

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.1185 of 2016

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1. Baidyanath Sharan Verma S/o Late Dr. S.R. Verma R/o Village- Vijay Hata,
P.O. +P.S. - Siwan Muffasil at Present Pachrukhi, District- Siwan.

.... Appellant/s

Versus

1. Pashupati Devi W/o late Ganesh Singh
2. Jyoti Kumari D/o late Ganesh Singh R/o Village- Mardapur, P.O. +P.S.- Siwan
Mufassil, District- Siwan.
3. Sonu Kumar Srivastava
4. Somu Kumar Srivastava
5. Monu Kumar Srivastava 3 to 5 Sons of late Ravindra Kumar null
6. Baby D/o late Ravindra Kumar
7. Name not known W/o late Ravindra Kumar 3 to 7 R/o Mohalla- Siwan town, Nai
Basti Mahadewa, P.O. Siwan,P.S & District- Siwan.
8. Ram Babu Singh S/o Jagarnath Singh R/o Village- Sarawa, P.O. +P.S. Siwan
Mufassil, District- Siwan.
9. Harishankar Singh S/o Ram Sobhag Singh R/o Village- Hakam, P.O. +P.S.
Siwan Mufassil, District- Siwan.
10. Moshmat Ghurli Kunwar W/o late Jagdish Singh R/o Village- Mahuwari, P.O.
+P.S. Siwan Mufassil, District- Siwan.
11. Ajeet Singh S/o late Jagdish Singh R/o Village- Mahuwari, P.O. +P.S. Siwan
Mufassil, District- Siwan.
12. Lal Babu Singh S/o Dudnath Singh R/o Village- Daroga Hata, P.O. +P.S. -
Siwan Mufassil, District- Siwan.
13. Poonkali Devi W/o late Shankar Prasad
14. Arbind Kumar
15. Pramod Kumar
16. Birat Kumar 15 to 17 Sons of late Shankar Prasad
17. Shobha Devi
18. Nirmala Devi
19. Asha Devi
20. Vimla Devi 17 to 20 D/o late Shankar Prasad 14 to 20 R/o Village- Bindusar
Buzurg , P.O. +P.S.- Siwan Mufassil, District- Siwan.
21. Raj Kishore Singh S/o Jagat Narayan Singh R/o village- Ziradei, P.O. +P.S.
Ziradei, District- Siwan.
22. Devendra Nath Asthana Son of late Gayanendra nath Asthana and Resident of
Village- Gouri Sherajpur, P.O. +P.S. Gambhirpur, District Azamgarh(U.P).
23. Smt. Pratibha Prasad
24. Smt. Kanti Swaroop
25. Smt. Krishna Verma 23 to 25 D/o late Dr. S.R. Verma R/o Village- Vijay Hata,
P.O. +P.S. Siwan Mufassil, District- Siwan at Present Pachrukhi, District- Siwan.

.... Respondent/s

with

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CIVIL MISCELLANEOUS JURISDICTION No. 1563 of 2016

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1. Baidyanath Sharan Verma, S/o Late Dr. S.R. Verma, R/o Village- Vijay Hata,
P.O.+ P.S.- Siwan Muffasil at present Pachrukhi, District- Siwan.

.... Appellant/s



Versus

1. Pashupati Devi W/o Late Ganesh Singh,
2. Jyoti Kumari, D/o Late Ganesh Singh. R/o Village- Mardapur, P.O. + P.S.- Siwan Mufassil, District- Siwan.
3. Sonu Kumar Srivastava.
4. Somu Kumar Srivastava.
5. Monu Kumar Srivastava, 3 to 5 Sons of Late Ravindra Kumar.
6. Baby, D/o Late Ravindra Kumar.
7. Name not known W/o Late Ravindra Kumar 3 to 7 R/o Mohalla- Siwan Town, Nai Basti, Mahadewa, P.O.- Siwan, P.S. & District- Siwan.
8. Ram Babu Singh, S/o Jagarnath Singh, R/o Village- Sarawa, P.O. + P.S.-Siwan Muffasil, District- Siwan.
9. Harishankar Singh, S/o Ram Sobhag Singh, R/o Village- Hakam, P.O. + P.S.- Siwan Muffasil, District- Siwan.
10. Moshmat Ghurli Kunwar W/o Late Jagdish Singh, R/o Village- Mahuwari, P.O. + P.S.- Siwan Mufassil, District- Siwan.
11. Ajeet Singh, S/o Late Jagdish Singh, R/o Village- Mahuwari, P.O. + P.S.- Siwan Mufassil, District- Siwan.
12. Lal Babu Singh, S/o Dudnath Singh, R/o Village- Daroga Hata, P.O. + P.S.- Siwan Muffasil, District- Siwan.
13. Poonkali Devi, W/o Late Shankar Prasad.
14. Arbind Kumar,
15. Pramod Kumar
16. Birat Kumar, 15 to 17 sons of Late Shankar Prasad,
17. Shobha Devi
18. Nirmala Devi
19. Asha Devi
20. Vimla Devi 18 to 21 D/o Late Shankar Prasad 14 to 21 R/o Village- Bindusar Buzurg, P.O. + P.S. Siwan, Mufassil, District- Siwan.
21. Raj Kishore Singh, S/o Jagat Narayan Singh, R/o Village- Ziradei, P.O. + P.S.- Ziradei, District- Siwan.
22. Devendra Nath Asthana
23. Smt. Pratibha Prasad
24. Smt. Kanti Swaroop.
25. Smt. Krishna Verma, 26 to 27 D/o Late S.R. Verma, R/o Village- Vijay Hata, P.O. + P.S.- Siwan Mufassil, District- Siwan at present Pachrukhi, District- Siwan.

.... Respondent/s

Appearance :

(In C.Misc. No.1185 of 2016)

For the Appellant/s : Mr. Rajendra Narayan, Sr. advocate

For the Respondent/s : Mr. Chandra Kant, advocate

(In C.Misc. No.1563 of 2016)

For the Appellant/s : Mr. Rajendra Narayan, Sr. advocate

Mr. Madhukar Pandey

For the Respondent/s : Mr. Chandra Kant, advocate

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA
ORAL JUDGMENT

Date: 21-02-2018

Civil Misc. No. 1185 of 2016 is filed against the order



dated 07.09.2016 passed by learned 5th Additional District Judge, Siwan in Title Appeal No. 66 of 2013 whereby the learned Additional District Judge has dismissed the amendment petition of the petitioner/appellant dated 03.03.2016.

2. Civil Misc. No. 1563 of 2016 is filed against the order dated 14.11.2016 passed by learned 5th Additional District Judge, Siwan in same Title Appeal No. 66 of 2013 whereby the amendment petition of petitioner dated 24.10.2016 has been dismissed.

3. Since both these Civil Misc. petitions arose out against the orders passed in Title Appeal No. 66 of 2013, they have been heard together and are being disposed of by this common judgement.

4. Heard Sri Rajendra Narayan, the learned senior counsel for the petitioner, and Sri Chandra Kant, the learned counsel for the respondents.

5. The petitioner is the plaintiff-appellant. The petitioner filed two amendment petitions one on 03.03.2016 and another on 24.10.2016. By the first amendment petition the petitioner sought amendment in the date of death of Indu Devi @ Khokhi Devi, mother of defendant 2nd set, as the same is necessary for resolution of the dispute between the parties. The petitioner stated in the plaint that Indu Devi @ Khokhi Devi died but did not mention the date of death. The petitioner came to know later on about the death of Indu Devi @ Khokhi Devi, who died on 23.12.1987. By the second amendment petition dated 24.10.2016 the petitioner seeks amendment in prayer portion and stated that all the facts have already been mentioned in the plaint but due to inadvertence and ignorance the plaintiff did not mention in the prayer portion about declaration of title of plaintiff and, therefore, prayer portion of plaint be amended by and the title of



the plaintiff over the subject matter of the suit be also declared.

6. Admitted facts are that the plaintiff filed the suit, bearing Title Suit No. 173 of 1990, for setting aside 15 sale deeds alleged to have been executed by defendants 2nd set in favour of defendants 1st set. The plaintiff is grand son of Gokul Prasad. Gokul Prasad blessed with two sons namely, Dhanushdhari Prasad and Sheodhari Prasad. Sheodhari Prasad got one daughter, namely, Indu Devi @ Khokhi Devi. She was married with Gyanendra Nath Asthana of village Gouri Sherajpur, P.S. Gambhirpur, district Azamgarh (Uttar Pradesh). Sheodhari Prasad died before 1955 leaving behind her daughter, Indu Devi @ Khokhi Devi. Wife of Sheodhari Prasad pre-deceased him. The plaintiff being grand son of Dhanushdhari Prasad inherited the entire property. Even records of rights were prepared in the name of plaintiff and his father but Indu Devi @ Khokhi Devi and her sons, defendants 2nd set, are said to have fraudulently executed sale deeds in favour of defendants 1st set without taking any consideration amount and without having title. The suit was dismissed. The petitioner filed appeal and during the pendency of the appeal, i.e. Title Appeal No. 66 of 2013, the petitioner filed aforesaid two amendment petitions for amendment of the plaint but the learned 5th Additional District Judge dismissed the two amendment petitions.

7. The learned senior counsel for the petitioner submits that both the amendment petitions are of formal nature and the amendment would not change the nature of the suit. The petitioner has stated in the plaint that Indu Devi died but due to inadvertence he did not insert the date of death of Indu Devi. A criminal case for fraudulent execution of sale deeds has already been filed in which the defendants 2nd set brought on record the death certificate of Indu Devi showing that she died on 20.12.1987. Death certificate of Indu Devi



has also been brought on record as evidence in the suit and defendants did not object the genuineness of death certificate and, therefore, the amendment should have been allowed. The learned counsel for the petitioner further submits that petitioner has stated in the plaint that he has got title over the land by virtue of succession since Sheodhari Prasad died before 1955 and her sole daughter did not succeed any land. Father and brother of Sheodhari Prasad were alive. They inherited the property after death of Sheodhari Prasad. Wife of Sheodhari Prasad pre-deceased him but the relief for declaration of title of the petitioner could not be stated in the relief portion, therefore, the same is required to be incorporated in the plaint. It is submitted that amendment is a mere notice and all the facts are from before in the plaint.

8. In support of his submission the learned senior counsel for the petitioner placed reliance on the following judgements:-

- (i) ***1991 (1) PLJR 157 (Ragho Pandey & Ors. v. Rajendra Tiwary***
- (ii) ***1998 PLJR (2) 70 (Rajmati Devi & Ors v. Ram Pravesh Rai & Ors)***
- (iii) ***BLJR 1979 306 (Mahanth Siya Ram Das v. State of Bihar & Ors***
- (iv) ***2018 (1) PLJR SC 91 (Mohinder Kumar Mehra v. Roop Rani Mehra)***

9. In the case of *Ragho Pandey v Rajendra Tiwary* (supra), it has been held that application for amendment of plaint and the prayer for admitting into evidence a death certificate would not change the nature and character of the suit and relief would also



remain the same. If amendment is allowed it does not amount to admission of fact nor will admission of document into evidence amount to accepting genuineness of the document. It is stated in the plaint itself about the death of Indu Devi @ Khokhi Devi but the date of death has not been mentioned in the plaint, therefore, mere insertion of date of death Indu Devi @ Khokhi Devi would certainly not change the nature and relief of the suit.

10. In the case of *Rajmati Devi & Ors v. Ram Pravesh Roy* (supra) it has been held that addition of relief by amendment admittedly will not amount to retrial of the suit rather the appellate court is to decide the appeal on the basis of evidence adduced by the parties. The court below is not correct in law in holding that merely because relief was available at the time when the suit was filed and the same was not added in the plaint, the subsequent prayer of addition of relief by amendment cannot be refused. The proposed amendment also cannot be said to be malafide for the reason that trial court in its judgement had held that the suit was hit by provision of Section 34 of Specific Relief Act which has necessitated the plaintiff to seek amendment of the plaint. In that view of the matter the approach of the court is not correct and the order suffers from serious illegality.

11. In the case of *Mahanth Siya Ram Das v. State of Bihar* (supra) it has been held that the amendment of plaint is mere addition of relief and does not amount to change the nature of the suit and if the amendment is necessary for resolution of the dispute between the parties the same should be allowed.

12. In the case of *Mohinder Kumar Mehra v. Roop Rani Mehra* (supra) the Apex Court has held that application filed by plaintiff for amendment of plaint and the trial court rejected the application of amendment holding that the claim is barred by



limitation. Newly inserted Rule 17 of Order VI of the C.P.C is to control filing of application for amendment of pleading subsequent to commencement of trial. It has been held that in view of object of the proviso it cannot be said that amendment is barred in view of the proviso and final determination as to whether the claim was barred would have been decided after considering the evidence led by the parties.

13. On the other hand the learned counsel for the respondents firstly submitted that plaintiff came to know about the death of Indu Devi @ Khokhi Devi in the year 1992 itself but he did not incorporate the facts of date of death of Indu Devi @ Khokhi Devi. The omission is not on account of typographical error but at the time of filing of the suit the plaintiff was not aware about the date of death of Indu Devi @ Khokhi Devi. This omission cannot be said to be typographical error. The learned counsel for the respondents has placed reliance on the judgement of Apex Court rendered in the case of *J. Samuel v. Gattu Mahesh, 2012 (1) PLJR SC 412* in which it has been held that amendment in plaint after conclusion of argument at the time of judgement on ground of omission by type mistake, lack of due diligence and mistake committed does not come within the purview of a typographical error. The term typographical error is defined as mistake made in printed/ typed material during a printing/ typing process. It includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. The act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error and amendment allowed by the High Court was set aside.

14. The learned counsel for the respondents secondly submitted that in view of proviso of Order VI of Rule 17 of the Code of Civil Procedure the amendment petition has rightly been dismissed



as the petitioner failed to make out a case and did not fulfill conditions as enumerated under Order VI Rule 17 of the C.P.C. The learned counsel for the respondents placed his reliance on the judgement of Apex Court reported in the case of *Vidyabai & Ors. v. Padamlatha & anr, (2009) 2 SCC 409* in which it has been held that after deleting the Rules 17 and 18 of Order VI by Act 46 of 1999 the amendment itself was not permissible. Ultimately, to strike a balance the Legislature applied its mind and reintroduced Rule 17 by Act 22 of 2002 with effect from 01.07.2002. It has a provision permitting amendment in the first part which said the court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the court come to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is submitted that the date of death and amendment in prayer portion by declaration of title of plaintiff were not brought during the pendency of the suit and, therefore, this cannot be allowed at the appellate stage.

15. The learned counsel for the respondents further submits that amendment in prayer portion for declaration of title is barred by limitation. The plaintiff filed the suit in the year 1990 and sought relief of declaration of sale deed executed by defendant 2nd set in favour of defendant 1st set to be void, inoperative and sham but did not seek relief with regard to declaration of title of the plaintiff. The defendant 1st set categorically stated in the written statement that Indu Devi @ Khokhi Devi and her sons, who had title over the land, executed the sale deed in favour of defendant 1st set and that amounts to denial of title of plaintiff. In view of the provision under Section 34 of Specific Relief Act the plaintiff should have sought relief of declaration of title and once it is denied, in view of provision of



Article 56 of the Limitation Act, the plaintiff should have incorporated the relief within three years from the date of first denial by inserting the fact in the written statement but the plaintiff kept mum and, therefore, the amendment in the prayer portion with regard to declaration of title is barred by law of limitation.

16. The learned counsel for the respondents placed his reliance on the judgement of Apex Court reported in the case of ***L. C. Hanumanthappa v.H. B. Shivkumar, (2016) 1 SCC 332*** in which it has been held that while enacting Article 58 of the 1963 Act the, Legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word “first” has been used between the words “sue” and “accrued”. This would mean that if a suit is based on multiple causes of actions, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued. The same view has been taken in the case of ***Rukhambai v. Lala Laxminarayan, AIR 1960 SC 335***.

17. Having heard the submission of both sides and on perusal of the records, the only question arises for consideration whether the amendments sought for are fit to be allowed on the facts and in the circumstances of the case?

18. Order VI of Rule 17 is the provision meant for amendment of pleadings which reads as follows:-

"17) Amendment of Pleadings - 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."

19. From perusal of the provision, as contained in Order VI Rule 17, it appears that the court has got unbridled power to allow either party to alter or amend his pleadings in such a 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. Therefore, the prime object to deal with amendment of pleadings by either party is whether the facts sought to be incorporated are necessary for the purpose of determining the real question in controversy between the parties.

20. Rule 17 and 18 of Order VI were deleted by Act 46 of 1999, making the amendment not permissible, but after much discussion to strike balance the Legislature applied its mind and reintroduced Rule 17 by Act 22 of 2002 w.e.f. 01.07.2002 but a proviso was added and the proviso prevented any application for amendment to be allowed after the trial had commenced unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.

21. From perusal of Section 7 of Act 22 of 2002 by which Rule 17 has been reintroduced, it appears that application of proviso to Rule 17 of Order VI has been made prospectively and it shall not be applicable for the pleadings pending from before. Therefore, I find that the judgement in the case of *Vidyabai v. Padamlatha* (supra) on which the learned counsel for the respondents placed his reliance is not helpful to his case on the facts and in the circumstances of the present case.

22. In the case of *Rajesh Agrawal v. K. K. Modi* reported in (2006) 4 SCC 385 the Apex Court has held in paragraphs



16, 17, 18 and 19 which reads as follows:-

“16. Order VI Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case”.

23. It is evident from perusal of the aforesaid judgement



that all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side should be allowed. The real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such amendment is necessary to decide the real dispute between the parties. If it is in affirmative the amendment will be allowed, if it is not, the amendment will be refused. It has also been held that the court should not go into the merits of the amendment at the stage of considering the prayer for amendment.

24. In the case of *L. C. Hanumanthappa v. H.B. Shiv Kumar* (supra) it has been held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. The 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 barred by limitation, the amendment must be refused.

25. Now I consider the proposed amendment and whether it introduces a totally different, new and inconsistent case as has been held by learned Additional District Judge that the proposed amendment is going to change the very root of the case and would introduce a totally new case and would also correct the defect of the impugned judgement.

26. The plaintiff sought amendment of date of death of Indu Devi @ Khokhi Devi. It appears that the plaintiff has stated at



the time of filing of the suit that Indu Devi @ Khokhi Devi died but the date and year have not been mentioned. This fact was disclosed by the defendants 2nd set, sons of Indu Devi @ Khokhi Devi, during the trial of a criminal case that Indu Devi @ Khokhi Devi died on 23.12.1987. Even during the course of hearing of the suit the plaintiff brought the death certificate of Indu Devi @ Khokhi Devi and the same was marked as exhibit without any objection. Therefore, in my view, the amendment with regard to date of death of Indu Devi @ Khokhi Devi will not introduce a new case and the same is necessary for the purpose of determining the real controversy between the parties as the plaintiff claimed that Indu Devi @ Khokhi had no title over the land and the sale deed executed by her is forged, fabricated and without any consideration amount. The defendants 2nd set, sons of Khokhi Devi, although did not appear in the suit but stated in the criminal case that neither he nor his mother executed any sale deed.

27. So far as second amendment is concerned, the same is sought for with regard to declaration of title. The plaintiff has categorically stated in the plaint that Gokul Prasad had two sons, namely, Dhanushdhari Prasad and Sheodhari Prasad. Sheodhari Prasad got one daughter, namely, Indu Devi @ Khokhi Devi and she was married to Gyanendra Nath Ashthana of village Gouri Sherajpur, P.S. Gambhirpur, district Azamgarh, Uttar Pradesh. Sheodhari Prasad died before 1955 leaving behind her daughter Indu Devi @ Khokhi Devi. Wife of Sheodhari Prasad pre-deceased him. The plaintiff has very categorically stated that at the time of death of Sheodhari Prasad his father and brother were alive and the property of Sheodhari Prasad devolved on Gokul Prasad and thereafter on Dhanushdhari Prasad. From perusal of the entire plaint, I find that the plaintiff stated the facts that he got title and possession over the land and even in the ceiling case records of right were prepared in the name of plaintiff and



during ceiling proceeding only the plaintiff were noticed for acquisition of land. Therefore, mere adding prayer for declaration of title, in my view, would not change the nature of the suit. The additional prayer is in fact for declaration of title for which entire facts have already been stated in the plaint. The plaintiff has also stated that he got title and possession over the land. Therefore, I find that the amendment of additional prayer in the prayer portion would not change the nature of the suit and the same shall be decided on the basis of evidence adduced by the parties and no further evidence is required for deciding the real controversy between the parties.

28. Therefore, I find that the learned Additional District Judge has committed jurisdictional error by rejecting the prayer for amendment. Accordingly, these Civil Misc. petitions are allowed and the orders dated 07.09.2016 and 14.11.2016 passed in Title Appeal No. 66 of 2013 are set aside.

The respondents are at liberty to raise the point of limitation during the hearing of the appeal.

(Prabhat Kumar Jha, J)

BKS/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	29.03.2018
Transmission Date	N.A.

