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(2010) 80 ALR 813 : (2010) 2 ARC 88 : (2010) 3 CivCC 915 : **(2010) 28 LCD 582** :  
(2011) 2 RCR(Civil) 328 : (2010) 110 RD 555

**ALLAHABAD HIGH COURT**

SINGLE BENCH

SHAHJAHAN — Appellant

Vs.

DISTRICT JUDGE, FAIZABAD — Respondent

( Before : Narayan Shukla, J )

Writ Petition No. 4723 (MS) of 2009

Decided on : 26-03-2010

- Civil Procedure Code Amendment Act, 1999 - Section 7
- Civil Procedure Code Amendment Act, 2002 - Section 16, Section 16(2)
- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 15, Order 6 Rule 17, Order 6 Rule 18, Order 6 Rule 5
- General Clauses Act, 1897 - Section 6

**A. Civil Procedure Code, 1908 — Order 6, Rule 17 — Amendment of pleadings — Applicability of proviso after commencement of trial — The proviso to Order 6, Rule 17, as inserted by the CPC (Amendment) Act, 2002 (Act No. 22 of 2002), has prospective effect and does not apply to suits instituted before 01.07.2002 (the date of its commencement). Therefore, in a suit filed in 1993, the proviso, which restricts amendments after the commencement of trial unless due diligence is shown, is not applicable. (Paras 4, 5, 12)**

**B. Civil Procedure Code, 1908 — Order 6, Rule 17 — Amendment of written statement — Nature of amendment permissible — An admission made by a defendant in a written statement can be explained, withdrawn, or elaborated through an amendment. Inconsistent pleas or alteration of defence is**

permissible in an amendment of the written statement, unlike an amendment of a plaint which introduces a new cause of action. The proposed amendments, if explanatory in nature and necessary for a proper and effective adjudication of the case, should generally be allowed. (Paras 6, 9, 10, 11, 12)

**C. Civil Procedure Code, 1908 — Order 6, Rule 17 — Amendment of written statement — Delay in filing application — Delay in moving an application for amendment of a written statement is not, by itself, a ground for rejection, especially when the proviso to Order 6, Rule 17 is inapplicable. (Paras 6, 7, 12)**

**D. Civil Procedure Code, 1908 — Order 6, Rule 17 — Amendment of written statement — Resiling from witness's admission — An amendment seeking to resile from a statement made by a witness during cross-examination (D.W.1) is generally not permissible in law. Where an amendment seeks to negate a witness's admission, such an amendment should be rejected. (Paras 4, 12)**

**E. Civil Procedure Code, 1908 — Order 6, Rule 17 — Principles for allowing/rejecting amendment — Key considerations for allowing or rejecting an amendment application include: 1. Whether the amendment is imperative for proper and effective adjudication of the case. 2. Whether the application is bona fide and not mala fide. 3. Whether the amendment causes prejudice to the other side that cannot be compensated by costs. 4. Whether refusing the amendment would lead to injustice or multiple litigation. 5. Whether the proposed amendment fundamentally changes the nature and character of the case. 6. Whether a fresh suit on the amended claims would be barred by limitation (though this is more relevant for plaints). (These factors are illustrative, not exhaustive.) (Paras 9, 10)**

**F. Civil Procedure Code, 1908 — Order 6, Rule 17 — Scope of judicial review — While considering an application for amendment, the court should not delve into the merits of the proposed amendment. The primary consideration is whether the amendment is necessary for the decision of the real controversy between the parties. The effect of the amendment on the merits of the case is not to be seen at the stage of allowing the application. (Paras 8, 12)**

**G. Civil Procedure Code, 1908 — Order 6, Rule 17 — Amendment at appellate stage — An application for amendment can be allowed at the appellate stage, provided it meets the general principles for allowing amendments and does not cause irreparable injury or miscarriage of justice.**

**(Paras 3, 6, 12)****Cases Referred**

- [Dondapati Narayan Reddy Vs. Duggirddey Venkatanarayana Reddy and Others](#), (2001) 7 AD 58 : AIR 2001 SC 3685 : (2001) 7 JT 112 : (2001) 5 SCALE 566 : (2001) 8 SCC 115 : (2001) AIRSCW 3636 : (2001) 6 Supreme 492
- [Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.](#), AIR 2006 SC 2832 : (2006) 7 JT 139 : (2006) 7 SCALE 517 : (2006) 6 SCC 498 : (2006) 4 SCR 259 Supp : (2006) AIRSCW 3956 : (2006) 5 Supreme 943
- [Andhra Bank Vs. ABN Amro Bank N.V. and Others](#), AIR 2007 SC 2511 : (2007) 139 CompCas 111 : (2007) 3 CompLJ 185 : (2007) 9 JT 244 : (2007) 9 SCALE 96 : (2007) 6 SCC 167 : (2007) 77 SCL 209 : (2007) 2 UJ 859 : (2007) AIRSCW 4466 : (2007) 5 Supreme 792
- [Prem Bakshi and Others Vs. Dharam Dev and Others](#), AIR 2002 SC 559 : (2002) 1 JT 34 : (2002) 1 SCALE 74 : (2002) 2 SCC 2 : (2002) 1 SCR 103 : (2002) AIRSCW 140 : (2002) 1 Supreme 40
- [Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another](#), AIR 1983 SC 462 : (1983) 1 SCALE 719 : (1984) 1 SCC 594 Supp : (1984) SCC 594 Supp
- [Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others](#), (2009) 13 JT 366 : (2009) 10 SCC 84 : (2009) 15 SCR 103 : (2009) 10 UJ 4850

**JUDGMENT**

Mr. Narayan Shukla, J.—Heard Mr. Mohd. Arif Khan, ' learned Senior Advocate assisted by Mr. Mohd. Adil Khan, learned counsel for the petitioner and Mr. S.K. Mehrotra, learned counsel for the opposite party No. 3.

2. The petitioner has challenged the order dated 3rd of July, 2009, passed by the District Judge, Faizabad, whereby the application for amendment of the written statement filed by the opposite party No. 3 has been allowed.

3. The petitioner filed a suit for declaration to be the sole owner of the property in dispute and further for mandatory injunction to remove the possession of the opposite party No. 3 from the property in dispute. During the course of trial of the suit the opposite party No. 3 moved an application for amendment of the written statement, which was rejected. Then he filed revision against the order passed on the application, which was also dismissed. Then the opposite party No. 3 preferred a writ petition bearing writ petition No. 530 of 2007 (MS), which was disposed of with the direction to amend the written statement. The petitioner was permitted to file reply of such an amendment and the trial court was directed to frame necessary issues. Accordingly the trial court framed the additional issues. The petitioner sought permission to bring on record the documentary evidence, which was rejected. Then he preferred a writ petition bearing writ petition No. 4260 (MS) of 2008.

This court by means of order dated 9th of September, 2009 passed in the aforesaid writ petition allowed the petitioner to file documentary evidence, in rebuttal of the evidence led by the respondent No. 3. Accordingly the trial court proceeded with the suit and decreed the petitioner's suit by means of order dated 12th of November, 2008. The opposite party No. 3 challenged the judgment and decree of the trial court by way of appeal, which is pending for decision before the opposite party No. 1. Now again at the stage of appeal the opposite party No. 3 moved an application for further amendment of the written statement, against which the petitioner filed objection to the effect that by moving such an application the opposite party No. 3 is adopting dilatory tactics to remain in occupation of the premises in dispute. Further he had already moved an application for amendment of the written statement, which was allowed, therefore, whatever amendment was required by him in the written statement that would have been proposed at first time of application of amendment moved by him. Considering the application for amendment as well as objection raised against that, the appellate court allowed the application for amendment by means of order dated 3rd of July, 2009, which is under challenge in the present writ petition.

4. Mr. Mohd. Arif Khan, learned counsel for the petitioner submits that the necessary facts as proposed through the amendment were already brought on record through the written statement for deciding the real controversy involving in the case, therefore, there is no need of further amendment in the written statement. He further submits that by way of proposed amendment the respondent No. 3 has tried to resile the admission of a witness, who is D.W.1, made through his cross examination, which is not permissible in the eye of law. He further submits that the respondent No. 3 has sought the amendment in the written statement after conclusion of trial, whereas the order 6 Rule 17 of the CPC speaks that no application for amendment shall be allowed after the trial is 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.

In the light of the aforesaid provisions he submits that the respondent No. 3 has failed to disclose as to why he could not raise the plea which have been taken through the proposed amendment before the commencement of trial or conclusion of the trial or even at the time of first application for amendment moved by him. He further submits that the trial court has also failed to appreciate the aforesaid provision. There is no finding of the trial court on this point. In support of his submission he cited a case i.e. Vijay Krishna Srivastava and another v. Ahira Khatoon and another reported in 2010 (78) ALR 688, in which this court has held that the petitioners have failed to establish that their case is covered under the provisions of Order 6 Rule 17 of the CPC and as to why they could not place the proposed facts before the Trial court. He cited another judgment i.e. Yogish Tripathi v. Ram Deo Tripathi through Lrs reported in 2010 (1) ARC 626, in which this court relied upon the judgment of Hon'ble Supreme Court rendered in the case of [Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others](#), and held that the proposed amendment does not come in any of the criteria laid down by the Hon'ble Supreme Court in the aforesaid case. The Hon'ble Supreme Court in the case of Ravajeetu Builders (Supra)

has laid down the guidelines for consideration of the application for amendment. Thus he submits that the order passed by the Additional District Judge suffers from error and is liable to be quashed.

5. On the other hand Mr. S.K. Mehrotra, learned counsel for the opposite party No. 3 submits that the proposed amendments are explanatory in nature to the facts submitted through the written statement, which are the necessary and relevant materials for deciding the real controversy and as such the amendment is permissible in the eye of law. It is stated that considering the facts and circumstances of the case the appellate court has allowed the application for amendment, which does not warrant interference of this court. He further submits that the proviso to Rule 17 of Order 6 CPC was inserted by way of Act No. 22 of 2002 with effect from 1st of July, 2002, whereas the suit was instituted in 1993. At the time of institution of suit this proviso was not part of Rule 17 of Order 6 CPC and it has only prospective effect, therefore, the proviso to Rule 17 Order 6 CPC does not come in the way of the present case. In support of his submission he cited the decision of Hon'ble Supreme Court rendered in the case of State Bank of Hyderabad v. Town Municipal Council, reported in 2007 (1) SCC 765. In this case the suit was filed in 1998 whereas amendment in the plaint was sought thereafter and was allowed by the appellate court by the order dated 7th of April, 2003. The Hon'ble Supreme Court by reading the provisions of Section 16(2) of the CPC (Amendment) Act, 2002 held that in view of the said provisions there cannot be any doubt whatsoever that the suit having been filed in the year 1998, proviso of Order 6 Rule 17 of the CPC shall not apply. The relevant paragraph 6, 7 and 8 of the judgment are reproduced hereunder:-

6. The proviso appended thereto was added by the CPC (Amendment) Act, 2002 which came into force with effect from 1.7.2002. It reads as under:

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.

7. Section 16(2) of the amending Act of 2002 reads as under:

16. (2) Notwithstanding that the provisions of this Act have come into force or repeal under subsection (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897,-

(b) the provisions of Rule, 5,15,17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the CPC (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the CPC (Amendment) Act, 1999 and Section 7 of this Act;

8. In view of the said provision there cannot be any doubt whatsoever that the suit having

been filed in the year 1998, proviso to Order 6 Rule 17 of the Code shall not apply.

6. On the allegation levelled by the learned counsel for the petitioner that the respondent No. 3 has adopted dilatory tactics by submitting the application for amendment belatedly at the stage of appeal, he further invited the attention of this court towards the same decision in which the Hon'ble Supreme Court has held that the court is not powerless to consider the question as to whether the relief sought for would be otherwise barred by limitation, whereas in the present case this is not the case of the petitioner. He further submitted that since through the proposed amendment he has only tried to explain the facts, which are necessary for the purpose of determining the real question of controversy between the parties, the proposed amendment will not cause failure of justice or irreparable injury to the petitioner, on the other hand in refusal to allow the said amendment may result in miscarriage of justice, therefore, the proposed amendments deserves to be allowed. In support of his submission he cited a case of Hon'ble Supreme Court i.e. [Prem Bakshi and Others Vs. Dharam Dev and Others](#),, paragraph 6 of which is reproduced hereunder:-

6. Now the question is whether the order in question has caused failure of justice or irreparable injury to Respondent 1. it is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps the converse is possible i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. After all, amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable injury to any party. He further submits that the amendment of the plaint and amendment of the written statement are not governed by exactly the same principle and the clarification in the pleading of the written statement is very much permissible as has been held by the Hon'ble Supreme Court in the case of Sushil Kumar Jain v. Manoj Kumar and another, reported in 2009 (27) LCD 1096. The relevant paragraphs 9 and 10 are reproduced hereunder:-

9. That apart, a careful reading of the application for amendment of the written statement, we are of the view that the appellant seeks to only elaborate and clarify the earlier inadvertence and confusion made in his written statement. Even assuming that there was admission made by the appellant in his original written statement, then also, such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his defence.

10. At this stage, we may remind ourselves that law is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering, substituting a new cause of action. (See: [Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.](#),).

He further pointed out that even the admission made by the defendant in his written statement can be explained by filing the application for amendment of the same. To support his submission he further invited the attention of this court towards paragraph 12 of the same judgment, which is reproduced hereunder:-

12. Keeping these principles in mind, let us now take up the question raised before us by the learned counsel for the parties. As stated herein earlier, the admission made by a defendant in his written statement can be explained by filing the application for amendment of the same. This principle has been settled by this Court in [Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another](#), , while considering this issue, held that the admission made by a party may be withdrawn or may be explained. It was observed in Paragraph 3 of the said decision as follows:

An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amendment, an admission of fact cannot be withdrawn.....

In view of our discussions made hereinabove and applying the principles laid down by this Court in the aforesaid decisions, we are therefore of the view that the High Court as well as learned Rent Controller had acted illegally and with material irregularity in the exercise of its jurisdiction in not allowing the application for amendment of the written statement of the appellant."

7. He further submitted that so far as the contentions of learned counsel for the petitioner that the application for amendment, which has been filed at the stage of appeal, is delayed, is concerned, the delay is no ground for refusal of prayer for amendment in the written statement as has been held by the Hon'ble Supreme Court in the case of [Andhra Bank Vs. ABN Amro Bank N.V. and Others](#), .

8. He further submitted that the effect of the amendment of the pleading cannot be seen while allowing the application for amendment as has been held by the Hon'ble Supreme Court in the same very case i.e. Andhra Bank (Supra). In paragraph 5 of the aforesaid judgment the Hon'ble Supreme Court has held that while allowing the application for amendment of the pleadings the court cannot go into the question of merit of such amendment. The only question at the time of consideration of amendment of the pleading would be whether it is necessary for decision of the real controversy between the parties in the suit. He further submits that the amendment should generally be allowed unless it is shown that permitting the amendment would be unjust and results encroaches against the opposite side, which cannot be compensated by costs or would deprive of a right, which would accrued to him with the lapse of time, as has been held by the Hon'ble Supreme Court in the case of [Dondapati Narayan Reddy Vs. Duggirddey Venkatanarayana Reddy and Others](#), . In which the Hon'ble Supreme Court has held that Rules governing the pleadings and leading of evidence have been incorporated to advance the interest of justice and to avoid multiplicity of litigation. The amendment should generally, be allowed unless it is shown that permitting the amendment would be unjust and result in prejudice against

the opposite side which cannot be compensated by costs or would deprive him of a right which has accrued to him with the lapse of time.

9. He further cited a case i.e. *Revajeetu Builders and Developers v. Narayanaswamy and sons and others*, reported in 2009 (1) SCC 84. In paragraph 63 of which the Hon'ble Supreme Court has laid down the principles, which ought to be taken into consideration while allowing or rejecting the application for amendment, which is reproduced hereunder:-

On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

10. In the light of the aforesaid proposition laid down by the Hon'ble Supreme court, he submits that the proposed amendment is necessary and imperative for proper and effective adjudication of the case. He has moved the application bonafidely and the amendment would not cause any prejudice to the opposite side. Through the proposed amendment in the written statement he has not come with a new defence, but he has only explained the facts brought on record through the written statement which are necessary to decide the real controversy involved in the case and the proposed amendment is not barred by limitation.

11. In the light of the aforesaid principles laid down by the Hon'ble Supreme Court in the matter of amendment of the written statement, he submitted that the facts of payment of Rs. 68,000/- by the respondent No. 3 to the petitioner, which was required to be paid by the petitioner to her husband in terms of compromise made between them in a case No. 121 of 1981 has already been stated in the written statement, but through the proposed amendment

in Paragraph 27- Ya and Ra, the respondent No. 3 has only tried to explain as to in which circumstances and how and in which manner the said payment was made to the petitioner. The other factor of oral gift executed in favour of respondent No. 3 by the petitioner is also on record through the written statement, but the respondent No. 3 has tried to explain as to why despite of execution of Will by the petitioner in favour of respondent No. 3 of the same ' property, the occasion arose to make an oral gift of the same property in favour of respondent No. 3. Accordingly it has been submitted by Mr. Mehrotra, learned counsel for the respondent No. 3 that the proposed amendment in the written statement are necessary for the purpose of determination of real question. Since these facts were not on record, the trial court failed to appreciate the case of the opposite party No. 3 in determination of the controversy involved in the matter. Mr. Mehrotra, also submits that if the proposed amendments are inserted, respondent No. 3 undertakes not to lead any evidence in support of the proposed amendments, therefore, it cannot be said that by way of application for amendment, he has adopted any dilatory practice to delay the proceeding of appeal.

12. After hearing the learned counsel for the parties as well as upon perusal of the record when I go through the proposed amendments in the written statement in the light of the above noted decisions, I find that the proposed amendment is explanatory in nature, which does not cause any prejudiceness to the petitioner. The answering respondent has not come with any new stand in his defence. Since the suit is pending since 1998 the proviso to Rule 17 of Order 6 CPC cannot be made applicable in the present case as has been held by the Hon'ble Supreme Court in the case of State Bank of Hyderabad v. Town Municipal Council (Supra). The only factor which is considerable is that the petitioner has proposed the said amendment at the stage of appeal and that too on a belated stage at second time. Since the Hon'ble Supreme Court in the case of Andhra Bank's (Supra) has held that the delay in moving the application for amendment is no ground to reject the application, I do not find error in allowing the application for amendment at the appellate stage. One objection raised by the petitioner, which is material for consideration, is that by way of amendment, as proposed through the paragraph 27-Sha, the answering respondent has tried to resile the statement of witness, D.W.1, made in his cross examination, which is to permissible in the eye of law, therefore, I do not feel it appropriate to permit the said amendment in the written statement, thus the proposed amendment through paragraph 27-Sha is rejected. Accordingly I hereby modify the order dated 3rd of July, 2009, passed by the Additional District Judge to the extent that the proposed amendment of Paragraph 27-Sha in the written statement is rejected. For rest of the amendments the order passed by the Additional District Judge is maintained.

13. In the aforesaid terms the writ petition is disposed of finally.