Uttam Chand Kothari Vs Gauri Shankar Jalan and Others

Court: Gauhati High Court

Date of Decision: Oct. 30, 2006

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 105, 115, 16, 53
Constitution of India, 1950 â€" Article 226, 227
Evidence Act, 1872 â€" Section 58

Citation: AIR 2007 Guw 20 : (2007) 1 GLT 37

Hon'ble Judges: I.A. Ansari, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

I.A. Ansari, J.
Whether an admission made by a defendant, in his written statement, can be allowed to be withdrawn by way of

amendment? Is there, in the matter of permitting such amendment of a written statement, any difference between an ''express admission'' and an

''implied admission''? Can a lawyer''s incorrect instructions, omission or failure leading to the making of an implied or express admission, in a

written statement, be allowed to be withdrawn by way of amendment and if not, what is the remedy for a defendant, whose written statement

contains, on account of incorrect instructions, failure or omission of his counsel, an admission, either express or implied? Is there any remedy

available at all to a defendant if an admission, implied or express is made by him in a written statement, following incorrect instructions, omissions

or failure on the part of his counsel and if so, what is the remedy? Should this Court interfere with the impugned order passed by the learned trial

Court disallowing the defendant''s prayer for amendment of his written statement? These are some of the prominent questions, which have arisen

for determination in the present writ petition.

2. I have heard Mr. S. Sharma, learned Counsel for the defendant-petitioneri, and Mr. B.K. Goswami, learned Senior counsel, appearing on

behalf of the plaintiffs-respondents.

3. The material facts and various stages, which have led to the present writ petition, may, in brief, be set out as follows:

The plaintiff-defendants instituted Title Suit No. 171/96, on 9-10-1996, seeking, inter alia, decree for ejectment of the defendant from suit

premises and for arrear of rents on the grounds that the defendant was a defaulter and that the suit premises were bona fide required by the

plaintiffs for their own use and occupation. Paragraphs 3 and 15 to 19 of the plaint read as follows:

3. That as per agreement the rent was fixed at Rs. 1,650/- (Rupees one thousand six hundred fifty) only per month payable within 7 days of the

succeeding months. It was agreed that the tenancy will commence on and from 1-6-1992 and will be according to English Calender month.

15. That the plaintiffs in view of the facts stated above urgently require the suit premises not only for meeting their present requirement but also for

expansion of their business.

16. That on several request and defence made by the plaintiffs for handing over the possession of the suit premises the defendant assured the

plaintiffs to vacate the premises but he failed to do the same and also stopped payment of rent and lastly on 2-10-1996 the plaintiffs again

requested to vacate the premises but the defendant turned a deaf ear and neither paid the arrear amount nor vacated the suit premises and hand

over possession to the plaintiffs. So the plaintiffs are compelled to file this present suit for ejectment and for arrear rent.

17. That the defendant has not paid the rent since May, 1996 and so the plaintiffs are entitled to receive the arrear rent and so they claim Rs.

9,900/- on account of arrear rent from May, 1996 to September, 1996 (both months inclusive.

18. That the cause of action for the suit arose on 7-6-1996 when the defendant failed to make payment of the rent for the month of May, 1996.

Cause of action also arose on every 7th day of every subsequent month when the defendant failed to make payments of the rent for the suit

premises. Cause of action also arose on 2-10-1996 when the plaintiffs lastly requested to vacate the premises and defendant failed to do the same.

The cause of action arose at Fancy Bazar, Guwahati and so this Court has jurisdiction to entertain the suit.

19. That the suit is valued at Rs. 33,660/-for purpose of jurisdiction and court-fee is paid on Rs. 23,760/- (being one year"s rent) and Rs. 9,900/-

(being arrear rent) separately.

4. The defendant resisted the suit by filing his written statement on 1,09,1997, where he did not specifically deny the statements made by the

plaintiffs in paragraphs 3 and 15 to 19 aforementioned.

5. The learned trial Court framed, on 7-4-1998, issues in the suit the issues so framed included issues as to whether the defendant was a defaulter

and whether the suit premises were bona fide required by the plaintiffs for their own use and occupation. The defendant filed a petition, on 31-3-

1999, seeking to amend his written statement. By this petition, the statements, which had not been specifically denied by the defendant in his

written statement, were sought to be denied by incorporating amendments in the pleadings of the written statement. When this petition for

amendment came up for hearing on 12-5-1999, the defendant and also his counsel were not present. The learned trial Court, however, passed an

order, on 12-5-1999, disallowing the amendments, sought for, on the ground that the defendant would be entitled to adduce evidence on the

question of bona fide requirement, in terms of issue No. 4. This order rejecting the prayer for amendment of the pleading of the written statement

remained unchallenged by the defendant and, therefore, attained finality. The defendant, then, filed another petition, on 27-8-1999, for amendment.

By order, dated 27-8-1999, the learned trial Court allowed correction of some typographical errors appearing in the written statement, but it

rejected that part of the defendant"s prayer, which sought to amend the pleadings with regard to the bona fide requirement, on the ground that

prayer for such an amendment already stood turned down on 12-5-1999. The plaintiffs, then, examined their first witness on 1-9-2001 and their

second witness was examined on 30-11-2004. Without, however, cross-examining these two witnesses, the defendant came forward with a third

petition, on 20-2-2002, seeking, once again, amendment of the pleadings of his written statement by specifically incorporating denial of those

statements of the plaint, which had not been specifically denied by the defendant in his written statement.

6. Having heard both sides, the learned trial Court rejected the prayer for amendment on 26-7-2002. This order was assailed in Civil Revision No.

304/2002. As the High Court refused to entertain the revision, on 24-5-2004, on the ground that a revision against an order refusing to grant

amendment is no longer maintainable u/s 115 of the Code of Civil Procedure, the defendant has filed, on 20-10-2004, the present writ petition,

under Article 227 of the Constitution of India, challenging the order passed in the suit, on 26-7-2002, aforementioned disallowing the defendant"s

third petition for amendment. It is in these circumstances that the present writ petition has been taken up for hearing.

7. Before proceeding further, it needs to be noted that the reason for seeking amendment is that according to the defendant, after his earlier

Advocate withdrew from the suit, the Advocate, now, engaged by him, has informed him (the defendant) that he (the defendant) ought to have

specifically denied the relevant pleadings appearing in the written statement, particularly, the pleadings appearing in paragraph Nos. 3 and 15 to 19

of the plaint and, hence, in these circumstances, the defendant had no option, but to seek amendment of his written statement.

8. Presenting the case on behalf of the defendant-petitioner, Mr. S. Sharma has submitted that for the fault of a counsel, the party to a suit should

not be penalized and when it was, on account of lack of instructions, that each of the material pleadings, made in the plaint, had not been

specifically denied by the defendant, the learned trial Court committed serious error of law in disallowing the defendant''s prayer for amendment of

the pleadings in his written statement.

9. Controverting the submissions made on behalf of the defendant-petitioner, Mr. B.K. Goswami, learned Senior counsel, has submitted that

though the Court needs to be, ordinarily, liberal in allowing amendment of written statements, an admission, made in a written statement, cannot be

permitted to be withdrawn by way of amendment. Support for this submission is sought to be derived by Mr. Goswami from the decision, in S.T.

Muthusami Vs. K. Natarajan and Others, and G.K. Bhatnagar (D) by Lrs. Vs. Abdul Alim, Mr. Goswami has also pointed out that the

amendments, which the petitioner has, now, sought to make, are materially same, which the learned trial Court had already disallowed as early as

on 12-5-1999 and the defendant-petitioner, having never challenged the order, dated 12-5-1999, the same attained finality and it is impermissible

in law to allow the defendant to make, now, amendment of his written statement on the basis of similar petition for amendment. It is further pointed

out by Mr. Goswami that in the case at hand, there can be no doubt that the learned trial Court had the power and jurisdiction to allow or not to

allow the amendment and since the learned trial Court has, in exercise of its jurisdiction, refused to grant the amendments, this Court, in exercise of

powers under Article 227, may not allow the amendments, for, even an erroneous decision, in the absence of anything more, is not amenable to

writ jurisdiction. In support of this submission. Mr. Goswami places reliance on Surya Dev Rai Vs. Ram Chander Rai and Others, Drawing

attention of this Court to the fact that it is the third petition for amendment made by the defendant, which the learned trial Court has disallowed Mr.

Goswami has also pointed out that the plaintiffs examined his first witness, as early as, on 1-9-2001, and the defendant is yet to cross-examine him

and the second witness of the plaintiffs has been examined on 30-11-2004, who has also remained without being cross-examined by the

defendant. The High Court, points out Mr. Goswami, dismissed the revision, in the present case, on 24-5-2004, but the defendant came to this

Court with the present writ petition, as late as, on 20-10-2004. For so belatedly approaching this Court, the defendant has not offered, further

points out Mr. Goswami, any explanation whatsoever and this indicates, according to Mr. Goswami, that the defendant is trying to prolong and

frustrate the plaintiffs'' suit by making repeated petitions for amendment. In such circumstances, the writ petition may not be allowed.

10. Repelling the submissions made on behalf of the plaintiffs-respondents, Mr. S. Sharma has submitted that there is a difference between an

implied and an express admission. When a defendant, according to Mr. S. Sharma, does not specifically deny a statement made in a plaint, it is a

case of implied admission and an implied admission can be allowed to be withdrawn by way of amendment, for, the Court, an the case of on

implied admission, has, notwithstanding such admission, the power to insist on the plaintiffs to prove the fact, which the defendant has, by non-

traversing such a fact, has impliedly admitted. In short, what Mr. Sharma contends is that since the Court has, under Order VIII, Rule 5, the power

to insist on a plaintiff to prove his case notwithstanding the fact that the defendant has not specifically denied a particular statement made in the

plaint, the defendant may be allowed to withdraw, by way of amendment, such an implied admission occurring due to non-denial of the statement

made in the plaint. Support for this submission is sought to be derived by Mr. Sharma from the case of Mahendra Radio and Television, Meerut

and Another Vs. State Bank of India, and Gobinda Sahoo Vs. Ram Chandra Nanda and Another, .

11. Mr. Sharma has also submitted that even defective pleadings may be permitted to be cured by way of amendment and in the case at hand,

since the counsel''s inefficiency had led to the implied admission of the statements made in paragraph Nos. 3 and 15 to 19 of the plaint, such

amendments ought to have been permitted. Reference, in this regard, is made by S. Sharma to the case of Ganesh Trading Co. Vs. Moji Ram, .

Amendment according to Mr. Sharma, can be permitted to elaborate the defendant''s defence and a defendant can take additional pleas and also

explain an indirect admission made in the original pleadings. Reference, in this regard, is made by Mr. Sharma to the case of M/s. Estralla Rubber

Vs. Dass Estate (Pvt.) Ltd.,

12. Before entering into the question as to whether the impugned order needs interference by this Court under Article 227, it is, to my mind,

necessary to ascertain if there is any difference in the law between an ''express'' and ''implied'' admission made in a written statement and

withdrawal thereof by way of amendment.

13. My quest for an answer to the above question brings me to Order VIII, Rules 3, 4 and 5 of the CPC (in short, "the Code"). The relevant

provisions are quoted herein below:

3. Denial to be specific : It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but

the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Evasive denial : Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance.

Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must

deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances,

it shall not be sufficient to deny it along with those circumstances.

5. Specific denial : (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the

pleading of the defendant, shall be taken to be admitted except as against a person under disability.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the

plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to Sub-rule (1) or under Sub-rule (2), the Court shall have due regard to the fact whether the

defendant could have, or has, engaged a pleader.

(4) Whenever a judgment Is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear

the date on which the judgment was pronounced.

14. What may be noted is that Order VIII, Rule 5(2) to 5(4) were inserted by the 1976 Amendment to the Code of Civil Procedure, 1908.

15. From a careful reading of Order VIII, Rules 3, 4 and 5, it clearly emerges that when an allegation of a fact, made in the plaint, is not denied, in

a written statement, specifically or by necessary implication or is not stated to have not been admitted, such a pleading will constitute an implied

admission. In short, evasive denial or non-specific denial constitutes an implied admission in a judicial proceeding of civil nature. This does not,

however, mean, I must hasten to add, that an implied admission must necessarily occur in a Judicial proceeding, for, it is possible to make an

implied admission, otherwise than in a judicial proceeding, in terms of the provisions of the Evidence Act. Whether there is an implied admission or

not is, usually, a question of fact or may, in a given case, be a mixed question of fact and law. An express admission is one which is specifically

made, either in a judicial proceeding or otherwise, in accordance with the provisions of the Evidence Act. However, in order to determine if an

admission has been made in a written statement, the written statement has to be read as a whole.

16. In the present case, we are concerned with the scope of amendment in respect of withdrawing of admissions, express or implied, made by a

defendant in his written statement. The law laid down by the Apex Court, in this regard, in its various pronouncements, would go to show that

admissions, made in a written statement, cannot be allowed to be withdrawn by way of amendment, be the admissions express or implied.

17. In its authoritative pronouncement made in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., a 3 Judges

Bench of the Supreme Court, at paragraph 10, held as follows:

It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative

pleadings but it is seeking to deplace the plaintiff completely from the admissions made by the defendants in the written statement. If such

amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the

defendants. The High Court rightly rejected the application for amendment and agreed with the that Court.

18. From the case of Modi Spinning & Weaving Mills. Co. Ltd. (supra), it is clear that when the amendment, sought for by the defendant, seeks to

completely displace the plaintiff from the admission, which the defendant has made in his written statement, such an amendment cannot be

permitted merely on the ground that the defendant is entitled to take inconsistent and alternative pleas and/or make inconsistent and alternative

pleadings.

19. Having taken note of the fact that a 2-Judges-Bench in Akshaya Restaurant Vs. P. Anjanappa and Another, had permitted the defendant to

resile, by way of amendment, from earlier admission made by the defendant and that this decision runs contrary to the decision in Modi Spinning &

Weaving Mills Company Ltd. (supra), the Supreme Court, in its subsequent decision, in Heeralal Vs. Kalyan Mal and Others, , held as follows:

Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind this admission that there was

an agreement of 25-1-1991 between the parties but the nature of the agreement was sought to be explained by him by amending the written

statement by submitting that it was not an agreement of sale as such but it was an agreement for development, of land. The facts of the present case

are entirely different and consequently the said decision also cannot be of any help for the learned Counsel for the respondents. Even that apart the

said decision of two learned Judges of this Court runs counter to a decision of a Bench of three learned Judges of this Court in the case of Modi

Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., . In that case Ray, C.J., speaking for the Bench had to consider the

question whether the defendant can be allowed to amend his written statement by taking an Inconsistent plea as compared to the earlier plea which

contained an admission in favour of the plaintiff. It was held that such an Inconsistent plea whcih would displace the plaintiff completely from the

admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in the written statement the plaintiff

will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the

plaintiff for claiming a decree for Rs. 1,30,000 against the defendants. The defendants in their written statement admitted that by virtue of an

agreement dated 7-4-1967 the plaintiff worked as their stockist-cum-dlstributor. After three years the defendants by application under Order VI,

Rule 17 sought amendment of written statement by substituting paras 25 and 26 with a new paragraph in which they took the fresh plea that the

plaintiff was mercantile agent-cum-purchaser, meaning thereby they sought to go behind their earlier admission that the plaintiff was stockist-cum-

distrtbutor. Such amendment was rejected by the trial Court and the said rejection was affirmed by the High Court in revision. The said decision of

the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned Judges of this Court Is a clear

authority for the proposition that once the writ ten statement contains an admission In favour of the plaintiff, by amendment such admission of the

defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would

cause him irretrievable prejudice. Unfortunately the aforesaid decision of this three member Bench of the Court was not brought to the notice of the

Bench of two learned Judges that decided the case in Akshaya Restaurant 1995 AIR SC 2277 . In the latter case it was observed by the Bench of

two learned Judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings.

The aforesaid observations in the decision in Akshaya Restaurant proceed on an assumption that it was the settled law that even the admission can

be explained and even inconsistent pleas could be taken in the pleadings. However, the aforesaid decision of the three member Bench of this Court

in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., is to the effect that while granting such amendments to written

statement no inconsistent or alternative plea can be allowed which would displace the plaintiffs case and cause him irretrievable prejudice.

10. Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiffs case it

could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by the latter Bench of two

learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it

was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking

a diametrically opposite view.

20. From the decision in Heeralal Vs. Kalyan Mal and Others, it becomes clear that when an amendment, sought for by a defendant, seeks to

withdraw an admission made earlier in his written statement, such an amendment would not be permitted. Such withdrawal of admission by way of

amendment is not permissible, reiterates the Apex Court, in Heeralal (supra), on the ground that a defendant is entitled to take inconsistent or

alternative pleas.

21. Clarifying that while a defendant may take inconsistent or alternative pleas, those inconsistent or alternative pleas, which may amount to

negating an admission already made in a written statement, cannot be permitted to be taken by way of amendment, the Apex Court in B.K.N.

Narayana Pillai Vs. P. Pillai and Another, ,at paragraph 4, page 717 B.K.N. Narayana Pillai Vs. P. Pillai and Another, held as follows:

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more

generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a

right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be

subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed

which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new

cause of action on the basis of which the original list was raised or defence taken. Inconsistent and contradictory allegations in negation to the

admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the

pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should

be allowed which amounts to or relates (sic results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay

in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should

not be made a ground for rejecting the application for amendment of plaint or written statement.

22. Emphasising that the amendments, which aim at resiling from an express admission, cannot be allowed, the Supreme Court, in Union of India

(UOI) Vs. Pramod Gupta (D) by L.Rs. and Others,

134. We do not agree. The pleadings before the trial Court are the basis for adduction of evidence either before the trial Court or before the

appellate Court. By amending the memo of appeal the original pleadings cannot be amended. The respondent claimants made their claim before

the Reference Court claiming compensation for the lands acquired under two different references at a certain rate. They are bound by the said

pleadings. Section 53 merely provides for applicability of the provisions of the CPC including the one containing Order 6, Rule 17 thereof. Order

6, Rule 17 of the CPC postulates amendment of pleadings at any stage of the proceedings. Before an amendment can be carried out in terms of

Order 6, Rule 17 of the CPC the Court is required to apply its mind on several factors including viz. whether by reason of such amendment the

claimant intends to resile from an express admission made by him. In such an event the application for amendment may not be allowed. See Modi

Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., , Heeralal Vs. Kalyan Mal and Others, and Sangramsinh P.

Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others,

23. What emerges from the various authorities cited above is that normally, amendment to a written statement is allowed subject to a few

exceptions, these exceptions are:

(i) The proposed amendment which the defendant seeks to make, should not cause injustice to the plaintiff and the admissions made in favour of

the plaintiff should not be allowed to be withdrawn.

(ii) The proposed amendment should not be allowed, if inconsistent and contradictory allegations in negation to the admitted position of facts or

mutually destructive allegations of facts are sought to be incorporated by means of amendment to the pleadings.

(iii) The proposed amendment should not be allowed if it amounts to, or results in, defeating a legal right accruing to the opposite party on account

of lapse of time.

24. The law, as regards amendment of written statements, is, thus, almost settled. The principles applicable to the amendments of the plaint are

applicable with equal force to the amendments of the written statements. However, the Courts are more generous in allowing amendment of written

statement as the question of prejudice is less likely to operate in the case of written statement. The defendant has a right to take alternative pleas in

defence, which, however, is subject to an exception that by proposed amendment, the opponent should not be subjected to prejudice. All

amendments of the pleadings should be allowed, which are necessary for determination of the real controversies in the suit provided that the

proposed amendment does not alter or substitute defence taken. However, inconsistent and contradictory allegations in negation to the admitted

position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings.

Proposed amendment should not cause such prejudice to the other side, which cannot be compensated by costs. No amendment should be

allowed, which amounts to, or results in, defeating a legal right accruing to the opposite party on account of lapse of time. The delay, in filing a

petition for amendment of the pleadings, should be properly compensated by costs. Error or mistake, which, if not fraudulent, should not be,

ordinarily, made a ground for rejecting the application for amendment of a written statement. Above, all, no admission made in favour of a plaintiff,

can be allowed to be withdrawn by amendment.

25. Now, the second question, which has to be answered, is as to what type of admissions can be allowed to be withdrawn by amendment or, for

that matter, whether evasive denial or non-specific denial, which constitutes implied admission, can be set right or wthdrawn by means of

amendment?

26. My quest for an answer to the question, posed above, brings me back to the provisions of Order VIII, Rules 3, 4 and 5.

27. Order VIII, as it stood before the same underwent amendment in 1976, came up for interpretation before a 3-Judges Bench of the Supreme

Court, in Badat and Co. Vs. East India Trading Co., . Referring to Order VIII, Rules 3, 4 and 5, the Supreme Court, at paragraph 11, observed

and held as follows:

These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal

consequences flowing from its non-compliance. The written statement must deal specifically, with each allegation of fact in the plaint and when a

defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the

said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first para of Rule 5 is a

reproduction of Order 19, Rule 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not

precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties

with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of Rule 5 has been modified by the introduction

of the proviso thereto. Under that proviso the Court may, in its discretion require any fact so admitted to be proved otherwise than by such

admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity in the pleadings in the

interest of justice. But on the original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious

thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice

to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and

thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the

justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and

conventions of a Court wherein such pleadings are filed.

It is true that in England the concerned rule is inflexible and that there is no proviso to it as is found in the Code of Civil Procedure. But there is no

reason why in Bombay on the original side of the High Court the same precision in pleadings shall not be insisted upon except in exceptional

circumstances. The Bombay High Court, in Laxminarayan v. Chimniram Girdhari Lal AIR 1918 Bom 103, construed the said provisions and

applied them to the pleadings in a suit filed in the Court of the Joint Subordinate Judge of Ahmednagar. There, the plaintiffs sued to recover a sum

of money on an account stated. For the purpose of saving limitation they relied in their plaint upon a letter sent by the defendant firm. The

defendants in their written statement stated that the plaintiffs suit was not in time and that ""the suit is not saved by the letter put in from the bar of

limitation"". The question was raised whether in that state of pleadings the letter could be taken as admitted between the parties and, therefore,

unnecessary to be proved. Batchelor. Ag., C.J. after noticing the said provisions, observed:

It appears to us that on a fair reading of para 6, its meaning is that though the letter put in by the plaintiffs is not denied, the defendants contend that

for one reason or another its effect is not to save the suit from the bar of limitation. We think, therefore, that the letter, Exhibit 33, must be

accepted as admitted between the parties, and therefore unnecessary to be proved.

The written statement before the High Court, in that case was one filed in a Court in the mofussil; yet, the Bombay High Court applied the Rule and

held that the letter need not be proved aliunde as it must be deemed to have been admitted in spite of the vague denial in the written statement. I,

therefore, hold that the pleadings on the original side of the Bombay High Court should also be strictly construed, having regard to the provisions of

Rules 3, 4 and 5 of Order 8 of the Code of Civil Procedure, unless there are circumstances wherein a Court thinks fit to exercise its discretion

under the proviso to Rule 5 of Order 8.

28. From what has been held and laid down, in Badat & Co. (supra), what clearly surfaces is thus : ""The written statement must deal specifically

with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance.

If his denial of a fact is not specific but evasive, the said fact shall be taken to have been admitted. In such an event, the admission itself being

proof, no other proof is necessary. However, in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if

they were strictly construed in terms of the said provisions, grave injustice would be done to the parties with genuine claims. To do justice between

those parties, for which Courts are intended, the rigor of Rule 5 has been modified by the introduction of the proviso thereto. Under that proviso

the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In construing such pleadings, the

proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental

slip or omission, but not to help a party who designedly made vague denials and, thereafter, sought to rely upon them for non suiting the plaintiff.

29. Pointing out that a non-specific or evasive denial amounts to admission, an admitted fact need not be proved and that evidence cannot be

allowed to be adduced contrary to such admission or inconsistent with such an admission, the Supreme Court, in Sushil Kumar Vs. Rakesh

Kumar, , held as follows:

73. In our opinion, the approach of the High Court was not correct. It failed to apply the legal principles as contained in Order 8, Rules 3 and 5 of

the Code of Civil Procedure. The High Court had also not analysed the evidences adduced on behalf of the appellant in this behalf in detail but

merely rejected the same summarily stating that vague statements had been made by some witnesses. Once it is held that the statements made in

paragraph 18 of the election petition have not been specifically denied or disputed in the written statement, the allegations made therein would be

deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid.

30. The Supreme Court, in Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar, too has held as follows:

13. Order 8, Rule 5(1) reads as follows:

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the

defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be provided otherwise than by such admission.

14. What is stated in the above is, what amounts to admitting a fact on a pleading while Rule 3 of Order 8 requires that the defendant must deal

specifically with each allegation of fact of which he does not admit the truth.

15. Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant.

What this rule says is, that any allegation of fact must either be denied specifically or by a necessary implication or there should be at least a

statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation shall be taken to be admitted.

16. From the above findings, it is clear that the plaint categorically stated in paragraph 7 as under:

That the said late Ramprit Kumar - the father of the defendant I having defaulted to pay rent of the said land having become defaulter under the

Assam Urban Area Rent Control Act and having sublet the land and the plaintiff having required the said land for their own use and occupation

after construction of buildings thereon, the plaintiff through their lawyer Shri C.C. Chakraborty, B.L. Pleader, Dibrugarh, served the said late

Ramprit Kumar the father of defendant 1 with a notice of ejectment dated January 8, 1965 through Regd. AID post requiring the said late Ramprit

Kumar the father of defendant 1 to quit, vacate and deliver up vacant possession of the said land on the expiry of the 28th day of February, 1966

after removal of the temporary structures therefrom. The said notice of ejectment was duly delivered and served upon the said late Ramprit Kumar

the father of defendant 1 and copy of the said notices were also sent to the pro forma defendants 2, 3, 4 and 5. The true copy of the said notices

and the postal receipt and the AID receipt are filed herewith and marked as plaintiffs document Nos. 1, 2 and 3.

17. The answer to this is in paragraph 5 of the written statement to the following effect:

That the notice of ejectment as referred to in para 7 of the plaint is not according to law.

18. Certainly it is a case to which Order 8, Rule 5 was attracted. It is unnecessary to examine the question as to where a judicial admission could

be permitted to be withdrawn or retracted.

19. Non-traverse would constitute an implied admission. In the facts of this case the findings of the trial Court and that of the first appellate Court

could be upheld on this admission. Thus, we find the High Court was wrong in interfering with the finding. Accordingly, the appeal will stand

allowed. No costs.

31. From the decision of the three Judges Bench, In Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., , it is clear

that an amendment, which seeks to displace a plaintiff completely from the admission made by the defendant in his written statement, cannot be

allowed. The decision, in Modi Spinning & Weaving Mills Co. Ltd. (supra), makes no distinction between express admission and implied

admission. So long as withdrawal of an admission, express or implied, seeks to displace a plaintiff completely from the admission so made, such a

withdrawal, by way of amendment of the written statement, cannot be permitted. The case of Lohia Properties (P) Ltd. (supra) shows that when a

statement made, in a plaint, is not specifically denied, it would constitute an implied admission. That even an implied admission cannot be allowed

to be withdrawn by way of amendment of the written statement can also be inferred from the decision, in Nagindas Ramdas Vs. Dalpatram

Ichharam alias Brijram and Others, , for a three Judges Bench of the Apex Court, in Nagindas Ramdas (supra), has held.

...Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible u/s 58 of

the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions.

The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made

the foundation of the rights of the parties. On the other hand, evidentiary admissions, which are receivable at the trial as evidence, are by

themselves, not conclusive. They can be shown to be wrong.

32. Since pleadings include both plaint as well as written statement, the decision, in Nagindas Ramdas (supra), makes it clear that an admission, in

the pleadings, or judicial admission stands on higher footing than evidentiary admission and admissions in the pleadings or judicial admissions are

fully binding on the party, which makes such an admission, and constitute waiver of proof thereof. The admission in the pleadings or judicial

admissions would obviously include both express admission as well as implied admission.

33. In the backdrop of the decision in Nagindas Ramdas (supra) and Lohia Properties Pvt. Ltd. (supra), when the decision, in Modi Spinning &

Weaving Mills Co. Ltd. (supra), is carefully analysed, there remains no escape from the conclusion that even an implied admission, made in a

written statement, is binding on the party making the admission, such admissions constitute waiver of proof and cannot be allowed to be withdrawn

by way of amendment of the written statement,; particularly, when the admission seeks to displace a plaintiff from the admission made by the

defendant in his written statement. Situated thus, I with all humility, find myself completely unable to agree with the views expressed, in Mahendra

Radio and Television, Meerut and Another Vs. State Bank of India, and Gobinda Sahoo Vs. Ram Chandra Nanda and Another, , which lay down

that an admission, made inadvertently or erroneously due to fault of an Advocate can be allowed even if the effect of such an amendment is to take

away the admission made.

34. The question, therefore, is as to what remedy a defendant has when a wrong instruction or lack of instruction of his counsel lead to implied

admission. Sufficient light, on this aspect of law, is thrown by the decision in Badat and Co. Vs. East India Trading Co., , for, this decision show

that ordinarily, the pleadings should be strictly construed and an implied admission shall not be, ordinarily, required to be proved by adducing

evidence.

35. What is important to note is that the proviso to Rule 5 gives to the Court the power to insist that notwithstanding the fact that there is an implied

admission, because of non-traversing of a fact, the plaintiff proves his statement by adducing evidence. The exercise of this discretion cannot be

arbitrary and the Court may have to bear in mind the standard of drafting obtaining at the place, where the suit is instituted. Thus, in a given case,

when the counsel''s default leads to an implied or express admission, the remedy of the defendant does not lie in withdrawing the admission by

making amendment in the written statement, but in making out a case for the Court to exercise its powers under the proviso to Rule 5 of Order 8

and insist upon the plaintiff to prove his case notwithstanding the admission - implied or express - made in the written statement. In the case at hand

too, if the learned trial Court finds that non-traversing of the statements made in paras 3 and 15 to 19 of the plaint have been impliedly admitted by

the defendant and still if the defendant satisfies the learned trial Court that such admission was due to fault of his earlier counsel, the Court may, if

satisfied, insist on the plaintiffs, to prove the statements made in paras 3 and 15 to 19 of the plaint.

36. Coupled with the above, it is pertinent to note that apart from the fact that Order VIII, Rule 5 permits the Court to insist on a plaintiff to prove

a fact notwithstanding an implied admission, which the defendant might have made, even Section 58 of the Evidence Act makes it clear that

notwithstanding a defendant''s admission, express or implied, made in his written statement, a Court may, in its discretion, require the facts

admitted to be proved otherwise than by such admission.

37. What emerges from the above discussion is that admission, express or implied cannot be withdrawn by way of amendment, but when the

admission, express or implied, occurs due to faulty advice of a counsel or for any other reason, the party affected may apply to the Court to direct

the plaintiff to prove a fact otherwise than by way of admission.

38. Let me, now, point out that substantial changes have been Incorporated In the provisions of Order VI, Rule 17 of the Code, byway of CPC

(Amendment) Act, 2002, which came into force on 1-7-2002. Order VI, Rule 17 of the Code reads as follows:

VI 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.

39. The aim of the sweeping changes, which have been introduced in the Code, is to cut short the delay in the disposal of the suits. A significant

amendment has, therefore, been introduced in Order VI, Rule 17, which, now, imposes restrictions, on the part of the Court, to allow amendment

after the trial has already 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 the trial Court. What, however, needs to be borne in mind is that the amendment of Order VI, Rule 17 has

not denuded completely the Court of its power to permit amendment even after the hearing has commenced. Though the proviso to Order VI,

Rule 17 does not, in the light of the provisions of Section 16(2)(b) of the CPC (Amendment) Act, 2002, apply to the pleadings filed before the

commencement of the amended provisions of Order VI, Rule 17, the fact remains that even without such an amendment, no Court could have

ignored the fact that it is only in exceptional and extraordinary circumstances and only when sufficient and convincing reasons for belatedly

proposing an amendment are offered by the party that the Court could have allowed the party to make amendments of Its pleadings after the

hearing of the suit had already commenced see Pradeep Slnghvi v. Heero Dhankani reported In (2004) 13 SCC 432.

40. What Is, now, of Immense importance to note is that the Apex Court has clarified, In Surya Dev Rai Vs. Ram Chander Rai and Others, , that

while exercising certiorari jurisdiction, the High Court proceeds on the assumption that the Court, which has the jurisdiction over a subject-matter,

has jurisdiction to decide correctly as well as Incorrectly and that the High Court would not, therefore, assign to Itself, while exercising the power

of certiorari, the role of an appellate Court and step into appreciating or evaluating the evidence and/or substitute Its own findings in the place of

those arrived at by the Inferior Court. However, while acting on the certiorari jurisdiction, though the High Court cannot convert itself into an

appellate Court, it remains free to exercise the powers of issuing writ of certiorari if the conditions precedent for exercise of such powers exists. To

put it differently, when a Court has jurisdiction and it passes an order, writ jurisdiction against such an order cannot be exercised either under

Article 226 or 227 of the Constitution of India merely on the ground that the order given or the decision reached is erroneous unless it can be

shown that the order is in ignorance or disregard of the provisions of law or grave injustice has been occasioned by the order. In the case at hand,

since the learned trial Court had the jurisdiction to pass appropriate order on the prayer for amendment made by the defendant and it has passed

the order, the exercise of such a jurisdiction is not amenable to writ jurisdiction unless it can be shown that the order is in clear ignorance or

disregard of the provisions of law or grave injustice or failure has been occasioned thereby.

41. In the present case, the amendment, sought to be made, could not have been al lowed by the Court unless the Court reached a conclusion that

the defendant had assigned convincing reasons for not seeking amendment before the commencement of the trial. Hence, when the learned trial

Court"s conclusion is that the defendant had not been diligent, it would not be an appropriate exercise of powers of this Court under Article 227 if

it, now, interferes with the Impugned order by substituting its own views in place of the views so formed by the learned trial Court, particularly,

when the defendant is not entirely left without a remedy inasmuch as he may, it need be, and if the suit is decreed against him, raise the question of

the trial Court"s rejection of his application for amendment by taking recourse to Section 105, for, Section 105 of the Code makes it clear that

where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of

objection tn the memorandum of appeal.

42. What surfaces from the above discussion is that though the suit was instituted in 1996, the third amendment, which forms the subject-matter of

the present writ petition, was made as late as on 20-2-2002 and that too, after the hearing of the suit had already commenced as early as on 1-9-

2001. In such circumstances, the Court could not have, ordinarily, allowed such an amendment unless it could have come to a conclusion that the

defendant could not have sought for the amendment before the commencement of the trial. In the case at hand, the learned trial Court has assigned

cogent reasons for not permitting the amendment, the reason being that similar amendments, in the past, had not been allowed and the defendant

had, in fact, denied the pleadings relating to the plaintiffs'' allegation that the defendant was a defaulter and/or that the suit property was bona fide

required by the plaintiffs and, hence, in such circumstances, the prayer for amendment cannot be allowed. It is also the finding of the learned Court

before that the defendant does not appear to have been diligent and he has failed to explain as to why he had not applied for the proposed

amendment before the commencement of the trial. It is in such circumstances that the learned trial Court has turned down the prayer for

amendment made by the defendant. The reasons, assigned by the learned trial Court, while turning down the defendant''s prayer for amendment,

cannot be said to be wholly without merit.

43. In the case at hand, since the suit is for eviction of the defendant from rented premises in an urban area, there cannot be, and there is, In fact,

no dispute that the suit is governed by Section 5 of the Assam Urban Areas Rent Control Act, 1972. This Act makes it clear that a Court, before

granting decree for ejectment of a tenant, must be satisfied that the defendant is a defaulter or that the suit house is bona fide required by the

landlord for his own use or occupation, reconstruction, re-building or repairing. The sine qua non for directing eviction is, thus, satisfaction of the

Court that the grounds for such eviction exist. This satisfaction can be reached by a Court not merely on the basis of the pleadings, but on the basis

of the evidence and, hence, in a given case, there is no impediment, on the part of the Court, to insist on proof of the facts, which may entitle the

plaintiff to obtain the decree for ejectment of the defendants.

44. The question as to whether the defendant has or has not made, in the present case, admission, express or implied, in his written statement, Is a

question, which I leave to the learned trial Court to decide at the appropriate stage of the trial, for, any definite opinion expressed by this Court, in

the present writ petition, may cause serious prejudice to the parties concerned.

45. Because of what have been discussed and pointed out above, I do not see any reason to interfere, at this stage of the trial, with the Impugned

order, dated 26-7-2002. This writ petition, therefore, fails and the same shall accordingly stand dismissed.

46. With the above observations and directions, this writ petition shall stand disposed of.

47. No order as to costs.

48. Send back the LCRs.