BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL, WESTERN ZONE BENCH

AT PUNE

Appeal-63/2016

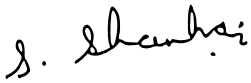
Shree Par Fragrance .... Appellant

Versus

Goa Coastal Zone Management Authority & Ors ...Respondents

INDEX

COMPILATION OF CASE LAWS ON BEHALF OF THE APPELLANT



GAURISH AGNI & SHIVSHANKAR SWAMINATHAN

ADVOCATES FOR THE APPELLANT

the same being ex hypothesi in existence at the time of the issuance of the detention order and framing of the grounds, should not be supplied to the detenu along with the grounds. Non-supply of such material and documents along with the grounds would clearly amount to a violation of the safeguard guaranteed under Article 22(5) of the Constitution. Since in the instant case that safeguard afforded to the detenu has been violated, further detention of the detenu would be illegal and void.

7. In the circumstances the writ petition succeeds and the detenu is directed to be released forthwith.

(1982) 3 Supreme Court Cases 408

(BEFORE D.A. DESAI AND R.B. MISRA, JJ.)

HARCHARAN .. Appellant ;

Versus

STATE OF HARYANA .. Respondent.

Civil Appeal No. 3620 of 1982† [arising out of S.L.P. (Civil) No. 110 of 1980], decided on November 16, 1982

Civil Procedure Code, 1908 — Order 6, Rule 17 ; Order 41, Rule 3 and Section 151 — Amendment of pleadings relating to the main controversy should not be refused on mere technical grounds — Appeal against award of compensation for acquisition of land — Ascertainment of market value main question in issue — Application filed before High Court seeking amendment of memorandum of appeal on the question of nature and potentiality of the land and referring to relevant decisions of the High Court in snpport — Held, cannot be dismissed in limine solely on ground of delay in filing the application — Land Acquisition Act, 1894 (1 of 1894), Section 23

The appellant's land was acquired under the Land Acquisition Act and he was awarded compensation therefor on the footing that the land was agricultural land. During pendency of appeal before the High Court against the award, the appellant moved an application under Order 6, Rule 17 read with Order 41, Rule 3 and Section 151, CPC for amendment of the memorandum of appeal seeking higher compensation on the basis that the land had the potentiality of a building site. In the application the appellant referred to illustrative decisions of the High Court awarding higher rate of compensation in cases of comparable lands having potentiality of building sites. The High Court, however, dismissed the application in limine observing that there was "no reason for the amendment, particularly after a lapse of six years" of the filing of the appeal. Allowing the present appeal by special leave the Supreme Court

Held :

When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit. The appellant is confined to and also would be held to the memorandum of appeal. To overcome any contention that

†Appeal by special leave from the Judgment and Order dated May 4, 1979 of the Punjab & Haryana High Court in R.F.A. No. 667 of 1973

such is not the pleading the appellant seeks the amendment. The amendment may be allowed at any stage of the proceedings for the purpose of determining the real questions in controversy between the parties.

(Paras 4 and 5)

The principal and primary question while ascertaining compensation for land acquired under the Act is the market value of the land on the date of the notification under Section 4. The determination of this question depends upon the nature and potentiality of the land. The best evidence with regard to evaluation of prices of land is the award of the court, subject to the comparison of the land areawise, topographywise and usewise. In the present case the appellant sought amendment on the point of nature and potentiality of the land relying upon the decisions of the High Court itself which provided a comparable yardstick for effectively disposing of the real controversy before it, viz. the market value of the land. The amendment was sought before the High Court proceeded to dispose of the appeal. The foundation for the amendment was not shaken by the High Court. Therefore, the High Court was not justified in denying an opportunity to agitate what was the market value of the land and what would be justly due to him merely on the ground of delay in moving the application for amendment of pleadings.

(Paras 5 and 7)

Ganesh Trading Co. v. Moji Ram, (1978) 2 SCC 91 : (1978) 2 SCR 614 : AIR 1978 SC 484, followed

R-M/5993/CS

Advocates who appeared in this case :

K.B. Rohtagi, Advocate, for the Appellant ;
R.N. Poddar, Advocate, for the Respondent.

ORDER

1. Special leave granted.

2. By a notification dated June 29, 1966, under Section 4 of the Land Acquisition Act ('Act' for short), respondent State of Haryana acquired land admeasuring 495 bighas 9 biswas and 12 biswansis pukhta situate in village Faridabad, for the planned development of Sector 14 of Faridabad Complex. A declaration under Section 6 of the Act followed. Thereafter the Land Acquisition Collector proceeded to determine the compensation on the footing that the land was agricultural land. The measure of compensation determined by him was as under : (i) cultivated land at the rate of Rs 190 per biswa pukhta ; (ii) banjar jadid and banjar qadim at the rate of Rs 152 per biswa pukhta ; and (iii) Ghair mumkin land at the rate of Rs 100 per biswa pukhta. Various claimants who were covered by the award sought reference under Section 18 of the Act. The learned District Judge enhanced the compensation in respect of some plantation land but otherwise affirmed the award of the Land Acquisition Collector. The present appellant filed R.F.A. No. 667 of 1973 in the High Court of Punjab & Haryana at Chandigarh. The High Court proceeded to ascertain and evaluate the market price of the land acquired as on the date of notification under Section 4 of the Act. During the pendency of the appeal the appellant moved an

application under Order 6, Rule 17 read with Order 41, Rule 3 and Section 151 of the Code of Civil Procedure for amendment of the memorandum of appeal seeking higher compensation on the allegation that the acquired land had the potentiality of a building site. The High Court rejected the application by a cryptic order which reads as under :

> We see no reason for the amendment, particularly after a lapse of six years of the filing of R.F.A. dismissed.

Hence this appeal by special leave.

3. In the application seeking leave to amend the memorandum of appeal the appellant urged that in Regular First Appeal No. 416 of 1974 decided on April 4, 1979, the High Court held that all lands in Ballabhgarh-Faridabad Controlled Area between Delhi-Mathura Road and Agra Canal except a strip up to 500 feet along the Mathura Road had the same potentiality and awarded compensation for the land acquired for the development of Sector 16 of Faridabad Complex at the rate of Rs 10 per square yard. It was further alleged that in Regular First Appeal No. 381 of 1977 and Regular First Appeal No. 563 of 1977, while evaluating the market value of the land for development of Sector 17 of Faridabad Complex, the High Court was pleased to award compensation at the rate of Rs 10 per square yard on the footing that the land had the potentiality of building site. It was also alleged that for the land acquired for development of Sector 13 of Faridabad Complex situated in Ballabhgarh-Faridabad Controlled Area compensation was awarded by the High Court at the rate of Rs 10 per square yard on the footing that the land had the potentiality of building site. After reciting the aforementioned averments, the appellant had stated that the land involved in dispute and acquired for development of Sector 14 is situated in the Ballabhgarh-Faridabad Controlled Area and must be held to have the same potentiality and, therefore, the compensation ought to be awarded on the footing that it has the potentiality of a building site. The appellant accordingly sought amendment of the memorandum of appeal for change of ascertainment of compensation. It is this application which was dismissed by the High Court in limine principally on the ground as transpires from the order extracted above that the application was moved nearly six years after the appeal was filed.

4. It is a well settled principle that the best evidence with regard to evaluation of price of land in a proceeding for ascertainment of compensation for land acquired under the Act is the award of the court, subject of course, to the comparison of the land areawise, topographywise and usewise. The appellant sought amendment relying on this principle. The question is whether the High Court was justified in dismissing this petition in limine. Order 6, Rule 17 in terms provides that 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 necessary for the purpose of determining the real questions in controversy between the parties.

5. Appellant contends that his land is acquired ; that it has the potentiality of a building site which can be used for industrial or commercial purposes ; and that Faridabad-Ballabhgarh Complex is primarily an industrial complex and, therefore, he must be awarded compensation on the footing that the land has the potentiality of a building site and not as has been done by the Land Acquisition Collector and the District Judge on the footing that it is agricultural land. Now, the principal and primary question while ascertaining compensation for land acquired under the Act is the market value of the land on the date of the notification under Section 4. The determination of this question depends upon the nature and potentiality of the land. It is the real question in controversy between the parties. To effectively and finally adjudicate this controversy necessary pleadings ought to be available. To highlight this real controversy it may become necessary to amend the pleadings. When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit because plaintiff is held to the case pleaded in the plaint. In the case of memorandum of appeal same situation obtains in view of Order 41, Rule 3. The appellant is confined to and also would be held to the memorandum of appeal. To overcome any contention that such is not the pleading the appellant sought the amendment. It was declined on the sole ground that it was delayed by six years because the High Court does not refer to any other ground for rejecting this application. The High Court has not held the averments in the application about the various decisions rendered by the same High Court as being untrue or otherwise. Therefore, the foundation for the amendment is neither shaken nor knocked out. We are, therefore, left to the only question whether the appellant should be denied an opportunity to agitate what is the market value of the land and what would be justly due to him on the ground of delay in moving the application for amendment of pleadings. We need not dilate on this question in view of the decision of this Court in *Ganesh Trading Co.* v. *Moji Ram*[1], wherein it has been observed as under : (SCC p. 93, para 2)

> Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.

6. In that case an application for amendment of the plaint with a view to altering the cause of action itself and to introduce indirectly through an amendment of his pleadings an entirely new or inconsistent cause of action, amounting virtually to the substitution of a

1. (1978) 2 SCR 614 : (1978) 2 SCC 91 : AIR 1978 SC 484

new plaint or a new cause of action in place of what was originally there, was rejected by the High Court and the plaintiff's revision petition to the High Court did not meet with success. This Court granted the application for amendment simultaneously observing that even though this Court would not ordinarily interfere with interlocutory orders, the Court felt compelled in order to promote uniform standards and views on questions basic for a sound administration of justice and in order to prevent very obvious failures of justice, to interfere even in such a matter in a very exceptional case such as the one that was before the Court.

7. The position before us is far better than the situation was before the Court in the aforementioned case. The appellant sought amendment relying upon the decisions of the High Court itself and the decisions provided a comparable yardstick for effectively disposing of the real controversy before the High Court and the amendment was sought before the High Court proceeded to dispose of the appeal.

8. Accordingly, interest of justice demands that we allow the appeal, set aside the order of the High Court rejecting the application and grant the amendment application and remit the matter to the High Court. The High Court will permit the respondent to raise any contention permissible in law and dispose of the appeal on merits. In the circumstances of the case there will be no order as to costs.

(1982) 3 Supreme Court Cases 412

(BEFORE P.N. BHAGWATI, R.S. PATHAK AND AMARENDRA NATH SEN, JJ.)

Civil Appeal No. 1349 of 1982†

M.M. GUPTA AND OTHERS .. Appellants ;

Versus

STATE OF JAMMU & KASHMIR AND OTHERS .. Respondents.

Civil Appeal No. 1997 of 1982‡

STATE OF JAMMU & KASHMIR THROUGH THE CHIEF SECRETARY OF J & K, JAMMU .. Appellant ;

Versus

M.M. GUPTA AND OTHERS .. Respondents.

†From the Judgment and Order dated March 8, 1982 of the Jammu & Kashmir High Court in W.P, No. 668 of 1982

‡Appeal by special leave from the Judgment and Order dated March 8, 1982 of the Jammu & Kashmir High Court in W.P. No. 668 of 1982

of this Court may have far-reaching persuasive effect on the court which may ultimately try the accused. It is always open to the petitioners to approach the investigative agencies directly with the incriminating materials and it is for the investigative agencies to decide on the further course of action. While we can appreciate the general claim that the efforts to uncover the alleged acts of corruption may be obstructed by entrenched interests, in this particular case the petitioners would be well advised to rely on the statutory remedies. It is only on the exhaustion of ordinary remedies that perhaps a proceeding can be brought before a writ court and in any case the High Court of Sikkim would be a far more appropriate forum for examining the allegations made in the present petition.

19. Hence, the writ petition is dismissed, however, with no order as to costs.

(2010) 4 Supreme Court Cases 518

(BEFORE R.V. RAVEENDRAN AND R.M. LODHA, JJ.)

STATE OF MAHARASHTRA .. Appellant;

Versus

HINDUSTAN CONSTRUCTION COMPANY LIMITED .. Respondent.

Civil Appeal No. 2928 of 2010†, decided on April 1, 2010

A. **Arbitration and Conciliation Act, 1996 — Ss. 37, 34(3) & (2)(b), 28, 33 and 16 — Amendment for incorporation of additional grounds in application under S. 34 or memo of appeal under S. 37 — Application for such amendment filed after expiry of limitation under S. 34(3), if and when can be allowed — Bar under S. 34(3), held, not invariably applicable to such applications — Although the same would be a factor for consideration in exercise of court's discretion to grant leave to amend but it does not denude the court of its power to grant leave if amendment is required in the interest of justice**

— Application seeking to add absolutely new grounds in memo of appeal for which no foundation had been laid in application for setting aside award, held, rightly rejected by appellate court — More so when amendment of application under S. 34 had not been sought either before court of first instance or before appellate court and only the memo of appeal was sought to be amended — Civil Procedure Code, 1908 — Or. 6 R. 17 — Amendment beyond limitation — Words and Phrases — "The court finds that"

The respondent Company and the appellant State entered into a contract for some construction work. After completion of the work, disputes arose between them in relation to payment/rates of payment under five different heads. Those disputes were referred to Arbitral Tribunal. The Arbitral Tribunal passed an award for a certain amount in favour of the respondent.

† Arising out of SLP (C) No. 3937 of 2009. From the Judgment and Order dated 9-1-2009 of the High Court of Judicature at Bombay in Civil Application No. 21 of 2008 in Arbitration Appeal No. 6 of 2007 in Arbitration Application No. 44 of 2003

The appellant State made an application for setting aside the award. It also relied upon Sections 28, 33 and 16 of the Arbitration and Conciliation Act, 1996 (the 1996 Act) to assail the award and set up the grounds of waiver, acquiescence, delay, laches and res judicata. The court at first instance rejected the said application.

The appellant then preferred an appeal under Section 37 of the 1996 Act before the High Court. About one year and four-and-a-half months thereafter (which was about five years from the date of the award), the appellant made an application before the High Court seeking amendment to the memorandum of arbitration appeal by adding additional grounds that the Arbitral Tribunal had exceeded its jurisdiction in granting Claims 1 and 3; that it had acted beyond the scope of arbitration with regard to Claim 2; and that it had misconducted itself in granting the other two claims. Dismissing the said application, the High Court held that grounds not initially raised in the petition for setting aside the arbitral award could not be permitted to be raised beyond the period of limitation prescribed in Section 34(3). It further observed that the proposed amendments were not even sought to the grounds contained in the application under Section 34. The State then filed the present appeal by special leave.

The question before the Supreme Court was whether in an appeal under Section 37 of the 1996 Act from an order refusing to set aside the award, an amendment in the memorandum of appeal to raise additional/new grounds could be permitted.

The appellant State contended that there was no nexus between pleadings and limitation and it was the relief that determined the limitation. That the grounds/objections in the petition under Section 34 of the 1996 Act were in the nature of pleadings. That therefore, in the interest of justice, addition of grounds in the memorandum of arbitration appeal ought to have been allowed.

Supporting the impugned order of the High Court, the respondent contended that the time-limit prescribed under Section 34 to challenge an award was absolute and unextendable by the court. That more than five years after the award, the appellant was not entitled to seek amendment in the memorandum of arbitration appeal by adding new grounds which had not been raised in the application for setting aside the award.

Dismissing the appeal, the Supreme Court

Held :

The application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under Section 34(3). If incorporation of additional grounds by way of amendment in the application under Section 34 is treated to be tantamount to filing a fresh application in all situations and circumstances, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. That is not and could not have been the intention of the legislature while enacting Section 34. (Para 29)

Madan Lal v. *Sunder Lal*, AIR 1967 SC 1233; *Union of India* v. *Popular Construction Co.*, (2001) 8 SCC 470; *Consolidated Engg. Enterprises* v. *Irrigation Deptt.*, (2008) 7 SCC 169, *considered*

Hukumdev Narain Yadav v. *Lalit Narain Mishra*, (1974) 2 SCC 133, *cited*

Moreover, the words in Section 34(2)(*b*) "the court finds that" do enable the court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice. (Para 30)

Case law enshrines clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment of the grounds in appeal under Section 37 of the 1996 Act. (Para 31)

L.J. Leach & Co. Ltd. v. *Jardine Skinner & Co.*, AIR 1957 SC 357 : 1957 SCR 438; *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*, AIR 1957 SC 363 : 1957 SCR 595, *explained* and *followed*

Vastu Invest & Holdings (P) Ltd. v. *Gujarat Lease Financing Ltd.*, (2001) 2 Arb LR 315 (Bom), *clarified*

In *Bijendra Nath Srivastava case*, (1994) 6 SCC 117, the Supreme Court highlighted the distinction between "material facts" and "material particulars" and observed that the amendments sought therein related to material facts, which could not have been allowed after expiry of limitation. Therefore, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application. (Para 33)

Bijendra Nath Srivastava v. *Mayank Srivastava*, (1994) 6 SCC 117, *clarified* and *followed*

Dhartipakar Madan Lal Agarwal v. *Rajiv Gandhi*, 1987 Supp SCC 93, *limited*

In the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment were absolutely new grounds for which there was no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly those grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage. The amendment was rather sought to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by the High Court in refusing to grant leave to the appellant to amend the memorandum of arbitration appeal suffers from any illegality. (Paras 36 and 37)

B. **Civil Procedure Code, 1908 — Or. 6 Rr. 17 & 18 and Or. 41 Rr. 2 & 3 — Amendment of pleadings in suit and memorandum of appeal — When to be allowed and when not — Legal position summarised — Held, appellate court has power to grant leave to amend memo of appeal (Paras 16 to 24)**

Ganesh Trading Co. v. *Moji Ram*, (1978) 2 SCC 91; *Clarapede & Co.* v. *Commercial Union Assn.*, (1883) 32 WR 262 (CA); *Charan Das* v. *Amir Khan*, (1919-20) 47 IA 255; *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, (1969) 1 SCC 869; *Harcharan* v. *State of Haryana*, (1982) 3 SCC 408, *considered*

L.J. Leach & Co. Ltd. v. *Jardine Skinner & Co.*, AIR 1957 SC 357 : 1957 SCR 438; *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*, AIR 1957 SC 363 : 1957 SCR 595, *cited*

C. **Civil Procedure Code, 1908 — Or. 6 Rr. 1, 2, 4 & 17 and Or. 41 R. 2 — Pleadings and particulars — Object of, held, is to enable the court to decide true rights of parties (Para 16)**

Ganesh Trading Co. v. *Moji Ram*, (1978) 2 SCC 91, *relied on*

H-D/A/45876/CV

Advocates who appeared in this case :

Shekhar Naphade, Senior Advocate (Sanjay V. Kharde, Chinmoy A. Khaladkar, Ms Asha Gopalan Nair and Ms Shubhangi Tuli, Advocates) for the Appellant;

Ashok H. Desai, Senior Advocate [Bhavesh V. Panjwani, Sameer Parekh, D.P. Mohanty, Ms Ranjeeta Rohatgi and Rajat Nair (for M/s Parekh & Co.), Advocates] for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2008) 7 SCC 169, *Consolidated Engg. Enterprises* v. *Irrigation Deptt.* 524*c*, 529*f*
2. (2001) 8 SCC 470, *Union of India* v. *Popular Construction Co.* 524*c*, 528*g-h*
3. (2001) 2 Arb LR 315 (Bom), *Vastu Invest & Holdings (P) Ltd.* v. *Gujarat Lease Financing Ltd.* 524*a*, 524*c-d*, 530*f-g*
4. (1994) 6 SCC 117, *Bijendra Nath Srivastava* v. *Mayank Srivastava* 524*d-e*, 530*h*
5. 1987 Supp SCC 93, *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi* 524*d-e*, 531*b-c*, 531*c*
6. (1982) 3 SCC 408, *Harcharan* v. *State of Haryana* 527*f-g*
7. (1978) 2 SCC 91, *Ganesh Trading Co.* v. *Moji Ram* 524*f-g*
8. (1974) 2 SCC 133, *Hukumdev Narain Yadav* v. *Lalit Narain Mishra* 529*c-d*
9. (1969) 1 SCC 869, *Jai Jai Ram Manohar Lal* v. *National Building Material Supply* 523*f*, 527*a*, 527*c-d*
10. AIR 1967 SC 1233, *Madan Lal* v. *Sunder Lal* 524*d-e*, 528*a-b*
11. AIR 1957 SC 363 : 1957 SCR 595, *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil* 523*e-f*, 525*g*, 525*g-h*, 530*d-e*
12. AIR 1957 SC 357 : 1957 SCR 438, *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.* 523*e-f*, 525*e*, 525*f*, 525*g-h*, 526*a*, 530*d-e*
13. (1919-20) 47 IA 255, *Charan Das* v. *Amir Khan* 525*d*, 525*f*, 525*g-h*, 526*d*, 526*e*
14. (1883) 32 WR 262 (CA), *Clarapede & Co.* v. *Commercial Union Assn.* 525*c*

The Judgment of the Court was delivered by

R.M. LODHA, J.— Leave granted. The question presented in this appeal by special leave is: whether in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") from an order refusing to set aside the award, an amendment in the memorandum of appeal to raise additional/new grounds can be permitted.

2. M/s Hindustan Construction Company Limited (respondent) and the State of Maharashtra (Irrigation Department, the Executive Engineer— appellant) entered into a contract on 14-3-1992 being ICB Contract No. II/1992 for the construction of civil work of pressure shafts and powerhouse complex at Koyna Hydroelectric Project, Stage IV. The contract work was completed by the respondent within the extended period i.e. by 31-3-2000.

3. However, it appears that disputes arose between the parties in respect of the work carried out by the respondent in relation to

(*a*) revision of percentages for hidden expenses, over breaks and profit for further additional cases of extract items/rate revision;

(*b*) claim for extended stay at site;

(*c*) revision of rate for pressure shaft excavation;

(*d*) fixation of new rate on account of variation in the item of transformer hall arch concrete; and

(*e*) fixation of new rate on account of variation in the item of transformer hall excavation.

These disputes were referred to the Arbitral Tribunal.

4. The Arbitral Tribunal made an award on 26-6-2003 and a signed copy thereof was forwarded to the appellant along with the letter dated 30-6-2003. By the said award the Arbitral Tribunal awarded an amount of Rs 17,81,25,152 to the respondent and further directed that if the said amount was not paid by the appellant within two months from the date of the award, then the awarded sum shall carry an interest at the rate of 15% per annum from 27-6-2003.

5. Not satisfied with the award dated 26-6-2003, the appellant made an application on 22-8-2003 for setting aside the award. The appellant also relied upon Sections 28, 33 and 16 of the 1996 Act in assailing the award being in contravention of the provisions of the 1996 Act and set up the grounds viz.

(*i*) waiver (final bill was accepted by the respondent without protest and the claims are not arbitrable);

(*ii*) acquiescence (contract ceased to exist after accepting final payment which was made on 30-3-2001 after completion of maintenance period);

(*iii*) delay (claims are time-barred under the provisions of the Limitation Act);

(*iv*) laches (the respondent's arbitrator was not appointed before expiry of 30 days from the defect liability and, therefore, the claimant was not entitled to bring Claims 3, 4 and 5 to arbitration); and

(*v*) res judicata (Claim 1 was referred to the earlier arbitration panel in the year 1998 and hence the said claim is barred by the principle of res judicata).

6. The District Judge, Ratnagiri vide order dated 29-6-2006 rejected the application for setting aside the award dated 26-6-2003. The appellant aggrieved thereby preferred an appeal under Section 37 of the 1996 Act on 6-2-2007 before the High Court of Judicature at Bombay.

7. On 23-6-2008, the appellant made an application before the High Court seeking amendment to the memorandum of arbitration appeal by adding additional grounds, namely, that the Arbitral Tribunal exceeded jurisdiction in awarding revision of percentage for hidden expenses

overheads and profits for further additional items (Claim 1); that the Arbitral Tribunal acted beyond the scope of arbitration with regard to extended stay charges (Claim 2); the Arbitral Tribunal exceeded jurisdiction and in fact, committed error of jurisdiction in granting the claim pertaining to revision of rate for pressure shaft excavation and misconducted itself in awarding escalation considering March 2000 Indices.

8. The aforesaid application was opposed by the respondent on diverse grounds, inter alia, that the additional grounds sought to be incorporated in the memorandum of arbitration appeal cannot be allowed at this stage after the expiry of period prescribed in Section 34(3) as that would tantamount to entertaining a challenge after and beyond the period of limitation and that the award has not been challenged by the appellant on any of the grounds sought to be urged/added through the amendment application.

9. On 9-1-2009, the learned Single Judge dismissed the application for amendment in the memorandum of arbitration appeal. The learned Single Judge held that the ground not initially raised in a petition for setting aside the arbitral award cannot be permitted to be raised beyond the period of limitation prescribed in Section 34(3). It was also observed that the proposed amendments in the memorandum of arbitration appeal are not even sought to the grounds contained in the application under Section 34.

10. Mr Shekhar Naphade, learned Senior Counsel for the appellant submitted that there is no nexus between pleadings and limitation and it is the relief that determines the limitation. The grounds/objections in the petition under Section 34 of the 1996 Act are in the nature of pleadings and any amendment thereto must be guided by the same principles which govern amendments to the pleadings. He heavily relied upon the decisions of this Court in *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*[1] and *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*[2] in support of his contention that delay does not affect the power of the court to order amendments if that is required in the interest of justice.

11. The learned Senior Counsel also placed reliance upon the decision of this Court in *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*[3] and submitted that the court always grants leave to amend the pleadings of a party, unless it is mala fide or that the other side cannot be compensated for by an order of costs.

12. Mr Shekhar Naphade submitted that although the Arbitral Tribunal is bound to decide in accordance with the terms of the contract, as mandated by Section 28 of the 1996 Act, in the present case the respondent got the relief from the Arbitral Tribunal beyond the terms of contract and, therefore, in the interest of justice, the amendments sought for by the appellant for addition of grounds in the memorandum of arbitration appeal ought to have been

1 AIR 1957 SC 357 : 1957 SCR 438
2 AIR 1957 SC 363 : 1957 SCR 595
3 (1969) 1 SCC 869

granted. He also contended that the decision of the Division Bench of the Bombay High Court in *Vastu Invest & Holdings (P) Ltd.* v. *Gujarat Lease Financing Ltd.*[4] does not lay down the correct law.

13. Mr Ashok Desai, learned Senior Counsel for the respondent, on the other hand, submitted that recourse to a court against an arbitral award could be made only by way of an application under Section 34 for setting aside such award and sub-section (3) thereof stipulates that such an application may not be made after three months have elapsed from the date on which the party making the application has received the arbitral award. Proviso to Section 34(3) empowers the court, if satisfied of sufficient cause, to entertain the application for setting aside the award within a further period of thirty days but not thereafter. He would submit that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendable by the court. He relied upon two decisions of this Court in this regard, namely, *Union of India* v. *Popular Construction Co.*[5] and *Consolidated Engg. Enterprises* v. *Irrigation Deptt.*[6]

14. Mr Ashok Desai, the learned Senior Counsel for the respondent submitted that the Bombay High Court in *Vastu Invest and Holdings (P) Ltd.*[4] has rightly held that new ground(s) cannot be permitted to be introduced into an arbitration petition for setting aside of the award beyond the period of four months stipulated in Section 34(3) of the 1996 Act. He also relied upon decisions of this Court in *Madan Lal* v. *Sunder Lal*[7]; *Bijendra Nath Srivastava* v. *Mayank Srivastava*[8] and *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi*[9].

15. Mr Ashok Desai submitted that more than five years after the award, the appellant was not entitled to seek amendment in the memorandum of arbitration appeal by adding new grounds which were not taken in the application for setting aside the award. He, thus, submitted that the High Court was not unjustified in rejecting the application for amendment in the memorandum of arbitration appeal.

16. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In *Ganesh Trading Co.* v. *Moji Ram*[10], this Court stated: (SCC p. 93, para 2)

> "2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so

4 (2001) 2 Arb LR 315 (Bom)
5 (2001) 8 SCC 470
6 (2008) 7 SCC 169
7 AIR 1967 SC 1233
8 (1994) 6 SCC 117
9 1987 Supp SCC 93
10 (1978) 2 SCC 91 : (1978) 2 SCR 614

that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."

17. Insofar as the Code of Civil Procedure, 1908 (for short "CPC") is concerned, Order 6 Rule 17 provides for amendment of pleadings. It says that 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.

18. The matters relating to amendment of pleadings have come up for consideration before the courts from time to time. As far back as in 1884 in *Clarapede & Co.* v. *Commercial Union Assn.*[11]—an appeal that came up before the Court of Appeal, Brett M.R. stated:

> "... The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made...."

19. In *Charan Das* v. *Amir Khan*[12] the Privy Council exposited the legal position that although power of a court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

20. A four-Judge Bench of this Court in *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*[1] while dealing with the prayer for amendment of the plaint made before this Court whereby the plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of the Privy Council in *Charan Das*[12] granted leave at that stage and held: (*L.J. Leach case*[1], AIR p. 362, para 16)

> "*16.* It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

21. Again, a three-Judge Bench of this Court in *Pirgonda Hongonda Patil*[2] in the matter of amendment of the plaint at the appellate stage reiterated the legal principles exposited in *L.J. Leach & Co. Ltd.*[1] and *Charan Das*[12]. This Court observed: (*Pirgonda Hingonda Patil case*[2], AIR p. 365, paras 8-9)

11 (1883) 32 WR 262 (CA)
12 (1919-20) 47 IA 255

"8. Recently, we have had occasion to consider a similar prayer for amendment in *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*[1], where, in allowing an amendment of the plaint in an appeal before us, we said: (AIR p. 362, para 16)

> '*16.* It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice.'

These observations were made in a case where damages were originally claimed on the footing of conversion of goods. We held, in agreement with the learned Judges of the High Court, that on the evidence the claim for damages on the footing of conversion must fail. The plaintiffs then applied to this Court for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. The application was resisted by the respondents and one of the grounds of resistance was that the period of limitation had expired. We accepted as correct the decision in *Charan Das* v. *Amir Khan*[12], which laid down that: (IA p. 255)

> though there was full power to make the amendment, such a power should not as a rule be exercised where the effect was to take away from a defendant a legal right which had accrued to him by lapse of time; yet there were cases where such considerations were outweighed by the special circumstances of the case.

9. As pointed out in *Charan Das case*[12] the power exercised was undoubtedly one within the discretion of the learned Judges. All that can be urged is that the discretion was exercised on a wrong principle. We do not think that it was so exercised in the present case. The facts of the present case are very similar to those of the case before Their Lordships of the Privy Council. In the latter, the respondents sued for a declaration of their right of pre-emption over certain land, a form of suit which would not lie having regard to the proviso to Section 42 of the Specific Relief Act (1 of 1877). The trial Judge and the first appellate court refused to allow the plaint to be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce the right. Upon a second appeal the court allowed the amendment to be made, there being no ground for suspecting that the plaintiffs had not acted in good faith, and the proposed amendment not altering the nature of the relief sought. In the case before us, there was a similar defect in the plaint, and the trial Judge refused to allow the plaint to be amended on the ground that the period of limitation for a suit under Order 21 Rule 103 of the Code of Civil Procedure, had expired. The learned Judges of the High Court rightly pointed out that the mistake in the trial court was more that of the learned pleader and the proposed amendment did not alter the nature of the reliefs sought."

22. In *Jai Jai Ram Manohar Lal*[3] this Court was concerned with a matter wherein amendment in the plaint was refused on the ground that the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. It was held: (SCC p. 871, para 5)

> "5. ... Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

This Court further stated: (*Jai Jai Ram Manohar Lal case*[3], SCC p. 873, para 7)

> "7. ... The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations."

23. Do the principles relating to amendment of pleadings in original proceedings apply to the amendment in the grounds of appeal? Order 41 Rule 2 CPC makes a provision that the appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the court. Order 41 Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal.

24. As a matter of fact, in *Harcharan* v. *State of Haryana*[13], this Court observed that the memorandum of appeal has the same position as the plaint in the suit. This Court said: (SCC p. 411, para 5)

> "5. ... When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit because plaintiff is held to the case pleaded in the plaint. In the case of memorandum of appeal same situation obtains in view of Order 41 Rule 3. The appellant is confined to and also would be held to the memorandum of appeal. To overcome any contention that such is not the pleading the appellant sought the amendment."

13 (1982) 3 SCC 408

25. In light of the aforesaid legal position governing the amendment of pleadings in the suit and memorandum of appeal, the immediate question to be considered is: whether the same principles must govern the amendment of an application for setting aside the award or for that matter, amendment in an appeal under Section 37 of the 1996 Act.

26. In *Madan Lal*[7], this Court with reference to the provisions of the Arbitration Act, 1940 (for short "the 1940 Act") stated that under the scheme of the 1940 Act there has to be an application to set aside the award; such application has to be made within the period of limitation and any objection to the award after the limitation has elapsed cannot be entertained. This Court observed: (AIR pp. 1235-36, paras 8-9)

> "*8.* It is clear, therefore, from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in Section 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Article 158 of the Limitation Act. If no such application is made the award cannot be set aside on any of the grounds specified in Section 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.
>
> *9.* It is not in dispute in the present case that the objections raised by the appellant were covered by Section 30 of the Act, and though the appellant did not pray for setting aside the award in his objection that was what he really wanted the court to do after hearing his objection. As in the present case the objection was filed more than 30 days after the notice it could not be treated as an application for setting the award, for it would then be barred by limitation. The position thus is that in the present case there was no application to set aside the award on grounds mentioned in Section 30 within the period of limitation and, therefore, the court could not set aside the award on those grounds. There can be no doubt on the scheme of the Act that any objection even in the nature of a written statement which falls under Section 30 cannot be considered by the court unless such an objection is made within the period of limitation (namely, 30 days), though if such an objection is made within limitation that objection may in appropriate cases be treated as an application for setting aside the award."

27. In *Popular Construction Co.*[5] this Court, while considering the question whether the provisions of Section 5 of the Limitation Act, 1963 are applicable to an application challenging an award under Section 34 of the 1996 Act, held: (SCC pp. 474-75, paras 12-15)

> "*12.* As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso

to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law:

> '*17.* ... [E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation.'*

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendable by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need 'to minimise the supervisory role of courts in the arbitral process'**. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

> '5. *Extent of judicial intervention.*—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'

15. The 'Part' referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act."

28. Again in *Consolidated Engg. Enterprises*[6] this Court observed: (SCC p. 180, para 19)

> "*19.* A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months

* **Ed.**: As observed in *Hukumdev Narain Yadav* v. *Lalit Narain Mishra*, (1974) 2 SCC 133, p. 146, para 17.

** **Ed.**: Part 4(*v*) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.

which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court."

29. There is no doubt that the application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) i.e. within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of the legislature while enacting Section 34.

30. More so, Section 34(2)(*b*) enables the court to set aside the arbitral award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in clause (*b*) "the court finds that" do enable the court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice.

31. *L.J. Leach & Co. Ltd.*[1] and *Pirgonda Hongonda Patil*[2], seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment of the grounds in appeal under Section 37 of the 1996 Act.

32. It is true that, the Division Bench of the Bombay High Court in *Vastu Invest & Holdings (P) Ltd.*[4] held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso to sub-section (3) of Section 34, but, in our view, by "an independent ground" the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein.

33. Insofar as *Bijendra Nath Srivastava*[8] is concerned, this Court did not agree with the view of the High Court that the trial court did not act on any

wrong principle while allowing the amendments to the objections for setting aside the award under the 1940 Act. This Court highlighted the distinction between "material facts" and "material particulars" and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.

34. In *Dhartipakar Madan Lal Agarwal*[9] this Court held that a new ground cannot be raised or inserted in an election petition by way of an amendment after the expiry of the period of limitation. It may not be proper to extend the principles enunciated in *Dhartipakar Madan Lal Agarwal*[9] in the context of the provisions contained in Section 81 of the Representation of the People Act, 1951 to an application seeking amendment to the application under Section 34 for setting aside an arbitral award or an appeal under Section 37 of the 1996 Act for the reasons we have already indicated above.

35. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal.

36. As noticed above, in the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage.

37. As a matter of fact, the learned Single Judge in para 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by the learned Single Judge in refusing to grant leave to the appellant to amend the memorandum of arbitration appeal suffers from any illegality.

38. The result is, the appeal has no force and is dismissed with no order as to costs.

4. The learned Single Judge while dealing with the matter had been pleased to record that the respondents herein had completed three years of service and the same had not been controverted by the appellant (State Government). In the wake of such factual situation, the learned Single Judge was pleased to direct regularisation which stands negatived by the appellate court. But the appellate court thought it fit to continue with the rest of the order which in effect transfers the respondents herein from temporary roll to monthwise permanent muster roll. There must be some cogent reasons as to why the State Government should prefer an appeal before this Court. The reasons seem to be rather imaginary by reason of the fact that no regularisation has been effected therein entitling the respondents to reap further benefits. It is the placement of the respondents herein by reason of completion of three years' period from temporary muster roll to a permanent muster roll. We do not thus find any merit in this appeal. The appeal therefore fails and is dismissed. No order as to costs.

(2002) 10 Supreme Court Cases 441

(BEFORE S.P. BHARUCHA, N. SANTOSH HEGDE AND Y.K. SABHARWAL, JJ.)

STATE OF M.P. AND ANOTHER . . Appellants;

Versus

STATE BANK OF INDORE AND OTHERS . . Respondents.

Civil Appeal No. 11528 of 1996, decided on March 15, 2001

A. **Sales Tax — M.P. General Sales Tax Act, 1958 (2 of 1959) — S. 33-C — Charge created by, in favour of the State in respect of sales tax dues — Overriding effect of — Held, it prevails over other charges (such as bank loan) including those created prior to enforcement of the said provision — Further held, such effect does not involve any question of retrospectivity — Retrospective/Retroactive operation — What does not amount to**

B. **Civil Procedure Code, 1908 — S. 96(1) — Appeal challenging the judgment and not the decree — Proper mode of disposal of such appeal — Instead of outright dismissing such appeal, held, amendment of the memo of appeal should be permitted**

The second respondent had pledged certain machinery with the first respondent Bank to obtain a term loan for a certain amount on 5-9-1974. The second respondent obtained further loans on 23-1-1979 and 25-1-1979. In view of Section 33-C which was inserted in the M.P. General Sales Tax Act, 1958 w.e.f. 19-1-1976, the State claimed a first charge upon the machinery in priority to the charge held by the Bank. The trial court and the High Court disallowed the said claim on the ground that the Bank's charge had been created prior to the enforcement of Section 33-C. The High Court dismissed the State's appeal on the additional ground that the State had challenged the judgment, and not the decree, of the trial court. Then the State filed the instant appeal.

Allowing the appeal, the Supreme Court

Held :

Section 33-C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank in respect of the loan taken by the second respondent. There is no question of retrospectivity in such a case, as, on the date when it was introduced, Section 33-C operated in respect of all charges that were then in force and gave sales tax dues precedence over them. (Para 5)

Dena Bank v. *Bhikhabhai Prabhudas Parekh & Co.*, (2000) 5 SCC 694, *followed*

The High Court further erred in dismissing the appeal before it on the ground that what had been challenged therein was the judgment of the trial court and not its decree. All that was required to be done in a case like that was to remove the technicality by permitting the amendment of the memo of appeal. (Para 6)

H-M/CSS/26432/S

Chronological list of cases cited ***on page(s)***

1. (2000) 5 SCC 694, *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co.* 443*b*

ORDER

1. The judgment and order under challenge was passed by a Division Bench of the High Court of Madhya Pradesh at Indore. It dismissed the first appeal filed by the present appellant, the State of Madhya Pradesh.

2. The second respondent had obtained from the first respondent Bank a term loan of rupees forty thousand on 5-9-1974. In this behalf, the second respondent had executed a promissory note and had pledged to the Bank certain machinery. A second loan was taken on 23-1-1979 and a third loan on 25-1-1979.

3. In the meantime, with effect from 19-1-1976, Section 33-C was inserted into the M.P. General Sales Tax Act, 1958. It read thus:

> "33-C. *Tax to be first charge.*—Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and/or penalty, if any, payable by a dealer or other person under this Act shall be a first charge on the property of the dealer or such person."

4. In respect of the second respondent's sales tax dues, the State claimed a first charge under Section 33-C upon the machinery in priority to the charge held by the Bank. The trial court and the High Court did not accept the State's submission in this behalf. In the view of the High Court, the Bank's charge on the machinery was created on 5-9-1974, that is, prior to the enforcement of Section 33-C, and the subsequent loans taken on 23-1-1979 and 25-1-1979 did not alter the position in favour of the State. In its view, "the charge created once remained valid and operative till repayment of the loan as borrowed". The High Court also took the view that the appeal before it was flawed because it challenged the judgment of the trial court and not its decree.

5. Section 33-C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in

favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank in respect of the loan taken by the second respondent. There is no question of retrospectivity here, as, on the date when it was introduced, Section 33-C operated in respect of all charges that were then in force and gave sales tax dues precedence over them. This position in law is discussed in detail in the judgment of this Court in *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co.*[1]

6. We are also of the view that the High Court was in error in dismissing the appeal before it on the ground that what had been challenged therein was the judgment of the trial court and not its decree. All that was required to be done in a case like that was to remove the technicality by permitting the amendment of the memo of appeal.

7. In the circumstances, the civil appeal is allowed and the judgment and order under appeal is set aside.

8. No order as to costs.

(2002) 10 Supreme Court Cases 443

(BEFORE S.P. BHARUCHA, C.J. AND N. SANTOSH HEGDE AND SHIVARAJ V. PATIL, JJ.)

ASSTT. COLLECTOR OF CENTRAL EXCISES AND ANOTHER . . Appellant;

Versus

KASHYAP ENGG. & METALLURGICALS (P) LTD. . . Respondent.

Civil Appeals Nos. 6577-78 of 1995, decided on April 18, 2002

Excise — Refund — Writ petition — Relief — Mode of exercise of High Court's discretion in granting relief — Where the assessee's claim to refund was rejected by the authorities as time-barred, High Court's order granting relief to him in a writ petition, set aside by Supreme Court — Further held, High Court, in a writ petition must exercise its discretion consistent with statutory provisions — Central Excise Act, 1944, S. 11-B — Constitution of India — Art. 226 — Relief — Customs Act, 1962, S. 27 (Para 2)

Mafatlal Industries Ltd. v. *Union of India*, (1997) 5 SCC 536 : (1997) 89 ELT 247; *CCE* v. *Doaba Coop. Sugar Mills Ltd.*, 1988 Supp SCC 683 : 1989 SCC (Tax) 23 : (1988) 37 ELT 478, *followed*

Appeals allowed H-M/AE/26029/S

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1. (1997) 5 SCC 536 : (1997) 89 ELT 247, *Mafatlal Industries Ltd.* v. *Union of India* 444*b*
2. 1988 Supp SCC 683 : 1989 SCC (Tax) 23 : (1988) 37 ELT 478, *CCE* v. *Doaba Coop. Sugar Mills Ltd.* 444*b-c*

1 (2000) 5 SCC 694

(2006) 4 Supreme Court Cases 385

(BEFORE H.K. SEMA AND DR. AR. LAKSHMANAN, JJ.)

RAJESH KUMAR AGGARWAL AND OTHERS .. Appellants;

Versus

K.K. MODI AND OTHERS .. Respondents.

Civil Appeals Nos. 5350-51 of 2002†, decided on March 22, 2006

A. **Civil Procedure Code, 1908 — Or. 6 R. 17 — Approach to be taken by courts in considering whether to permit amendment — Need to consider subsequent events — Two parts to Or. 6 R. 17 — Directory and mandatory parts, analysed — Consideration of truth or merits of amendment — Impermissibility — Held, courts should allow 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 — 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 — However, court should not go into correctness or falsity of the case in the amendment, nor record a finding on the merits of amendment at the stage of considering the prayer for amendment — Courts should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice — On facts, if it was permissible for appellants to file an independent suit on basis of the amendment application turned down by the High Court, it is incomprehensible why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit — In present case, appellant beneficiaries of a trust claiming certain reliefs against the trustees for mismanagement and breach of trust — Appellants later by way of amendment, seeking additional relief of reinvestment of trust property to their benefit in the pending suit — Permissibility of such amendment — Held, the amendment sought was necessary for the purpose of determining the real controversy between the parties as beneficiaries of the trust and should have been allowed — Trusts and Trustees — Mismanagement/breach of trust**

B. **Civil Procedure Code, 1908 — Or. 6 R. 17 — Object of**

By a deed of trust dated 1-5-1979, a trust in the name and style of Modipon Limited Senior Executive (Officers) Welfare Trust ("the Trust") was formed. The Trust was formed for the general benefit of employees employed in a division of Modipon. The appellants were beneficiaries of the Trust. The respondents were trustees and secretary of the Trust. The Trust purchased and ultimately became entitled to about 58,000 equity shares of Godfrey Philips ("GPI"), though held in the name of Respondent 1 in his capacity as a trustee of the Trust. According to the appellants, the bonus shares issued had not been forwarded to the Trust and the share certificates despatched by GPI from time to time were not received by the Secretary of the Trust. It was further stated that a new bank account was opened by Respondent 1 in his name and not in the name of the Trust and was being operated by Respondent 1. Since the beneficiaries of the Trust were not

† From the Final Order dated 27-8-2001 of the Delhi High Court in FAO (OS) No. 35 of 2000 and CM No. 387 of 2000

deriving any benefit from the Trust the appellants were constrained to file a suit for declaration, permanent injunction and mandatory injunction in the High Court against the respondents. Later, the appellants filed an application under Order 6 Rule 17 read with Section 151 CPC seeking leave of the Court to amend the plaint and to incorporate amendments principally claiming the relief of a grant of mandatory injunction directing the defendants to sell the shares of GPI held by the Trust and to use the sale proceeds thereof for the benefit of the beneficiaries of the Trust.

The Single Judge of the High Court allowed the said amendment application. Respondent 1 filed a first appeal wherein the appellate court allowed the appeal filed by Respondent 1 and dismissed the application of the appellants for amendment of the plaint. The appellants were before the Supreme Court thereagainst.

Allowing the appeals, the Supreme Court

Held :

The object of Order 6 Rule 17 is that the courts should try the merits of the case that come before them and should, consequently, allow 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. 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. The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. (Paras 15, 18 and 20)

Ganesh Trading Co. v. *Moji Ram*, (1978) 2 SCC 91; *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, (1969) 1 SCC 869; *Ragu Thilak D. John* v. *S. Rayappan*, (2001) 2 SCC 472, *relied on*

Charan Das v. *Amir Khan*, (1920) 47 IA 255 : AIR 1921 PC 50; *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*, 1957 SCR 438 : AIR 1957 SC 357; *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393; *B.K. Narayana Pillai* v. *Parameswaran Pillai*, (2000) 1 SCC 712, *cited*

Order 6 Rule 17 consists 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. 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. (Paras 16 and 18)

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. The High Court without deciding whether the amendment in

question was necessary has expressed certain opinions and entered into a discussion on merits of the amendment. Hence the order passed by the High Court is not sustainable in law. (Paras 19, 18 and 28)

Sampath Kumar v. *Ayyakannu*, (2002) 7 SCC 559, *relied on*

In the present case 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 there was merely a change in the nature of relief claimed. If it was permissible for the appellants to file an independent suit it is incomprehensible why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit. (Para 17)

Further, the amendment sought was necessary for the purpose of determining the real controversy between the parties as the beneficiaries of the Trust. It was alleged that Respondent 1 was not only in exclusive possession of about 58,000 shares of GPI and the dividend received on the said shares but had also been and was still exercising voting rights with regard to those shares, and that he had used the Trust to strengthen his control over GPI. Therefore, the proposed amendment was sought in the interest of the beneficiaries and to sell the shares and have the proceeds invested in government bonds and/or securities. A reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to show that there was no question of any inconsistency with the case originally made out in the plaint. (Paras 20 and 26)

K.K. Modi v. *K.N. Modi*, (1998) 3 SCC 573; *Kanda* v. *Waghu*, (1949) 77 IA 15 : AIR 1950 PC 68; *Kumaraswami Gounder* v. *D.R. Nanjappa Gounder*, AIR 1978 Mad 285 (FB), *distinguished*

D-M/ATZ/33983/C

Advocates who appeared in this case :

Mukul Rohatgi, Senior Advocate (B.L. Wali, Ms Inklee Barooah and Ms Bina Gupta, Advocates, with him) for the Appellants;

S. Ganesh, Senior Advocate (Praveen Bahadur, Ms Meghalee Barthakur, Rajan Narain, Ms Kanika Gomber, Ms Bharti Badesra and Rupa Barmola, Advocates for O.P. Khaitan & Co., Advocates, with him) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2002) 7 SCC 559, *Sampath Kumar* v. *Ayyakannu* 398*g*
2. (2001) 2 SCC 472, *Ragu Thilak D. John* v. *S. Rayappan* 391*a*, 395*a*
3. (2000) 1 SCC 712, *B.K. Narayana Pillai* v. *Parameswaran Pillai* 395*c*
4. (1998) 3 SCC 573, *K.K. Modi* v. *K.N. Modi* 392*b-c*, 395*f*
5. (1978) 2 SCC 91, *Ganesh Trading Co.* v. *Moji Ram* 390*h*, 394*e*, 395*b-c*
6. AIR 1978 Mad 285 (FB), *Kumaraswami Gounder* v. *D.R. Nanjappa Gounder* 392*c*, 396*a*
7. (1974) 2 SCC 393, *Ganga Bai* v. *Vijay Kumar* 395*b-c*
8. (1969) 1 SCC 869, *Jai Jai Ram Manohar Lal* v. *National Building Material Supply* 390*h*, 394*g*
9. 1957 SCR 438 : AIR 1957 SC 357, *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.* 395*b-c*
10. (1949) 77 IA 15 : AIR 1950 PC 68, *Kanda* v. *Waghu* 392*b-c*, 395*g*
11. (1920) 47 IA 255 : AIR 1921 PC 50, *Charan Das* v. *Amir Khan* 395*b-c*

The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J.— The above appeals were filed against the final order dated 27-8-2001 passed by the High Court of Delhi in FAO (OS) No. 35 of 2000 and CM No. 387 of 2001 whereby the High Court of Delhi allowed the appeal of the respondents.

2. The short facts of the case are as follows:

By a deed of trust dated 1-5-1979, a trust in the name and style of Modipon Limited Senior Executive (Officers) Welfare Trust was formed. The said Trust was formed for the general benefit of employees employed in the Fibre Division only of Modipon Limited and the purpose was to provide benefits to such employees and dependent members of their families particularly for the purposes of giving them education, medical relief, facilities for sports, cultural and other activities on sound, permanent and organised basis.

3. The appellants are beneficiaries of Modipon Limited Senior Executive (Officers) Welfare Trust. The respondents (Defendants 1-4) are trustees of the Trust and Respondent 5 is the Secretary of the Trust. The Trust purchased 19,314 equity shares of Godfrey Philips (India) Limited (in short "GPI") in the name of Respondent 1 in his capacity as a trustee of the Trust. GPI issued bonus shares in the ratio of 1:1 to its existing shareholders. Bonus shares were issued in the ratio of 1:1 in the year of 1992-93. By reason of the above, the Trust became entitled to 57,942 shares of GPI. According to the appellant, the bonus shares issued have not been forwarded to the Trust and the share certificates despatched by GPI from time to time were not received by the Secretary of the Trust. It was further stated that a new account was opened by Respondent 1 at Oriental Bank of Commerce in his name and not in the name of the Trust and is being operated by Respondent 1. Since the beneficiaries of the Trust were not deriving any benefit from the Trust and as such the appellants were constrained to file a suit for declaration, permanent injunction and mandatory injunction in the High Court of Delhi, which was registered as Suit No. 181 of 1997, against the respondents claiming the following amongst other reliefs:

(*a*) a decree for declaration that Defendant 1 is not a fit and proper person to continue as trustee of Modipon Limited Senior Executive (Officers) Welfare Trust;

(*b*) a decree directing that Defendant 1 be removed from such office by the orders of this Court;

(*c*) a decree of permanent injunction restraining Defendant 1 and/or his servants, agents and assignees from operating Savings Account No. 9089 opened in Oriental Bank of Commerce, New Friends Colony, New Delhi;

(*d*) a decree by way of mandatory injunction restraining Defendant 1 from depositing the dividend/bonus shares received in future from GPI in the account opened by him with Defendant 6 at Delhi and simultaneously directing him to forward the same to the Secretary of the Trust;

(*e*) a decree of mandatory injunction in favour of the plaintiff to direct Defendant 1 to hand over the relevant bonus share certificates in Account No. 9089 and dividend amounting to Rs 15,64,434.00, or any other amount of GPI to the Secretary of the Trust i.e. Defendant 5 herein;

(*f*) pass such other order or further order/orders as this Court may deem fit and proper in the facts and circumstances of the case.

Written statement was filed on behalf of Respondents 1 and 5 before the High Court.

4. On 23-9-1998, the appellants filed an application being IA No. 8479 of 1998 under Order 6 Rule 17 read with Section 151 CPC seeking leave of the Court to amend the plaint and to incorporate the following amendments to the original plaint of the appellants:

"12(*a*) The beneficiaries of the Trust are not deriving any benefit from the creation of the Trust since 1991-92 and as such the object of the Trust has been frustrated. The Trust as of date owns 77,256 shares of GPI, but 57,942 of the shares are in the exclusive power and possession of Defendant 1. Only 19,314 shares of GPI are in the possession of Defendant 5 being the Secretary of the Trust. It is stated that GPI declared a dividend of Rs 7 per share in the year 1996-97 when the market price of the shares was between Rs 250-300 per share which means a mere 2.5% return on the investment per annum. If the said GPI shares were to be sold and then invested in government bonds/securities the investment would yield a minimum return of 10% to 12% per annum. It is pertinent to mention that since 1991-92, even the dividend declared on GPI shares is being solely appropriated by Defendant 1 to the exclusion of the beneficiaries. Since Defendant 1 who is holding the said shares of the Trust is deriving benefit by holding the shares, the beneficiaries of the Trust are being deprived from the benefit which they are entitled to. It is in the interest of justice that the said shares may be sold and then invested in government bonds and/or securities which will be in the interest of beneficiaries, because at present the beneficiaries are not deriving any benefit by virtue of the said shares which are in the power and possession of Defendant 1 as is evident from the records of the case.

Similarly, the appellants sought amendment in para 15 and want to incorporate relief of mandatory injunction as per prayer (*b-1*) to be read as under:

Relief	*Valuation for the purposes of jurisdiction*	*Court fee*	*Court fee paid*
For the relief of mandatory injunction [as per prayer (*b-1*)] herein.	Rs 130.00	Rs 13.00	Rs 13.00

Pass a decree of mandatory injunction directing the defendants to sell the shares of GPI held by the Trust and use the sale proceeds thereof for the benefit of the beneficiaries."

5. The application was filed under Order 6 Rule 17 CPC. Respondent 1 filed reply to the said application. The appellants filed their rejoinder to the reply of Respondent 1 to the said application.

6. The learned Single Judge of the High Court, vide his order dated 31-8-1994, allowed the application of the appellant seeking relief of amendment to the plaint. Respondent 1 herein filed first appeal against the order of the learned Single Judge which was registered as FAO (OS) No. 35 of 2000 whereby the learned Single Judge had allowed the application of the appellants seeking the relief of amendment of the plaint.

7. The appellate court allowed the appeal filed by Respondent 1 and dismissed the application of the appellants for amendment of the plaint on the ground that the proposed amendment introduces a totally different, new and inconsistent case and that the application does not appear to have been made in good faith and at the instance of someone behind the curtain. Aggrieved against the said order, the above civil appeals have been filed.

8. We heard Mr Mukul Rohatgi, learned Senior Counsel appearing for the appellants and Mr S. Ganesh, learned Senior Counsel appearing for the contesting respondents along with other counsel for the parties.

9. Elaborate and lengthy submissions were made by learned Senior Counsel appearing on either side by inviting our attention to the pleadings, annexures filed and the judgments impugned.

10. Mr Mukul Rohatgi submitted that the High Court was not justified in disallowing the amendment of the plaint so as to defeat the valuable rights of the appellants. He would further submit that the Court was not correct in dismissing the application in view of the settled position of law that all amendments of pleadings should be allowed which are necessary for determination of the real controversies in the suit and that the amendment proposed by the appellant was necessary for determining of the real controversies in the suit. This apart, the Division Bench was not right in rejecting the application at the stage of amendment when it is settled law that the Court does not enter into merits at the stage of amendment. According to Mr Rohatgi, the appellants sought an amendment that the shares be sold and then invested in government bonds and/or securities which will be in the interest of the beneficiaries because presently the beneficiaries were not deriving any benefit by virtue of the said shares which are in the power and possession of Respondent 1 as is evident from the records.

11. Mr Rohatgi, learned Senior Counsel for the appellants, in support of his contention placed strong reliance on the following three judgments of this Court being *Ganesh Trading Co.* v. *Moji Ram*[1], *Jai Jai Ram Manohar Lal* v.

1 (1978) 2 SCC 91

National Building Material Supply[2] and *Ragu Thilak D. John* v. *S. Rayappan*[3].

12. Per contra, Mr Ganesh, learned Senior Counsel for the respondent submitted that the judgment of the Division Bench is completely in line with the settled legal position that an application for amendment of a plaint will not be allowed if it seeks to introduce into the plaint a new and different case which is inconsistent with the case originally made out in the plaint or, if the amendment has not been moved bona fide or in good faith, but only for the purpose of achieving some collateral/objective which is not bona fide. According to Mr Ganesh, the amendment sought to be introduced by the appellants' amendment application set up a case which was altogether new and different and also directly contrary to and inconsistent with the case made out in the original plaint. In this connection, Mr Ganesh invited our attention to several paragraphs in the pleadings filed by both the parties. It was contended that the case made out in the original plaint is one that is confined strictly and solely to respondent-Defendant 1 alone and the reliefs prayed for are also on that basis and footing. In contrast, the new case sought to be made out by amending the plaint is against all the respondents, and this is clear from the submissions and contentions set out in the proposed prayer (*b-1*) which is directed against all the respondents and not merely against Respondent 1. He would further submit that the case made out in the original plaint was based on the deed of trust dated 1-5-1979 and the appellants purport to seek to enforce their right as beneficiaries in terms of the said deed of trust. In contrast, the case which was sought to be made out in the proposed amendments was directly contrary to and inconsistent with the specific terms of the said deed of trust dated 1-5-1979. Therefore, the appellants by moving these amendments are seeking an order for realisation of the investments held by the Trust and the investment of such monies in a different manner, that is, a change or alteration of the investments. It was further submitted that the contentions put forward by the appellant-plaintiffs in the original plaint were based on the provisions of Sections 60 and 61 of the Trusts Act which provide that the beneficiary of a trust has a right, subject to the provisions of the trust, to have the trust property protected, and the trustees compelled to perform their duties and restrained from committing any contemplated or probable breach of trust. In other words, Sections 60 and 61 of the Trusts Act authorise the beneficiary to enforce the instrument of the trust as against the trustees and to enforce the implementation of the terms of the instrument of the trust. The case which was sought to be made out in the proposed amendments was totally alien and extraneous to the ambit and purview of Sections 60 and 61 of the Trusts Act. Essentially, in the proposed amendments, the appellants seek an order for a material amendment and a complete rewriting of the instrument of the trust, which is directly contrary to what is contemplated and provided by Sections 60 and 61. It was also

2 (1969) 1 SCC 869 : AIR 1969 SC 1267
3 (2001) 2 SCC 472

submitted that the proposed amendments are also utterly lacking in bona fides or good faith and that the suit was targeted at Mr K.K. Modi, respondent-Defendant 1 and the only object of the suit was clearly to ensure that K.K. Modi Group would be denied the voting power in respect of the GPI shares held by the Trust. Our attention was also drawn to the various IAs filed and argued before the High Court and the orders passed thereon. Concluding his argument Mr Ganesh submitted that the present application for amendment is an abuse of the process of court and this Court ought not to entertain such frivolous applications. Mr Ganesh, in support of his contention, relied on the following judgments:

1. K.K. Modi v. *K.N. Modi*[4].

2. Kanda v. *Waghu*[5].

3. Kumaraswami Gounder v. *D.R. Nanjappa Gounder*[6].

13. We have carefully gone through the relevant pleadings, annexures and the judgment rendered by the learned Single Judge and of the learned Judges of the Division Bench of the High Court.

14. Order 6 Rule 17 CPC reads thus:

> "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."

This rule declares that the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should 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 for which amendment is sought before the commencement of the trial.

15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow 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.

16. Order 6 Rule 17 consists 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

4 (1998) 3 SCC 573

5 (1949) 77 IA 15 : AIR 1950 PC 68

6 AIR 1978 Mad 285 (FB)

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 have expressed certain opinions 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 the rights of both parties and to subserve the ends of justice. It is settled by a 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.

20. We shall now consider the proposed amendment and to see whether it introduces a totally different, new and inconsistent case as observed by the Hon'ble Judges of the Division Bench and as to whether the application does not appear to have been made in good faith. We have already noticed the prayer in the plaint and the application for amendment. In our view, the amendment sought was necessary for the purpose of determining the real controversy between the parties as the beneficiaries of the Trust. It was alleged that Respondent 1 is not only in exclusive possession of 57,942 shares of GPI and the dividend received on the said shares but has also been and is still exercising voting rights with regard to these shares and that he has used the Trust to strengthen his control over GPI. Therefore, the proposed amendment was sought in the interest of the beneficiaries and to sell the shares and have the proceeds invested in government bonds and/or securities. A reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to show that there was no question of any inconsistency with the case originally made out in the plaint. The court

always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. There is a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The amendments sought for by the appellants have become necessary in view of the facts that the appellants being the beneficiaries of the Trust are not deriving any benefit from the creation of the Trust since 1991-92 and that if the shares are sold and then invested in government bonds/securities the investment would yield a minimum return of 10-12%. It was alleged by the appellants that Respondent 1 is opposing the sale in view of the fact that if the said shares are sold after the suit is decreed in favour of the appellants, he will be the loser and, therefore, it is solely on account of the attitude on the part of Respondent 1 that the appellants have been constrained to seek relief against the same.

21. We shall now consider the argument of the learned Senior Counsel for the respondent on Sections 60 and 61 of the Trusts Act. It was submitted by the appellants that since Respondent 1 did not act in a bona fide manner as a result of which the appellants were compelled to file the suit before the High Court in the capacity of the beneficiaries of the Trust and that the amended plaint is not alien and extraneous to the ambit and purview of Sections 60 and 61 of the Trusts Act.

22. We shall now consider the judgments cited by learned Senior Counsel for the appellants:

1. Ganesh Trading Co. v. *Moji Ram*[1]

This Court held that the main rules of pleadings in Order 6 CPC, 1908, show that the provision for the amendment of pleadings subject to such terms as to costs and giving to all parties concerned necessary opportunities to meet exact situations resulting from any amendment, are intended for promoting the ends of justice and not for defeating them. This Court further held that the amendment only sought to give notice to the defendant on facts which the plaintiff would and could have tried to prove in any case. Such notice was given only by way of abundant caution so that no technical objection can be taken that what was sought to be proved was outside the pleadings.

2. Jai Jai Ram Manohar Lal v. *National Building Material Supply*[2]

It was held that a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting *mala fide*, or that by his blunder he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission and however late the proposed amendment, the

amendment may be allowed if it can be made without injustice to the other side.

3. Ragu Thilak D. John v. *S. Rayappan*[3]

Sethi, J. speaking for the Bench has observed that the amendment sought would change the nature of the suit originally filed was not a reason for refusing application for amendment and that the dominant purpose of Order 6 Rule 17 was to minimise litigation and that the plea that the relief sought for by way of amendment was barred by time is arguable in the circumstances of the case. This Court further observed in para 5 as under: (SCC p. 473)

> "*5.* After referring to the judgments in *Charan Das* v. *Amir Khan*[7], *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*[8], *Ganga Bai* v. *Vijay Kumar*[9], *Ganesh Trading Co.* v. *Moji Ram*[1] and various other authorities, this Court in *B.K. Narayana Pillai* v. *Parameswaran Pillai*[10] held: (SCC p. 715, para 3)
>
> > '*3.* The purpose and object of Order 6 Rule 17 CPC 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 a 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.' "

23. We shall now consider the judgments relied on by Mr Ganesh, learned Senior Counsel for the respondent.

1. K.K. Modi v. *K.N. Modi*[4]

This civil appeal was filed by K.K. Modi against K.N. Modi and others and this judgment was relied on by Mr Ganesh to show that the parties are litigating before different forums and that the directions issued by this Court pending final disposal of the suit in the Delhi High Court.

2. Kanda v. *Waghu*[5]

The Privy Council, in the above case, has observed as under: (IA pp. 21-22)

> The powers of amendment must be exercised in accordance with legal principles. An amendment which involves the setting up of a new

7 (1920) 47 IA 255 : AIR 1921 PC 50
8 1957 SCR 438 : AIR 1957 SC 357
9 (1974) 2 SCC 393
10 (2000) 1 SCC 712

case and alters the real matter in controversy between the parties cannot be allowed. (AIR p. 68)

3. Kumaraswami Gounder v. *D.R. Nanjappa Gounder*[6]

Likewise, the above case was cited in regard to the permissibility of amendment by introducing a new cause of action. This Full Bench decision of the Madras High Court was cited for the proposition that when the amendment sought for sets up a totally different cause of action which ex facie cannot stand in line with the original pleading, the courts cannot allow such application for amendment and that a pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of an amendment a new cause and a case cannot be substituted and the courts cannot be asked to adjudicate the alternative case instead of the original case.

24. This judgment is distinguishable on facts. The cause of action for filing the present suit arose on 21-10-1993 when Defendant 1 informed that the account has been opened by him in Oriental Bank of Commerce and that the cause of action further arose on several dates when the reminders were sent to Defendant 1 for handing over the bonus share certificates and the dividends to the Trust. It was alleged in the plaint that Defendant 1 has no authority in holding the monies of the Trust and that the dividends of the shares have not been accounted for. A further prayer by way of permanent injunction was sought against Defendant 1 and his servant's agent and assignees from operating the bank account in Oriental Bank of Commerce, New Delhi and for a mandatory injunction restraining the defendant from depositing the dividends/bonus shares received in future from GPI in the account opened by him with Defendant 6 Bank at Delhi. A further decree for mandatory injunction was also sought in favour of the appellant-plaintiffs to direct Defendant 1 to hand over the relevant bonus shares and the dividends or any other amount of GPI to the Secretary of the Trust, Defendant 5.

25. In the application for amendment in paras 6, 7 and 8 it was submitted as follows:

> *6.* The plaintiffs and/or their family members, being the beneficiaries of the said Trust are not deriving any benefit from the creation of the said Trust since 1991-92. During the period in or around 1979-80, the Trust purchased 19,314 equity shares of Godfrey Philips Ltd. (hereinafter referred to as GPI) and Defendant 1 took over the management and control of Godfrey Philips Ltd. in the year 1980 or so. The Trust as of date owns 77,256 shares of GPI. But 57,942 of the shares are in the exclusive power and possession of Defendant 1. Only 19,314 shares of GPI are in the possession of Defendant 5 being the Secretary of the Trust.
>
> *7.* It is stated that GPI declared a dividend of Rs 7 per share in the year 1996-97 when the market price was rising from Rs 250-300 per share which means a mere 2.5% return on the investment per annum. If the said GPI shares were to be sold and then invested in government

bonds/securities the investments would yield a minimum return of 10% to 12% per annum.

8. It is pertinent to mention that since 1991-92, even the dividends declared on GPI shares are being solely appropriated by Defendant 1 to the exclusion of the beneficiaries. Since Defendant 1 who is holding the said shares of the Trust is deriving benefit by holding the shares, the beneficiaries of the Trust are being deprived from the benefit which they are entitled to. It is in the interest of justice that the said shares may be sold and then invested in government bonds and/or securities which will be in the interest of beneficiaries, because at present the beneficiaries are not deriving any benefit by virtue of the said shares which are in the power and possession of Defendant 1 as is evident from the records of the case.

26. It is thus seen that the entire case of the plaintiff revolves around the equity shares of GPI and that the dividend declared thereon is not accounted for. Therefore, a further prayer by way of amendment was sought to amend the plaint and to incorporate clause 12(*a*) after the existing para 12 and also to incorporate the relief of mandatory injunction as per prayer (*b-1*) directing the defendants to sell shares of GPI held by the Trust and use the sale proceeds thereof for the benefit of the beneficiaries. Thus, it is clearly seen from the above narration of facts that the amendment sought for does not introduce a new cause of action inconsistent with the case made out in the original plaint. It is pertinent to notice the following facts also:

23-9-1998	The application under Order 6 Rule 17 was filed on the same date, the appellant filed the amended plaint.
13-1-1999	Respondent 1 filed reply to the application under Order 6 Rule 17.
22-1-1999	The appellants filed their rejoinder to the reply of Respondent 1.
31-8-1999	The learned Single Judge allowed the application.
25-10-1999	Respondent 1 filed first appeal before the Division Bench in FAO (OS) No. 35 of 2000.
31-1-2000	Respondent 2 filed his written statement.
11-7-2000	*Respondent 1 filed his amended written statement to the amended plaint.* (underlining is ours†)
15-9-2000	The appellants filed their application to the amended written statement of Respondent 1.
10-1-2001	Admission/denial of documents was conducted by the parties and the documents were executed.

† **Ed.**: Herein italicised.

20-8-2001 The learned Single Judge framed the following issues on the pleadings of the parties:

(*1*) Whether the suit is not maintainable in its present form, having been filed by only three employees of Modipon Fibre Division "OPD".

(*2*) Whether the suit has been filed by the plaintiffs at the instance of M.K. Modi Group in order to harass Defendant 1 and in a bid to dislodge and destabilise Defendant 1's control and management of GPI? "OPD".

(*3*) Whether Defendant 1 has acted bona fidely to protect the assets, properties and income of the Trust and interests of the beneficiaries of the Trust? "OPD".

(*4*) Whether Defendant 1 has misused the assets of the Trust? "OPD".

(*5*) Whether the plaintiffs are entitled to the relief claimed in the plaint in view of the terms of clause 19 of the Trust?

27-8-2001 The appellate court allowed the appeal filed by Respondent 1 and dismissed the application of the appellant for amendment of the plaint.

3-12-2001 SLP filed.

18-1-2002 Notice was issued in the SLP — Further proceedings in the suit were stayed until further orders.

26-8-2002 Interim order dated 18-1-2002 shall continue to remain in operation during the pendency of the appeal.

27. From the abovenoted dates, it is clearly seen that the respondents have filed their amended written statement and the appellants their replication to the amended written statement and conducted admission and denial of documents and more so the issues were framed and despite the said fact, the High Court has allowed the appeal of the respondents and disallowed the application of the petitioner for amendment of the plaint.

28. Since the Court has entered into a discussion into the correctness or falsity of the case in the amendment, we have no other option but to interfere with the order passed by the High Court. Since it is settled law that the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing prayer for amendment, the order passed by the High Court is not sustainable in law as observed by this Court in *Sampath Kumar* v. *Ayyakannu*[11].

29. We make it clear that we are not expressing any opinion on merits of the rival claims. Now that the amended plaint written statement (*sic*) and the issues have been framed, it is for both parties to contest the suit on merits on the basis of the amended plaint written statement (*sic*) and the issues now framed.

30*. In the result, Civil Appeals Nos. 5350-51 of 2002 are allowed and the order passed by the Division Bench of the High Court in FAO (OS)

11 (2002) 7 SCC 559

* **Ed.**: Para 30 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2006 dated 24-4-2006.

No. 35 of 2000 and CM No. 387 of 2001 dated 27-8-2001 stands set aside. However, there will be no order as to costs.

31. The suit was filed in the year 1997. Now that the pleadings are complete and the suit is ready for trial, we request the High Court to dispose of the suit as expeditiously as possible and at any rate not later than 6 months from the date of receipt of the copy of the order from this Court or on production of the same by either party, whichever is earlier.

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(BEFORE B.P. SINGH AND ARUN KUMAR, JJ.)

T. MADHAVA KURUP . . Appellant;

Versus

T.C. MADHAVA KURUP (DEAD) BY LRS.
AND OTHERS . . Respondents.

Civil Appeal No. 7424 of 2002†, decided on April 5, 2006

Hindu Law — Joint family — Marumakkathayam law — Inheritance of tavazhi property on death of last female member of tavazhi — Held, on death of last female member of tavazhi the tavazhi comes to an end — In such circumstances rule of survivorship ceases to operate and the surviving male members, in the absence of tavazhi, must inherit the property as tenants-in-common, and share it equally — Position contrasted with that obtaining in joint family governed by Mitakshara law — Family Law — Succession

The question that arose before the Supreme Court was whether the suit properties being tavazhi properties devolved on the two surviving male members of the tavazhi after the death of the last female member as co-owners, or whether the suit properties devolved upon one of them as the last surviving male owner by survivorship, who acquired the same as his absolute property.

Allowing the appeal, the Supreme Court

Held :

While under the Hindu law, descent is traced through males, in the Marumakkathayam system of inheritance, it is traced through females. In the case of a Hindu joint family a single male coparcener may continue the coparcenary with his sons who may be born later, but in the absence of a female member a tavazhi cannot be continued by male members alone. Different considerations may arise if the sole surviving member of the tavazhi is a female.

(Para 14)

If the descent is traceable only through females, in the absence of a female member, the tavazhi must come to an end with no chance of there being a female member to continue the line. The rule of survivorship in such circumstances ceases to operate and the surviving male members, in the absence of a tavazhi, must inherit the property as tenants-in-common, and share it equally. Hence the descendants of the male member who expired first could maintain a suit for partition against members of the other male member who survived.

(Paras 15, 12 and 10)

† From the Order/Judgment and Decree dated 29-6-2001 of the High Court of Kerala at Ernakulam in AS No. 188 of 1990