

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.476 OF 2019.

HARICHANDRA DATTA CHARI

... PETITIONER

Versus

DINESH KUSHALI FAL DESSAI
AND 22 ORS.

... RESPONDENTS

Shri Sanman Keny, Advocate for the Petitioner.

Shri P. Phaldessai, Advocate for the respondent nos.1 to 7, 9 to 17.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 13th December 2019.

P.C.

The plaintiffs filed Regular Civil Suit No.5/2015/A, initially against four defendants; later they brought on the record six more defendants. The petitioner in this writ petition is the third defendant. In the plaint, the plaintiff pleaded in paragraph 13 thus:

“The plaintiffs state that in the suit portion of the property there exists three mundkarial houses of the defendant nos. 2 to 4 and fruit bearing trees such as cashew trees, mango trees etc raised by the plaintiffs.”

2. Later, the defendants—including the third defendant, that is the petitioner here—filed their written statements. In the light of the defence placed on record, the plaintiffs filed Exh. P-4 application for the amendment of the plaint. Through the amendment, the plaintiffs wanted the trial Court to delete “three mundkarial houses of the defendants nos. 2 to 4” from para 13 of the plaint. The trial Court allowed it.

3. Aggrieved, the third defendant has filed this Writ Petition. This Court, through its order dated 13.6.2019, directed the petitioner to serve the notice on the respondent nos.1 to 17, who alone are the contesting respondents. In other words, the other respondents, who are originally the co-defendants in the suit, were treated as formal parties to the writ petition. On the service of notice, the respondent nos. 1 to 17 entered their appearance through their counsel.

4. In the above factual background, the petitioner's counsel has argued that the trial Court has erroneously allowed the amendment, though the plaintiffs in effect wanted to take away an admission through the amendment. He has also pointed out that the trial Court has misdirected itself in observing that the rule prohibiting amendment from taking away an admission applies only to the written statement.

5. In reply, the learned counsel for the respondents 1 to 17 has submitted, first, that the amendment does not intend to take away any admission. Second, the petitioner is not a necessary party to the proceeding but was added only formally; third, the amendment under Order 6 Rule 17 of CPC can be entertained at any stage and, through this amendment, even an admission can be taken away or diluted.

6. The learned counsel has also submitted that the house the third defendant claims does not fall within the property the plaintiffs have been claiming in the suit.

7. Heard Shri S. Keny, the learned Counsel for the Petitioners; and

Shri P. Phaldessai, the learned counsel for the respondents 1 to 7 and 9 to 17.

8. Indeed, to begin with, the trial Court has clearly misdirected itself in observing that the rule of binding-admission applies only to the written statement. In other words, the trial Court has concluded that only the defendant cannot take away an admission, but the plaintiff can. Yet it is not only the defendant but also the plaintiff that is bound by the rule: neither can take away an admission.

9. It is equally fallacious, I reckon, for the respondents to contend that only the defendant suffers the constraint of not withdrawing an admission from the pleadings. Pleadings under Order 6 CPC include both the plaint and the written statement. If the portion from paragraph 13 is deleted as sought by the plaintiffs, it does amount to the plaintiffs' taking away an admission which may enure to the defendants' benefit.

10. At this juncture, I will also answer the plaintiffs' assertion that the property the plaintiffs claim does not include the petitioner's mundkarial house. But in paragraph 13 extracted above, it has been clearly mentioned that the house does exist in a portion of the suit property.

11. Though the respondents' counsel has also contended that the petitioner is only a formal party to the suit, neither in the pleadings nor in the Exh. P-4 application had it been spelt out. In fact, the application for amendment is devoid of any explanation, except stating that the plaintiffs' "wrongly stated" in paragraph 13 about the mundkarial houses. The

plaintiffs have only tried to explain it away as an inadvertent error.

12. That is, the plaintiffs wanted the sentence “three mundkarial houses of the defendant nos. 2 to 4 and” removed from paragraph No.13. What lies in the suit property and how the defendants are related to that property are the questions that may form the core of the suit and may engage the trial Court’s attention.

13. The trial Court does observe that the amendment to the plaint can be granted liberally before the commencement of the trial if it does not change the nature of the suit or cause of action. Agreed. But does this liberal approach allow the plaintiff to withdraw admission. First, the liberal approach applies to the benefit of both the plaintiff and the defendant. In fact, it applies more liberally to the defendant’s benefit, for he suffers no doctrinal limitations of electing one among many competing narratives in the plaint. Nor does he face the hurdle of inconsistent pleadings. He can, in fact, plead inconsistently, too.

14. In *Revajeetu Builders and Developers v. Narayanaswamy and Sons*^[1], the Supreme Court, after referring to its earlier decisions, has culled out the principles on amendment:

(1) Is the amendment sought imperative for proper and effective adjudication?

(2) Is the application for amendment *bona fide*?

(3) Does the amendment cause to the other side any prejudice which cannot be compensated adequately in terms of money?

(4) Does the court’s refusal to amend, in fact, lead to injustice or multiple litigations?

1 [1] (2009) 10 SCC 84

(5) Does the proposed amendment constitutionally or fundamentally change the nature and character of the case?

(6) Should the court, as a general rule, decline amendments if a fresh suit on the amended claims would be barred by limitation by the date of application?

15. Indeed, the above enumeration is not exhaustive; it is illustrative. To the above list, we ought to add the rule against withdrawing an admission. In *Ram Niranjan Kajaria v. Sheo Prakash Kajaria*^[2], on which the trial Court has relied on, the question whether a defendant in a suit for partition can be permitted to withdraw an admission made in the written statement after a pretty long period? The contextual expression “pretty long period” may not tilt the scales, though.

16. In tune with the settled principles of law, *Ram Niranjan Kajaria* holds that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. Indeed, the party in that case that sought to amend the pleadings was a defendant. But *Ram Niranjan Kajaria* has not laid down any proposition, as the trial Court has erroneously assumed, this constraint against not withdrawing the admission applies only to the defendant. It applies on both sides.

17. Recently, this Court, in *Chirayu Jamnadas Bhatia v. M/s. Karsondas Lalbhai Narielwala*^[3], has considered the precedential position on the amendment that enables a party to withdraw an admission or set up a new case. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*^[4],

2 [] (2015) 10 SCC 203

3 [] MANU/MH/1946/2019

4 [] AIR 1957 SC 363

a three-Judge Bench of the Supreme Court has quoted with approval Batchelor J. in *Kisandas Rupchand v. Rachappa Vithoba*⁵: "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..."

18. In another case, the trial court rejected the defendants' application for amendment. It was on the ground that the defendants wanted to resile from admissions made in the written statement. According to it, the defendants' repudiating their clear admission would deprive the plaintiff of his accrued valuable right, and it is against the law. In that context, the Supreme Court's three-Judge Bench, in *Ladha Ram*, has held that though the defendant can take inconsistent or alternative pleas in the pleadings, he should not be permitted to amend the pleadings to "displace the plaintiff completely from the admissions" the defendant made in the written statement. If such amendments are allowed, according to *Ladha Ram*, the plaintiff will be irretrievably prejudiced "by being denied the opportunity of extracting the admission from the defendants."

19. But in *Panchdeo Narain Srivastava v. Jyoti Sahay*⁶, a two-Judge Bench of the Supreme Court seemed to have struck a different note. In that case, the respondent's counsel argued that "by the device of

5 [] I.L.R. [1900] Bom. 644

6 [] AIR 1983 SC 462

amendment a very important admission is being withdrawn." Then, with little elaboration, *Panchdeo Narain Srivastava* observes that "an admission made by a party maybe withdrawn or explained away. Therefore, it cannot be said that by amendment an admission of fact cannot be withdrawn."

20. That said, Section 58 of the Evidence Act mandates that no fact need to be proved in any proceeding if that fact is deemed to have been admitted by a party in his pleadings. Such course must be permissible "by any rule of admission." In other words, admission is the best of evidence. Of course, the court may still require the facts admitted to be proved otherwise than by such admission.

21. In *Nagindas Ramdas v. Dalpatram Iccharam alias Brijram*^[7], another three-Judge Bench of the Supreme Court has held that "admissions if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admission." *Nagindas Ramdas* goes on to observe that admissions in pleadings bind the party that makes them and constitute a waiver of proof: "They by themselves can be made the foundation of the rights of the parties." But *Nagindas Ramdas* puts the evidentiary admissions on a lower pedestal. They are by themselves not conclusive; they can be wrong.

22. In a suit for declaration of title, the defendant denied the

7 [7] AIR 1974 SC 471

plaintiffs title. Besides that, later through an amendment, he wanted to introduce an alternative plea: limitation. In that context, the Supreme court in *Baldev Singh v. Manohar Singh*^[8], has held that an amendment of a plaint and amendment of a written statement, as is well settled, are not necessarily governed by the same principle. According to it, the plaintiff cannot be allowed to amend his pleadings to alter materially or substitute his cause of action or the nature of his claim. But this proposition governing the plaintiff "has no counterpart in the law relating to amendment of the written statement."

23. *Baldev Singh* notes that "adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action." So with the amendment of a written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with the same rigour in the former than in the latter case. Here, in this case, an application by the plaintiff-petitioner stands on the same footing as a plaint does.

24. After examining all the above precedents, the Supreme Court in *Steel Authority of India Ltd. v. Union of India*^[9], has held that "by taking recourse to an amendment made in the pleading, the party cannot be permitted to go beyond his admission."

8 [] AIR 2006 SC 2832

9 [] (2006) 12 SCC 233

25. About the inadvertence, we may refer to another Supreme Court judgment. The primary aim of the court, according to the Supreme Court in *J. Samuel v. Gattu Mhesh*^[10], is to try the case on its merits and “ensure that the rule of justice prevails.” For this, the true facts of the case are to be placed before the court, so that the court may access all the relevant information before its deciding the case. And this, at times, requires the parties to amend their pleadings. The court's discretion to grant permission for a party to amend his pleadings lies on two conditions: first, no injustice must be done to the other side; second, the amendment must be necessary for determining the real question in controversy between the parties.

26. *J. Samuel* further observes that the proviso has been added to “balance the interests of the parties in pursuit of doing justice.” In this context, it has emphasised that, before allowing the amendment, the court ought to conclude that despite due diligence, the party could not have raised the matter before the commencement of the trial. Elaborating on “due diligence”, *J. Samuel* holds thus:

13. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term ‘Due diligence’ is specifically used in the Code so as to provide a test for determining whether to exercise the discretion

¹⁰[] (2012) 2 SCC 300

in situations of requested amendment after the commencement of trial.

14. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

27. In *J. Samuel*, the party seeking amendment pleaded that he wanted to correct a "typographical error." No other reason was supplied. So the Supreme Court has observed in that case "there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error."

28. Under these circumstances, I find that the order impugned is consequently erroneous and affects substantial merits of the parties. I, therefore, allow this Writ Petition and set aside the impugned order dated 3.5.2019.

Petition stands disposed of as held above.

DAMA SESHADRI NAIDU, J.