

(1866) 09 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 1553 of 1863

Gopinath Pundit and Others

APPELLANT

Vs

Gobindo Mahapatro and Others

RESPONDENT

Date of Decision: Sept. 10, 1866

Judgement

Norman, Officiating C.J.

1. In this particular case it was clearly improper to allow an amendment of the plaint, which was originally one for possession and mesne profits, by making it a suit for resumption. The suit was instituted on the 4th May 1861, just ten years after the passing of Act XIV of 1859. The additional stamp as in a plaint for resumption was put into Court on the 25th of April 1862. Whether the amendment would really have had that effect or not it was probably intended to secure to the plaintiff the benefit of s. 18 of that Act, by exempting the suit for resumption as a suit instituted within two years after the date of the passing of Act XIV from the operation of cl. 14, s. 1 of that Act. It is clear that no amendment should ever be allowed which might tend to deprive the opposite party of a right conferred on him by law. My learned colleagues, in quoting s. 32 of Act VIII of 1859, overlook the words "in any case." The language is "Provided that the Court may in any case allow the plaint to be amended if it appear proper to do so." Again by s. 141 "at any time before the decision of the case the Court may amend the issues or frame additional issues on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made." These are large powers of amendment, and they should be construed as remedial provisions liberally. In case of fraud, especially when practised on infants, by agents in foreign countries, by trustees, or by directors of public companies or their shareholders, it constantly happens that the true facts of the case, the rights of the parties, and the remedies to which the complaining party is entitled, are discovered during the progress of the case, and from the answers and admissions extracted from the adversary. It is notorious to any one acquainted with Courts of Equity that in such cases repeated amendments of the bill are necessitated. The general power

of the Court under Act VIII to amend a plaint in a case where justice required such an amendment at any time during the progress of the cause has been distinctly asserted by a Full Bench of seven Judges of this Court in *Hera Monee Dabee v. Koonj Beharee Haldar* Appdx., post, decided since this case was argued, and that decision has since been acted on in hundreds of cases.

2. The result of our judgment in the case is that the decision of the lower Courts will be reversed, and the suit will go back for trial as a suit for possession. The appellant will recover the costs of this appeal and in the lower Appellate Court, and the costs of the hearing which has already taken place in the first Court.

3. Loch, J. (Trevor and Pundit, JJ., concurring).♦ "The cases alluded to in the above reference are of the same nature and with the same object as the present suit, No. 1553 of 1863. The plaintiff is the same in all the cases, but the defendants are different. The suit as brought by plaintiff in Nos. 1678 and 1679 was to recover possession with mesne profits from the defendants, lakhirajdars of lands, the possession of which had been confirmed to the defendants under Act IV of 1840. While the suit was pending, the plaintiffs petitioned to have the case converted into a resumption proceeding, paying the necessary stamp duty. This was done, and the plaintiffs obtained a decree. The Judge admitted the change in the nature of the suit relying on a precedent of this Court, dated the 15th July 1852 *Harkunth Sein v. Kalihishore Roy Chowdree*, S.D.D. for 1852, 690. The judgment passed by this Court was in the following words:-- "We think the whole proceedings below highly irregular. The suit originally was for possession of certain land with mesne profits. It was converted into a suit in which neither possession nor mesne profits could be given; but in which a decree of quite a different nature must be passed. Again, in the suit as originally brought, a mere boundary dispute between two parties, the burden of proof lay primarily on the plaintiffs; whereas in the second the burden lay on the lakhirajdars entirely." With regard to the points referred for the decision of the Full Bench, we find from s. 26, Act VIII of 1859, that the plaint is required, among other things, to contain the relief sought, the subject of the claim, the cause of action, and when it occurred, These we think must be distinctly specified in the plaint, so that the defendant may perfectly understand the nature of the suit that is brought against him. Section 29 prescribes that "if the plaint do not contain the several particulars hereinbefore required to be specified, or if it contain particulars other than those required to be Specified, whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified, the Court may reject the plaint, or at its discretion may allow the plaint to be amended." By s. 31 the Court may reject if the plaintiff on being required by the Court to correct an improper valuation or to supply additional stamped paper shall fail to comply with the requisition. Under s. 32 also the plaintiff may be allowed to amend his plaint. When upon the face of it, or after examination of the plaintiff, the subject-matter does not constitute a cause of action, or the right of action is barred by lapse of time. The sections of the law above quoted clearly

indicate the time at which any amendment in the plaint shall be ordinarily made, and the nature of that amendment which extends merely to the correction of any error in the plaint, not to an entire alteration of the claim. Again s. 139 says:-- "At the first hearing of the suit, the Court shall inquire and ascertain upon what questions of law or fact the parties are at issue, and shall thereupon proceed to frame and record the issues of law and fact on which the right decision of the case may depend. The Court may frame the issues from the allegations of facts which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations of fact contained in the written statements, if any, tendered by the parties or their pleaders." And s. 41 enables the Court, "at any time before the decision of the case, to amend the issues or frame additional issues;" and "all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made." These sections undoubtedly give the Judges who have to dispose of a case in the first instance great freedom to enable them to ascertain what is the real question at issue between the parties, but when the Judge, after examination of the parties or their representatives, finds that the real dispute is one altogether at variance with the claim stated in the plaint, if for instance as in the case referred, we find the claim as shown in the plaint to be for possession with mesne profits, and the plaintiffs at the first hearing convert this claim into one for resumption, we think that the Judge should not permit such an alteration, and that if the plaintiffs be unable or unwilling to go on with the suit as originally brought, the Judge should dismiss the case with costs. The powers vested in a Judge under the above quoted sections, though extensive, are still limited by the nature of the suit as brought by the plaintiff. The Judge, on the representation of the plaintiff, cannot alter the nature of the suit or change the cause of action. This however extends by means of a viva voce explanation to the elucidation of what is ambiguous in the claims of the contending parties, the amendment of what is erroneous, and the supplying of what is defective, but does not contemplate the conversion of a suit of one character into another inconsistent with, and that may be opposed to it; and the issues we apprehend must be founded on the claim as brought in the plaint, and not on something else which the plaintiff at some subsequent period may prefer to consider as his cause of action, but which is altogether at variance with the relief prayed for in the plaint.

¹ See *Eshenchunder Singh vs. ; The East Indian Railway Co. v. F.J. Jordan*, 4 B.L.R., O.C., 97; *Gobind Chandra Dutt v. Gunga Dhye and others*, 7 B.L.R., 333, see p. 334; *S.M. Nistarini Dasi v. Makhanlal Dutt*, 9 B.L.R., 11.