appeal; but this is pre-eminently a reason while the trying Court should spare no pains to ascertain precisely the real character of the dispute and of the case made by each party. Nothing, I think, is more calculated to imperil the justice of a case than negligence or carelessness in these essential preliminaries, as nothing conduces more to a right decision than to have these points firmly determined at the outset.

9. Subject to these and similar considerations the mofussil Courts would, I think, do well to bear in mind that the rules of procedure have no other aim than to facilitate the task of doing justice. On this subject the following words of Lord Peazance in *Kendall v. Hamilton*[7] should have perennial interest for Subordinate Judges trying original suits: "Procedure," said his Lordship "is but the machinery of the law after all--the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal, rights, and is thus made, to govern where it ought to subserve." Directions not less emphatic and of even closer application to the subject under notice were conveyed by the Judicial Committee in Hunoomanpersaud Panday's case 6 M.I.A. 393 at pp. 410, 411; 18 W.R. 81(Supra); note, where their Lordships lay down "that it is of the utmost importance to the right administration of justice in these Courts," that is, the Courts in India, "that it should be constantly, borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence or other cause the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment and, if need be, by adjournment, for the decision of the real points in issue." It seems to me that in this case, as occasionally in other cases, these imperative directions have been somewhat lost sight of; and I have thought it well again to call attention to their importance.

10. I am of opinion that this appeal fails and should be dismissed with costs.

Beaman, J.

11. I will state shortly what I conceive to be the true principle which has governed English Judges in exercising the discretion reposed in them, by the Orders and Rules of the Supreme Court corresponding with our O. VI, R. 17.

12. The question was recently fully and ably argued before me on the Original Side of this Court, and examined and answered, to the best of my ability in an exhaustive critical judgment. See *Nandlal Thakersey v. The Bank of Bombay*[8].

13. After carefully reconsidering the whole question for the purpose of this case I have found no

sufficient reason for departing from or modifying any part of the conclusions I then reached.

14. A careful analysis of the leading English cases seems to me to yield this result. Amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs. That is a rule of practice, or as one of the great English Judges prefers to call it, a rule of conduct, not of positive law. And while usually adhering to it, the English Courts have been careful to distinguish its essential character, from a rule of positive law, which must be obeyed in all cases. Thus it has been observed that notwithstanding the salutariness and general correctness of the rule, it is always open to exception where the circumstances of a particular case are very peculiar.

15. In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed. I prefer to state the principle, and the tests by which its application can be ascertained, in the simplest and widest terms. Because the dicta of the most eminent Judges in some of the leading cases appear to me to refer to the particular facts, and when wrested from their appropriate context, and sought to be used as universal propositions, rather to obscure the true principle. Thus I question whether the introduction of such a factor as the claim being a fresh claim can logically be made to express the principle in its completeness, as applicable to all cases. Great prominence was given to this factor in Weldon v. Neal (1887) 19 Q.B.D. 89.4; 66 L.J.Q.B. 621; 35 W.R. 820(Supra) as was natural in the facts of that case. But I cannot escape the feeling that in a sense every amendment which Courts are asked to allow, must introduce a "fresh," that is to say a changed, or different, if not an additional claim or defence. But at the lowest every such amendment seems to me to bring forward an old claim in a new form. If this were not so, it would not be necessary to amend at all. If then the freshness" of the claim introduced by the amendment is to be sought as a determinant of the Courts' discretion in granting or refusing it, and not the disadvantage or injury it inflicts on the other party, I should feel a real difficulty in reconciling the practice with the principle. For the practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs. The words of Order VI, Rule 17 are very wide. They authorize Courts to allow amendments whenever in the opinion of the Judges it is just that this should be done. So that we are thrown back on some consistent criterion of justice, in the average circumstances of such application. And in order to systematize the

practice and not allow too much latitude to individual Judges' notions of Justice, the English Rule appears to me to have been founded on the broad principle, tested by the two simple uniform tests, I have stated.

16. If I am so far correct, it would follow that prima facie this case is within the rule. But I agree with my learned brother that its circumstances are so peculiar that it may properly be excepted. I, therefore, concur in the decree which he has proposed.

Cases Referred.

1(1887) 19 Q.B.D. 89.4; 66 L.J.Q.B. 621; 35 W.R. 820
2(1878) 10 Ch. D. 393 (396); 39 L.T. 552; 27 W.R. 249; 48 L.J. Ch. 495
3(1883) 32 W.R. 261 (263)
4(1886) 16 Q.B.D. 556; 55 L.J.Q.B. 157; 54 L.T. 35; 34 W, R. 316; 50 J.P. 324
5(1887) 19 Q.B.D. 89.4; 66 L.J.Q.B. 621; 35 W.R. 820
6(1886) 16 Q.B.D. 556; 55 L.J.Q.B. 157; 54 L.T. 35; 34 W, R. 316; 50 J.P. 324
7(1879) 4 App. Cas. 504; 48 L.J.C.P. 705; 41 L.T. 418; 28 W.R. 97
811 Bom. L.R. 926; 4 Ind. Cas. 652