

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SANJAY DWIVEDI
ON THE 27TH OF JULY, 2023
WRIT PETITION No.13985 of 2021**

BETWEEN:-

**DEVENDRA SADHO S/O LATE SHRI SITARAM SADHO,
AGED ABOUT ADULT, R/O MIG -12, MLA QUARTER,
JAWAHAR CHOWK, BHOPAL (MADHYA PRADESH)**

.....PETITIONER

(BY SHRI PUSHPENDRA YADAV - ADVOCATE)

AND

- 1. SMT. PRAMILA KUMAR W/O LATE SHRI SATYENDRA KUMAR, AGED ABOUT 56 YEARS, R/O H. NO.E-139/1, PROFESSOR COLONY, BHOPAL (MADHYA PRADESH)**
- 2. BHARTI PAHARE W/O SHRI HEMANT PAHARE, AGED ABOUT-ADULT, R/O EO- 50, IRRIGATION COLONY, SHANTI NAGAR, RAIPUR (CHHATTISGARH)**
- 3. BHAWANA SADHO D/O LATE SHRI SITARAM SADHO, AGED ABOUT- ADULT, ADDITIONAL SESSION JUDGE, R/INFRONT OF CIRCUIT HOUSE, SARDARPUR, DISTRICT DHAR (MADHYA PRADESH)**
- 4. DR. VIJAYLAXMI SADHO D/O LATE SHRI SITARAM SADHO, AGED ABOUT- ADULT, R/O 96-97, SOUTH AVENUE, NEW DELHI (DELHI)**

.....RESPONDENTS

***(BY SHRI AJAY MISHRA- SENIOR ADVOCATE WITH MS. NIKITA KAURAV –
ADVOCATE)***

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This petition having been heard and reserved for orders, coming on for pronouncement this day, the Court pronounced the following:

ORDER

By the instant petition filed under Article 226 of the Constitution of India, the petitioner is challenging the validity of the order passed by the trial Court dated 10.03.2021 (Annexure-P/1) allowing the application filed by the plaintiff/respondent No.1 under Order 6 Rule 17 of the Code of Civil Procedure, 1908 in a pending suit.

2. Shri Pushpendra Yadav, learned counsel appearing for the petitioner has submitted that the application filed by the plaintiff/respondent No.1 under Order 6 Rule 17 of CPC seeking amendment in the plaint ought to have been rejected by the trial Court for the reason that the suit had been filed for declaration and permanent injunction not claiming any possession, but by way of amendment the plaintiff/respondent No.1 has claimed relief of possession also and the said relief was apparently time barred, therefore, the same cannot be claimed by the plaintiff/respondent No.1 by way of amendment. He has also submitted that the amendment made in the plaint changed the nature of suit. He has further submitted that the issue has already framed and affidavit under Order 18 Rule 4 of CPC has also submitted by the plaintiff/respondent No.1 and when the application for dismissal of suit was filed raising a ground that the suit for declaration is not maintainable as the consequential relief of possession has not been claimed then only the plaintiff/respondent No.1 has moved an application for amendment for filling-up the lacuna, especially under the circumstances when trial has already commenced and plaintiff/respondent No.1 in her application did not disclose due diligence for not filing the amendment in time and as such, as per the proviso

appended with the respective provision i.e. Order 6 Rule 17 of CPC, the application cannot be allowed and as such, the petitioner has challenged the order passed by the trial Court dated 10.03.2021 (Annexure-P/1) allowing the application of the plaintiff/respondent No.1 for amendment.

3. Shri Yadav in support of his submission has placed reliance upon the judgment of Supreme Court reported in **(2008) 14 SCC 364 (Rajkumar Gurawara (Dead) through LRS. v. S.K. Sarwagi and Company Private Limited and Another)** and also the orders passed by this Court in case of **Smt. Preeti Agrawal Vs. Kamta Prasad Patel and others** (M.P. No.4693 of 2022) and **Vikas Pandey and Others Vs. Sureshchandra Shrivastava** (M.A.No.810 of 2012).

4. *Per contra*, Shri Ajay Mishra, learned senior counsel appearing for the plaintiff/respondent No.1 has submitted that the petition deserves to be dismissed on the ground of maintainability because it is filed under Article 226 of the Constitution whereas it should have been filed under Article 227 of the Constitution, but intentionally it is filed under Article 226 because under Article 227 the scope of interference by the High Court is very limited and, therefore, according to him, the petition can be dismissed only on this count alone. He has submitted that the amendment sought for is on the basis of existing pleadings, but relief according to the pleadings under misconception could not be claimed, therefore, the same can be claimed and application has rightly been allowed and amendment does not change the nature of suit because it is nothing but a consequential relief claimed by the plaintiff/respondent No.1 on the basis of existing pleadings. He has also submitted that the relief of possession claimed by the plaintiff/respondent No.1 though by way of amendment, but according to him, that is not barred by time. He has further submitted that even otherwise the Court can frame the issue of

limitation and that will be decided after recording of evidence, but at this stage seeking amendment only on the basis of limitation, application cannot be rejected. Shri Mishra has further submitted that the basic object of making amendment is to avoid multiplicity of litigation and the Court has to see whether the amendment which is sought for, if required for proper adjudication, the same can be allowed even after commencement of trial. He has further submitted that there is no specific bar that once trial is commenced the application for amendment cannot be filed. He has submitted that the impugned order is absolutely perfect and does not call for any interference. In support of his submission, he has relied upon the judgments of the Supreme Court reported in **AIR 2007 SC 2511 (Andhra Bank v. ABN Amro Bank N.V. and Ors)**, **AIR 2001 SC 699 (Ragu Thilak D. John v. S. Rayappan and Others)** and **AIR 2008 SC 2887 (M.C. Agrawal HUF v. M/s. Sahara India and Ors)**.

5. Considering the submissions made by the counsel for the parties and perusal of record, it reveals that initially the suit was filed for declaration and permanent injunction. The plaintiff and defendant are real brother and sister. The suit property is a house and agricultural land which was described in paragraph-3 of the plaint. The plaintiff in the plaint has claimed her share in the property and also claimed that no partition took place, but relief of partition and possession was not claimed by her and, therefore, she moved an application for amendment.

6. From perusal of plaint, it is clear that there were specific averments made in the plaint by the plaintiff/respondent No.1 that she is also having share over the property and also mentioned that no partition got done because the demand was made by the plaintiff to the defendant to get the settlement done and the suit property be partitioned according to the share of the parties, but the defendant denied to do so.

7. In my opinion, under such circumstances when specific pleadings are there in the plaint, the relief of partition and possession not claimed, can be claimed by the plaintiff/respondent No.1 by making amendment in the prayer clause and allowing the amendment does not change the nature of suit because the existing facts have not been disturbed and no new fact was inserted. The relief of possession is a consequential relief and as per the existing pleadings, the same should have been claimed, but not claimed under some misconception and if suit is allowed and decreed in favour of the plaintiff and possession is not claimed, the plaintiff would be required to file another suit claiming possession and as such, the basic object of amendment to avoid multiplicity of suit would have been defeated if application would have been rejected.

8. The proviso appended with the respective provision provides that the application for amendment shall not be allowed after commencement of trial unless the Court is satisfied that instead of due diligence party could not have raised the matter before commencement of trial, but in number of cases it is observed and held even by the Supreme Court that said proviso is not conclusive, mandatory and puts specific bar for allowing the application after commencement of trial whereas the Court has observed that it is directory and if the Court is satisfied that the amendment is necessary for proper adjudication of the case and also to resolve the dispute between the parties, the same can be allowed.

9. Although, the counsel for the petitioner has placed reliance upon the order passed by this Court in case of **Smt. Preeti Agrawal (supra)**, but the facts and situation of that case are altogether different than that of the present case because in the said case the examination of witness was over and application for amendment was brought because certain important questions were not asked as they were not part of the pleadings

and no question even in cross-examination of the plaintiff was asked by the defendant though the said fact was very much in his knowledge. The application was accordingly rejected by the Court on the ground that the facts which were being brought by way of amendment are not necessary for proper adjudication of the case, but situation in this case is not like that and, therefore, the said case has no application. The another case in which the petitioner has placed reliance is **Vikas Pandey (supra)**, in which, the Court has described the importance of term 'due diligence'. In the said case, the amendment was sought at the appellate stage. However, the facts of said case are also not applicable and similar to the present case for the reason that after explaining 'due diligence' a stand was taken that proper advise was not given by the counsel engaged and it was also stated that the said counsel was not competent. The Court finally came to the conclusion that the said stand taken by the parties showing due diligence cannot be considered to be a proper stand and it does not overcome the rider as placed by the law-makers in the proviso attached with the respective provision, but here in this case, the pleadings have not been sought to be amended and only on the basis of pleadings, the relief clause has been amended and as such, the question of due diligence does not arise. Even otherwise, the Supreme Court in number of cases has observed that if amendment is relevant and necessary for proper adjudication and also sought to avoid multiplicity of litigation, the same can be allowed.

10. In case of **Raghu Tilak (supra)**, the Supreme Court has held that the plea that relief sought through amendment is barred by limitation and if it was disputed then issue about limitation can be raised after allowing the amendment. Further, the Supreme Court has also considered the object for amendment and observed as under:-

4. In view of the subsequent developments, the appellant filed an application under Order 6, Rule 17, for the amendment of the

plaint for adding paras 8 (a) to 8(f) in his plaint. The trial Court rejected his prayer and the revision petition filed against that order was dismissed by the High Court vide order impugned in this appeal, mainly on the ground that the amendment, if allowed, would result in introducing a new case and cause of action. It was further held that as the appellant was seeking recovery of damages, the amendment could not be allowed as it would allegedly change the nature of the suit. It was also observed that the amendment sought was barred by limitation.

5. After referring to the judgments in Charan Das v. Amir Khan, AIR 1921 PC 50 L. J. Leach and Co. Ltd. v. Jardine Skinner and Company, 1957 SCR 438: (AIR 1957 SC 357), Smt. Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: (AIR 1974 SC 1126), M/s. Ganesh Trading Co. v. Moji Ram, (1978) 2 SCC 91: (AIR 1978 SC 84) and various other authorities, this Court in B. K. N. Pillai v. P. Pillai, (1999) 10 JT (SC) 61: (2000 AIR SCW 43: AIR 2000 SC 614) held:(Para 3):

"The purpose and object of Order 6, Rule 17, C. P. C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.

6. If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

11. The Supreme Court in case of **Andhra Bank (supra)** in respect of amendment has also observed as under:-

5. We have heard Mr. Rohit Kapadia, learned senior counsel appearing for the appellant and Mr. S. Ganesh, learned senior counsel for the respondent. We have perused the original written statement as well as the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement, we are of the view that the amendment sought to be introduced by the appellant must be allowed. From a perusal of the impugned order of the Special Court we find basically that two grounds have been taken by the Special Court for rejecting the prayer. for amendment of the written statement. The first ground is that considerable delay has been caused by the appellant in filing the application for amendment of the written statement. It is well settled that delay is no ground for refusal of prayer for amendment. Mr. Ganesh, appearing for ABN Amro Bank submits before us that by filing of such an application for amendment of the written statement which has been filed with long delay, the appellant sought to stall the hearing of the suit which has been fixed on 13th July, 2007. In response to this Mr. Kapadia, learned counsel for the appellant, submits that in the event the prayer for amendment is allowed by us his client undertakes to file the amended written statement by day after tomorrow, i.e., 12th July, 2007 before the Special Court. Since, we are of the view that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr. Kapadia, we do not think that delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. From a perusal of the amendment application we find that the appellant in their prayer for amendment has only taken an additional defence that in view of Section 230 of the Indian Contract Act, the suit itself is not maintainable. It is well settled, as noted herein earlier, that at the time of considering the prayer for amendment of the written statement it would not be open to the Court to go into the fact whether in fact the suit in view of Section 230 of the Indian Contract Act was or is not maintainable.

(emphasis supplied)

12. The Supreme Court in case of **M.C. Agrawal (supra)** has observed as under:-

4. Having heard the learned counsel for the parties and after going through the plaint as well as the application for amendment of the plaint and the objections filed by the respondent, we do not find any ground to refuse the prayer of the appellant to amend the plaint in the manner they have prayed for. While rejecting the application for amendment of the plaint, it was held by the High Court that the amendment was not necessary nor germane to the controversy between the parties for the reason that claim for mesne profits/damages had to be dehors the contract between the parties. It was further observed that measure of mesne profits/damages would be the rental fetched by similar situated properties in the vicinity over the period mesne profits was being claimed. Upon, these observations, the prayer for amendment of the plaint was rejected. In our view, the amendment of the plaint sought for by the plaintiff/appellant was necessary in deciding the real controversy between the parties. It is always open by way of an amendment to amalgamate the two reliefs in one suit. That apart, at the time of allowing or refusing to amend the plaint, it is not open for the Court to decide the merits of the suit which can only be gone into and decided by it at the time of decision of the suit. The plaintiff/appellant is entitled to plead and prove the amount of rent and the equivalent amount of benefit received out of the letting out of the property to show the contractual rent of use and occupation charges. On the basis of the lease agreement, it is clear that the mesne profit/ damages cannot be awarded less than the contractual rate of use and occupation charges. Therefore, in the event of allowing the amendment of the plaint in the aforesaid circumstances, the nature of the suit shall not be changed. Therefore, in our view, there was no reason as to why the prayer for amendment of the plaint should not be allowed. In our view also, the prayer for amendment of the plaint was necessary in order to adjudicate the real controversies between.. "the parties, i.e. with respect to the quantum of the mesne profits/damages.

(emphasis supplied)

13. Thus, taking note of the views of the Supreme Court in different cases quoted hereinabove, I am of the opinion that the order passed by the trial Court does not suffer from any patent irregularity and illegality. The amendment application has rightly been allowed because the said amendment according to me avoids multiplicity of litigation and was necessary for proper adjudication of the dispute pending between the parties.

14. I do not find any substance in the submission made by the counsel for the petitioner and the grounds raised in the petition have also no force. The order dated 10.03.2021 (Annexure-P/1), therefore, does not call for any interference. The petition being *sans* merit, is hereby **dismissed.**

**(SANJAY DWIVEDI)
JUDGE**

ac/-