RAJASTHAN HIGH COURT

Devi Shankar

Vs.

Ugam Raj

C.S.A. No. 17 of 1984
(Sunil Kumar Garg, J.)

09.01.2002

ORDER

Sunil Kumar Garg, J.

1. This second appeal has been filed by the appellant- defendant against the judgment and decree dated 22-12-1983 passed by the learned Addl. District Judge, Udaipur in Civil Appeal No. 15/1983 by which he dismissed the appeal of the appellant-defendant and confirmed the judgment and decree dated 9-8-1982 passed by the learned Munsiff, Udaipur in Civil Original Suit No. 211/1980 by which the learned Munsiff, Udaipur decreed the suit of the plaintiff-respondent for eviction of the appellant-defendant from the shop in question on the ground of reasonable and *bonafide* necessity as envisaged under Section 13(1)(h) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as 'the Act of 1950').

2. The facts giving rise to this second appeal are as follows:-

> On 7-7-1980, the plaintiff-respondent filed a suit against the defendant-appellant in the Court of Munsiff, Udaipur for arrears of rent and eviction of the defendant-appellant from the shop in question on the ground of reasonable and *bonafide* necessity as envisaged under Section 13(1)(h) of the Act of 1950 stating *inter alia* that the shop, the details of which are given in para No. 1 of the plaint, was given to the defendant-appellant by Smt. Bhuri Bai on monthly rent of Rs. 40/-. It was further alleged in the plaint that the said shop, which was given on rent by Smt. Bhuri Bai to the defendant-appellant, was purchased by the plaintiff-respondent from Smt. Bhuri Bai through registered sale deed dated 2-8-1979 and thereafter, plaintiff-respondent became the owner of the shop in

question. It was further alleged in the plaint that the information about purchase of the shop in question by the plaintiff- respondent from Smt. Bhuri Bai through the registered sale deed dated 2-8-1979 was given by the plaintiff-respondent to the defendant-appellant through notice dated 7-8-1979.

The case of the plaintiff-respondent for eviction of the defendant-appellant from the shop in question on the ground of reasonable and *bonafide* necessity as put forward by him in para No. 4 of the plaint, was that he had no shop of his own for doing business of goldsmith and, that is why, he purchased the shop in question from Smt. Bhuri Bai and he wanted that shop for the purpose of doing his business because at present he was doing his business of goldsmith in a rented shop and not only this, owner of that rented shop had asked him to vacate the shop. It was further alleged by the plaintiff-respondent that since he was doing the business of goldsmith and he had 3-4 laborers with him, therefore, shop in question was needed by him for doing his business and his need for the shop in question was reasonable and bonafide. It was further alleged by the plaintiff-respondent that in case the shop in question was not vacated, he would be put to greater hardship than the defendant-appellant as he was the owner of the shop in question and furthermore, he was doing his business in a rented shop and the landlord of that shop had asked him to vacate that shop. Thus, it was prayed that the decree for eviction of the defendant-appellant from the shop in question on the ground of reasonable and *bonafide* necessity may be passed in his favour.

It may be stated here that since in the second appeal, the only issues pertaining to reasonable and *bonafide* necessity are challenged, therefore, other facts pertaining to eviction of the appellant-defendant on the ground of default are not being discussed here.

The suit of the plaintiff-respondent was contested by the defendant-appellant by filing a written statement on 12-12-1980 and in that written statement, the main contention of the defendant-appellant was that there was a shop in the north side of the shop in question in which one Yusuf used to sit, but plaintiff-respondent had got possession of that shop and, therefore, the need of the plaintiff-respondent for the shop in question came to an end, as he had got another shop adjacent to the disputed shop in question and furthermore, he was doing business in the shop in question for the last 20 years. He had further averred that the need of the plaintiff-respondent should not be termed as reasonable and *bonafide* as he had got another shop adjacent to the shop in question. Hence, it was prayed that the suit filed by the plaintiff-respondent be dismissed.

On the pleadings of the parties, the following issues were framed by the learned Munsiff, Udaipur on 30-3-1981 :-

Thereafter, both the parties led evidence in support of their respective cases.

After recording evidence and hearing both the parties, the learned Munsiff, Udaipur decided the issues Nos. 3 and 4 in favour of the plaintiff-respondent and against the defendant-appellant and thus, vide judgment and decree dated 9-8-1982, the learned Munsiff decreed the suit of the plaintiff-respondent for eviction of the defendant-appellant from the shop in question on the ground of reasonable and *bonafide* necessity as envisaged under Section 13(1)(h) of the Act of 1950 holding *inter alia* that the need of the plaintiff-respondent for the shop in question was found reasonable and *bonafide* as the plaintiff- respondent would convert the disputed shop in question with the shop adjacent to the shop in question, the possession for which was obtained by the plaintiff-respondent after filing of the suit and thereafter, he would do his business in both shops after amalgamating them into one.

Aggrieved from the said judgment and decree dated 9-8-1982 passed by the learned Munsiff, Udaipur, the defendant-appellant preferred first appeal in the Court of District Judge, Udaipur, which was transferred to the learned Addl. District Judge, Udaipur. The learned Addl. District Judge, Udaipur vide his judgment and decree dated 22-12-1983 dismissed the appeal of the appellant-defendant and confirmed the findings on issues Nos. 3 and 4 recorded by the learned Munsiff, Udaipur through his judgment and decree dated 9-8-1982.

Aggrieved from the judgment and decree dated 22-12-1983 passed by the learned Addl. District Judge, Udaipur, the appellant-defendant has filed this second appeal in this Court on 13-1-1984.

3. This Court while admitting this second appeal on 13-2-1984 framed the following substantial questions of law :-

"(1) Whether new case in respect of *bonafide* and reasonable necessity has been made out at the stage of evidence without there being a plea in the plaint to the effect that the plaintiff would raise a new shop by amalgamating the shop in question with the adjacent shop.

(2) Whether the courts below have failed to take into consideration the question of partial ejectment.

4. It may be stated here that this Court vide order dated 13th Feb., 1984 further ordered that the findings in respect of partial ejectment may be called for from the Court of Addl. District Judge, Udaipur and in compliance of the said order dated 13-2-1984 passed by this Court, the learned Addl. District Judge, Udaipur through his order dated 24-7-1984 recorded the findings in respect of partial ejectment and he came to the conclusion that since there were two shops, one on north side which was marked as No. 1 and which was in possession of the plaintiff-respondent and the other was disputed shop in question, which was marked as No. 2 and which was in possession of the defendant-appellant as tenant and, therefore, partial eviction was possible in the manner as stated by him in para No. 8 of his order dated 24-7-1984.

5. Against the said order dated 24-7-1984 passed by the learned Addl. District Judge, Udaipur, the plaintiff-respondent filed objections before this Court on 16-11-1984 alleging that the findings of partial ejectment recorded by the learned Addl. District Judge are wholly erroneous one and they cannot be sustained as they were based on the report of the Commissioner, who was not produced and no opportunity was afforded to the plaintiff-respondent to adduce evidence. Hence, it was prayed that findings recorded by the learned Addl. District Judge, Udaipur through his order dated 24-7-1984 be set aside.

6. This Court vide order dated 27-11-1984 ordered that the objections filed by the plaintiff-respondent against the findings recorded by the learned Addl. District Judge, Udaipur in his order dated 24-7-1984, would be heard and decided at the time of hearing of this second appeal.

7. In this second appeal, the following submissions have been raised by the learned counsel appearing for the appellant-defendant:-

> (1) That both the courts below have made out a new case for the plaintiff-respondent as the simple case as set up by the plaintiff-respondent in his plaint was that he was carrying on his business in a rented shop which was not proper for him and furthermore, landlord of that shop was pressing upon the plaintiff-respondent to vacate that shop, therefore, he wanted to carry on his business in the shop occupied by the appellant-defendant as tenant, which he had purchased from one Smt. Bhuri Bai, but nowhere in the plaint, it was disclosed by the plaintiff-respondent that he wanted to convert the disputed shop in question and the shop adjacent to shop in question into one shop and since this was not the case set up by the plaintiff-respondent in his plaint, therefore, both the courts

below have committed error in permitting the plaintiff-respondent to make out absolutely a new case, which was not set up by him in his plaint.

(2) That since the simple case of the plaintiff-respondent as put forward by him in para No. 4 of his plaint was that he had no other shop of his own and since the disputed shop was purchased by him from one Smt. Bhuri Bai and, therefore, that shop was needed by him for doing his business and for that, his need was reasonable and *bonafide* one, but since after filing of the suit, he had got another shop, which was adjacent to the shop in question from another tenant, therefore, his need for the disputed shop came to an end as he had got alternative accommodation of the similar nature as the shop which was adjacent to the shop in question is equivalent in size with that of the disputed shop.

Thus, it was prayed that since there was variance between pleadings and proof in the present case in adducing evidence on behalf of the plaintiff- respondent, therefore, findings of the courts below are erroneous one and the same be set aside and this second appeal filed by the appellant-defendant be allowed and the suit of the plaintiff-respondent be dismissed.

8. On the other hand, it has been argued by the learned counsel appearing for the plaintiff-respondent that this new plea should not have been allowed to be raised at the stage of second appeal and since the disputed shop in question and other shop which was adjacent on north side of the shop in question were purchased by the plaintiff-respondent from Smt. Bhuri Bai and if by chance after filing of the suit, another shop which was adjacent to shop in question was got vacated by plaintiff-respondent, it would not affect his case on reasonable and *bonafide* necessity and if after getting the possession of another shop which was adjacent to shop in question after filing of the suit, the plaintiff-respondent as PW-1 stated in Court that he would convert both the shops into one and, thereafter, do his business, his need would remain reasonable and *bonafide* and thus, the findings of the courts below should not be disturbed in this second appeal.

9. I have heard the learned counsel appearing for the appellant-defendant and the learned counsel appearing for the respondent-plaintiff and perused the record of the case.

10. To appreciate the above contentions, the scope of Sections 100 and 101 of the Code of Civil Procedure has to be kept in mind.

11. Sections 100 and 101, Civil Procedure Code read together make it quite clear that :-

(1) a second appeal will lie only on the ground of an error in law or procedure; and that

(2) a second appeal will not lie merely on the ground of an error on a question of fact.

12. About substantial question of law, it can be said that by the Amendment Act of 1976 the three grounds on which a second appeal could lie under the former Section 100 have been abrogated and in their place only one ground has been substituted which is a highly stringent ground, namely, that there should be a substantial question of law. It is now, therefore, not enough if a mere question of law is involved. It must be a substantial one. The appellant must show that some substantial question of law, as opposed to a substantial question of fact, is involved for decision. Whether a particular question is substantial or not must depend on the circumstances of each case. However generally a question of law which is not dependent upon examination of the evidence and requires no fresh investigation of facts, a finding based on evidence but perverse in the sense that no normal person could arrive at that finding, a finding based on no legal evidence or without judicial consideration of the facts in issue and the evidence on record are substantial questions of law depending of course on the effect caused by them on the adjudication of the issues between the parties.

13. The words 'substantial question of law' mean a substantial question of law as between the parties in the case involved and not merely a question of general importance.

14. If there is a finding based on no evidence or in disregard of evidence or on inadmissible evidence or on assumptions of facts without inquiry, such findings can be disturbed in second appeal, as they amount to an error of law.

15. In *Jagdish Singh v. Natthu Singh,* [1] it has been held by the Hon'ble SC that where the finding by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings.

16. In *Kashibai v. Parwatibai* [2] it has been held by the Hon'ble SC that High Court cannot reappreciate the evidence and interfere with the concurrent findings of fact of courts below without even formulating any question of law. The High Court has no

jurisdiction to entertain a second appeal on ground of erroneous findings of fact, based on appreciation of relevant evidence.

17. In *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar,* [3] the Hon'ble SC has held that concurrent findings of fact, howsoever erroneous, cannot be disturbed by the High Court in exercise of powers under Section 100, C.P.C.

18. In *Roop Singh v. Ram Singh,* [4] it has been held by the Hon'ble SC that under Section 100 of the Civil Procedure Code, jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100, Civil Procedure Code.

19. Thus, the position of law is very clear that as a rule High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be or as a rule in second appeal, finding of fact should not be disturbed, but if, as already stated above, they are based on no evidence or in disregard of evidence or on inadmissible evidence or against the basic principles of law or on the face of it there appears error of law or procedure or when there is a complete variance between pleadings and proof, such findings can be disturbed.

20. Looking to the above proposition of law, it is to be seen in this case whether there is complete variance between pleadings and proof as alleged by the learned counsel appearing for the appellant-defendant or not.

21. Before appreciating the contentions raised at the bar by both the learned counsel, the position of law in respect of variance between pleadings and proof has also to be seen.

Position of law in respect to variance between pleadings and proof.

22. Rule 2 of Order 6, CPC runs as follows:-

> 2. Pleading to state material facts and not evidence.
>
> (1) Every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

23. It may be stated here that facts are of two kinds, facta probanda and facta probantia. Facts on which the party pleading relies for his claim or defence are called facta probanda. And the facts by means of which they are to be proved are called facta probantia. The former are material facts, the latter evidence to prove the former.

24. It may further be stated here that pleadings should not state the evidence by which the facts are to be proved. The Hon'ble SC in *Om Prabha v. Abnash Chand,* [5] has observed that the ordinary rule of law is that evidence should be given only on plea properly raised and not in contradiction of the plea.

25. The rule of secundum allegata et probata is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite party. Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. In applying this test the whole of the circumstances must be taken into account and carefully scrutinized to find out whether there has been such surprise or prejudice as will disentitle a party to relief. Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defense and the rule of secundum allegata et probata will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby. A variation which causes surprise and confusion is always looked upon with considerable disfavor. But, where a ground though not raised in the pleadings in expressly put in issue or where the new claim set up is not inconsistent with the allegations made in the pleadings and is based on facts alleged therein, there is no question of surprise to the opposite party. So also, where although there was no specific plea or specific issue on a particular question, the parties have gone to trial with the full knowledge that the question was in issue and adduced evidence, there can be no prejudice. Whether a plea has been raised may be gathered from the pleadings taken as a whole, and if a sufficient plea is disclosed and the parties have led evidence on the point the Court can give relief on such plea.

26. In Firm *Sriniwas Ram Kumar v. Mahabir Prasad,* [6] the Hon'ble SC has held as under:-

"A plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent acts of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

27. The Hon'ble SC in *Trojan and Co. Ltd. v. Nagappa Chettiar,* [7] has held as under :-

"The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment in the plaint the Court held was not entitled to grant the relief not asked for."

28. In *Bhagwati Prasad v. Chandramaul,* [8] the Hon'ble Supreme Court, after analysing the law laid down in the case of *Trojan and Co. Ltd. v. Nagappa Chettiar* (supra), has further stated that it a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. But, if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties. In *Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College,* [9] the Hon'ble SC has held that it is not desirable to place undue emphasise on form. Instead substance of pleadings should be

considered.

29. The Hon'ble SC in *Bhim Singh v. Kan Singh,* [10] has held that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expresly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactoirly proved by the evidence.

30. In *Kali Prasad v. Bharat Coking Coal Ltd.* [11] it has been held by the Hon'ble SC that where the parties went to trial knowing fully well what they were required to prove and they had adduced evidence of their choice in support of the respective claims and that evidence was considered by both courts below, they could not be allowed to turn round and say that the evidence should not be looked into.

31. Thus, from the above discussion, it can be concluded:-

(1) That the reason for the general rule that a party is bound by his pleadings is that if he is allowed to substantiate a case different from that pleaded, his opponent will be seriously prejudiced. But the Court may depart from the strict enforcement of the general rule, if it is satisfied that rigid compliance of the rule will lead to injustice.

(2) That where no prejudice was caused by the variation between the pleading and the proof to the opposite party, even no objection was raised about it when evidence was being led, such variance would not be fatal to defence of party who has made variation.

(3) That generally the parties should not be allowed to travel beyond their pleadings. However, pleadings should be construed liberally and the Court should not adopt a pedantic approach. If the substance of the essential material facts for grant of relief is stated in the pleading, the Court should not throw away the same on the ground of defective form or the deficiency in the pleading. Even if the plea is not raised in the pleading even then a claim of the party cannot be defeated, if the parties know the respective cases of each other on the said plea and led evidence in support of their cases.

(4) That if the alternative case is admitted by the defendant in his written statement and not only that, thereafter, both parties have led evidence, in such a situation, decree can be granted on such alternative case.

(5) That if the parties have led evidence considering the pleas taken either in pleadings or in, evidence, in such circumstances,

it is not proper to say that such type of evidence should not be looked into.

(6) That if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

(7) That if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties, it is not desirable to place undue emphasis on form, instead substance of pleadings should be considered.

32. Looking to the above proposition of law, it is to be seen whether there is variance between the pleadings and proof in this case or not.

33. From perusing the plaint, it appears that in para No. 4 of the plaint, it has been pleaded by the plaintiff-respondent that he needed the disputed shop for his own business as at that time he was doing his business in a rented shop and there was demand on behalf of the landlord of that shop for vacating that shop. From this point of view, it can be easily said that if a person wants to come to his own shop for doing his business when he was doing business in a rented shop, his need from every point of view can be regarded as reasonable and *bonafide* one.

34. The other aspect of the case is that from the statement of PW. 1 Ugam Raj (plaintiff-respondent), it further appears that after filing of the suit, he also got possession of another shop which was adjacent to shop in question and the size of both the shops is equivalent and since during the pendency of the suit, the plaintiff-respondent had got possession of another shop, which was also purchased simultaneously by him from Smt. Bhuri Bai along with the disputed shop, the plaintiff-respondent had developed his case and stated on oath in the Court that now he intended to do his business in both shops by amalgamating them into one.

35. On this point, the case of the learned counsel for the appellant-defendant is that since the point of amalgamation of both the shops was not found in para No. 4 of the

plaint and furthermore, the plaint was not amended to that effect, therefore, this plea of amalgamation should not be allowed to be raised and when plaintiff-respondent has got vacant possession of another shop, therefore, his need cannot be termed as reasonable and *bonafide* and furthermore, in this case, there is variance between pleadings and proof also.

36. It may be stated here that both the Courts below have come to the conclusion that since the plaintiff-respondent was doing his business in a rented shop and since he has got his own shop, therefore, his need for both shops was found by them to be reasonable and bonafide.

37. From the pleadings of the parties and from the statements of the parties, the following undisputed facts have emerged:-

(1) That plaintiff-respondent purchased disputed shop in question as well as shop adjacent to the disputed shop in question from one Smt. Bhuri Bai.

(2) That before filing of the suit, plaintiff-respondent was doing the business of gold-smith in a rented shop and the owner of that rented shop asked the plaintiff-respondent to vacate that shop.

(3) That suit was filed by the plaintiff respondent on 7-7-1980 and in para No. 4 of the plaint, it has been pleaded by the plaintiff-respondent that since he was doing business of gold smith in a rented shop, therefroe, disputed shop in question was required by him for doing his own business of gold smith.

(4) That in reply to para No. 4 of the plaint, the defendant-appellant through his written statement dated 12-12-1980 averred that after filing of the suit, the plaintiff-respondent got another shop, which was just adjacent to the disputed shop in question and, therefore, his need for the disputed shop in question came to an end.

(5) That plaintiff-respondent in his statement recorded in Court as PW. 1 had admitted that within six months, after filing of the suit, he also got possession of another shop which was just adjacent to the disputed shop in question.

(6) That plaint was not amended by the plaintiff-respondent on the point that he also got possession of another shop after filing of the suit.

(7) That in his statement recorded in Court as PW. 1, the plaintiff-respondent developed his case that since he has also got vacant possession of another shop,

which was adjacent to the disputed shop in question, therefore, he wanted to amalgamate both the shops into one for doing his business of goldsmith.

38. In my considered opinion, the above argument of the learned counsel appearing for the appellant-defendant though on the very face appears to be very attractive and forceful one, but after going through the entire facts and circumstances of the case and the philosophy of law and the admitted facts just narrated above, that argument should fail because of the following reasons:-

(A) That since plaintiff-respondent got the possession of another shop, which was adjacent to the disputed shop in question, after filing of the suit, therefore, the question of pleading about that shop in the plaint, does not arise, as the suit was filed on 7-7-1980 and the vacant possession of that shop was taken over by him later on.

(B) That the defendant-appellant filed written statement on 12-12-1980 and from perusing para No. 4 of the written statement, it appears that the defendant-appellant was aware of the fact that the shop on the north side of the shop in question had fallen vacant and the plaintiff-respondent had got the possession of that shop and that is why, in reply to para No. 4 of the plaint, in his written statement, the defendant-appellant pleaded that since the plaintiff-respondent had got the possession of another shop adjacent to the shop in question, therefore, his need for the shop in question cannot be said to be reasonable and *bonafide* one.

(C) That thus, the case which has been set up by the plaintiff-respondent through his statement PW. 1 cannot be said to be a new case as defendant-appellant was aware of that fact and he had specifically pleaded that fact in his written statement and, thereafter, both parties led evidence keeping in mind that another shop had also fallen vacant to plaintiff-respondent.

(D) That the test, when an objection of this kind is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. In applying this test the whole of the circumstances must be taken into account, and carefully scrutinized to find out whether there has been such surprise or prejudice as will disentitle a party to relief. Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defence and the rule of secundum allegata et probata will not be strictly applied where there could be no surprise and the opposite party is not

prejudiced thereby.

Thus, it is held that in the present case, no question of surprise arises, as the defendant-appellant was aware of the case set up by the plaintiff- respondent through his statement recorded in Court as PW. 1 and he contested that case through his pleadings as well as through evidence, but his plea was not found favourable by the Courts below.

(E) That had there been a case that the plaintiff-respondent would have got the possession of the shop which was adjacent to shop in question before filing of the suit and he would have not mentioned that fact in his plaint, the position would have been different one, as in such a situation, it could be easily said that he had materially suppressed the fact, but from the statement of PW. 1 Ugam Raj (plaintiff-respondent) and from para No. 4 of the written statement, it is very much clear that plaintiff-respondent got the possession of another shop which was adjacent to shop in question after filing the present suit and thus, from this point of view, it cannot be said that the plaintiff-respondent had any ulterior motive or bad intention in his mind in pleading his case that he wanted to amalgamate both the shops to satisfy his need.

(F) That apart from this, subsequent events can be taken into consideration even at the appellate stage and since in the present case, another shop adjacent to shop in question fell vacant after filing of the suit within six months, therefore, that fact can be taken into consideration and the plaintiff-respondent through his statement as PW. 1 has very frankly taken into consideration that shop which was adjacent to shop in question to make out his case for reasonable and *bonafide* necessity. From this point of view also, if the plaintiff-respondent has raised plea of amalgamation of both shops, it cannot be said that it is inconsistent with the earlier case set up by him.

(G) That the theory of amalgamation of the disputed shop in question with the shop adjacent to the disputed shop in question was an afterthought and it amounted to variance between pleadings and proof, but such objection was never raised by the appellant-defendant either through application or through arguments advanced before the courts below and thus, it appears that the defendant-appellant has not taken this plea in surprise and rather it goes to show that he contested the case taking it for granted that both the shops were needed by the plaintiff-respondent.

(H) That the case of the plaintiff-respondent can also be examined from another angle.

A party's case may be disclosed :-

(1) by his allegations in his pleading.

(2) by his answers to interrogatories delivered to him by the opposite party in the suit.

(3) by allegations made on oath by him or by any person present on his behalf, or made by his pleader, and

(4) by the contents of documents produced by him.

Issues are framed on the case of the parties so disclosed and evidence is directed at the trial to the proof of the case so set up and covered by the issues framed thereon. A party is expected and is bound to prove the case as alleged by him and as covered by the issues framed.

In the present case, no doubt the plea of amalgamation is not pleaded in the plaint, but the same has been substantiated by the plaintiff-respondent through his statement as PW 1 on oath, to prove issue No. 3 on the point of reasonable and *bonafide* necessity. Thus, if evidence is led by the plaintiff-respondent in this case after getting the possession of the shop adjacent to the shop in question, after filing of the suit, he cannot be estopped from stating in Court that he wanted to amalgamate both the shops, as a party can disclose his case even through statement.

Apart from that, rules of interpretation of pleadings should be construed liberally and not strictly and from this point of view also, what has been stated by the plaintiff-respondent in his statement cannot be said to be outside the scope of the suit.

39. For the reasons stated above, the present case cannot be said to be a case of variance between pleadings and proof on behalf of the plaintiff-respondent.

40. I have also gone through and considered the decisions relied upon by the learned counsel for the appellant-defendant in *Atta Mohammad v. Emperor,* [12] *Trojan and Co. v. Nagappa (AIR 1953 SC 235)* (supra), *Kusum Chand v. Kanhaiyalal,* [13] , *Kailash Kumar v. Banarsi Das,* [14] and *Allam Gangadhara Rao v. Gollapalli Gangarao,* [15] and looking to the facts and circumstances of the case, they would not be helpful to the learned counsel for the appellant-defendant.

41. In view of the discussion made above, the findings of the Courts below on issue No. 3 pertaining to reasonable and *bonafide* necessity appear to be correct one and they do not suffer from basic infirmity and illegality, and, therefore, in this second appeal, they should not be disturbed.

42. For the reasons stated above, the substantial question No. 1 is answered in favour of the plaintiff-respondent and against the appellant-defendant holding that if the plaint is not amended by the plaintiff-respondent, it would not affect his case on the point of reasonable and *bonafide* necessity.

Substantial Question No. 2

43. Before proceeding further, the law with regard to comparative hardship, as laid down by the the Hon'ble SC in *Hiralal Moolchand Doshi v. Barot Raman Lal Ranchhoddas,* [16] may be stated here (para 25) :-

> "In a suit for eviction on the ground of *bonafide* personal requirement the landlord is not supposed to have pleaded his own comparative hardship in the plaint itself, Section 13(2) comes into play at the stage when the Court is satisfied that the ground contained in Clause (g) of sub-section (1) of Section 13 has been made out. It is at that stage that the Court has to examine the question of comparative hardship. It is thus not necessary to plead in the plaint itself. Often the parties at the stage of recording of evidence of *bonafide* personal requirement also lead evidence as to the comparative hardship of the landlord or the tenant. But such averments are not required to be pleaded in the plaint itself to give cause of action to the landlord to enable him to file a suit for eviction of the tenant on the ground of his *bonafide* personal requirement."

44. In the above case, the Hon'ble SC has categorically observed that in a suit for eviction on the ground of *bonafide* personal requirement, the landlord is not supposed to plead his own comparative hardship in the plaint itself.

45. The simple case of the plaintiff-respondent was that he got no other accomodation of his own except disputed shop and furthermore, except that shop which he got after filing of the suit. Since he was doing his business in a rented shop, therefore, his need to the shop in question was not only reasonable, but *bonafide* one and if a person is not allowed to come to his own shop from a rented shop, hardship will be caused to him and from this point of view also, Courts below have rightly decided issue No. 4 on the point of comparative hardship in favor of the plaintiff-respondent and against the

defendant-appellant.

46. It may be stated there that this Court vide order dated 13-2-1984, remitted the matter to the learned Addl. District Judge, Udaipur for taking findings on partial ejectment and in compliance of the said order dated 13-2-1984, the learned Addl. District Judge, Udaipur through his order dated 24-7-1984 gave findings in favor of the defendant-appellant and against the plaintiff-respondent holding that partial ejectment was possible.

47. In my considered opinion, the findings of partial ejectment recorded by the learned Addl. District Judge, Udaipur through his order dated 24-7-1984 cannot be sustained because of the simple reason that the learned Addl. District Judge appointed retired P.W.D. Overseer Shri B. L. Mantri to inspect the shop and asked him to submit his report and on the basis of the report of the Overseer, the learned Addl. District Judge gave findings without recording the evidence of the Overseer Sri B. L. Mantri and no opportunity was given to the plaintiff-respondent to adduce evidence. In these circumstances, the so- called findings recorded by the learned Addl. District Judge, Udaipur through his order dated 24-7-1984 cannot be sustained.

48. Apart from this, when this Court has come to the conclusion while confirming the findings of the Courts below on issue No. 3 with regard to reasonable and *bonafide* necessity, that both shops are needed by the plaintiff-respondent after amalgamation, the question of partial ejectment becomes redundant. From this point of view also, the findings of partial ejectment recorded by the learned Addl. District Judge, Udaipur through his order dated 24-7-1984 cannot be sustained and it is held that it is not a fit case where partial ejectment should be allowed. Thus, the findings of partial ejectment recorded by the learned Addl. District Judge, Udaipur through his order 24-7-1984 are set aside and the findings recorded by the learned Addl. District Judge, Udaipur through his judgment dated 22-12-1983 on issue No. 4 pertaining to comparative hardship are confirmed.

49. For the reasons stated above, the substantial question No. 2 is also decided in favor of the plaintiff-respondent and against the defendant- appellant.

In the result, this second appeal filed by the appellant-defendant is dismissed, after confirming the judgment and decree of eviction passed by the Courts below against the defendant-appellant on the ground of reasonable and *bonafide* necessity as envisaged under Section 13(1)(h) of the Act of 1950.

Three months' time is granted to the appellant-defendant to vacate the shop in question. No order as to costs.

Appeal dismissed.

Cases Referred.

1. AIR 1992 SC 1604
2. (1995) 6 SCC 213: (1995 AIR SCW 4631)
3. AIR 1999 SC 2213
4. 2000 AIR SCW 1001: (AIR 2000 SC 1485)
5. AIR 1968 SC 1083
6. AIR 1951 SC 177
7. AIR 1953 SC 235
8. AIR 1966 SC 735
9. AIR 1987 SC 1242
10. AIR 1980 SC 727
11. AIR 1989 SC 1530
12. AIR 1930 PC 57
13. AIR 1974 Raj 73
14. AIR 1961 Jammu and Kashmir 34
15. AIR 1968 AP 291
16. AIR 1993 SC 1449