

JASWANT KAUR & ANR. A

v.

SUBHASH PALIWAL & ORS.

(SLP (C) No. 3592 of 2006)

DECEMBER 15, 2009 B

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

Code of Civil Procedure, 1908 – O. 6 r. 17 and O. 41 r. 27 – Application under – Maintainability of – Suit for eviction of tenant from shop room and recovery of rent by respondent no. 1 and 2-sons of original owner – Ground of bonafide need of respondent no. 1's son – Subsequently, application u/O. 11 r. 12 and 14 seeking direction upon respondent no. 1 and 2 to produce Will executed by their father – Case of tenant that shop room was bequeathed to respondent no. 2, thus respondent no. 1 not the owner and suit not maintainable – Dismissal of application – Written statement by tenant but no averments made regarding Will, however admitted that respondents were their landlords – Decree in favour of respondents – During pendency of appeal, application u/O. 6 r. 17 for amendment of written statement to incorporate the plea regarding Will – Dismissal of application – Revisional application by tenant – Thereafter, tenant obtained certified copy of Will – Filing of applications u/O. 6 r. 17 and O. 41 r. 27 for amendment of written statement and to bring on record the certified copy of Will – Allowed by First Appellate Court – However, set aside by High Court – Special Leave Petition – Held: High Court rightly entertained the appeals – Tenants admitted in their written statement that respondents were their landlords and they were paying rent for the shop to them, thus, could not resile from their admissions – More so, tenants were fully aware of Will but did not mention the same in the written statement and only made application u/O. 11 r. 12 and 14 – Applications u/O. 6 r. 17 and O. 41 r. 27 filed after a long delay – It was an attempt to introduce a new case by way of

A *defence – Hence, Special Leave Petition dismissed – O. 43 r. 1(u) – Rajasthan Premises (Control of Rent & Eviction) Rent Act, 1950 – s. 3(iii), 13.*

B *Dondapati Narayana Reddy vs. Duggireddy Venkatanarayana Reddy (2001) 8 SCC 115; Prem Bakshi and Ors. vs. Dharam Dev and Ors. (2002) 2 SCC 2; Rajesh Kumar Aggarwal vs. K.K. Modi (2006) 4 SCC 385; Andhra Bank vs. ABN Amro Bank N.V. (2007) 6 SCC 167; Pandit Ishwardas vs. State of M.P. (1979) 4 SCC 163; Harcharan vs. State of Haryana (1982) 3 SCC 408, distinguished.*

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Case Law Reference:

	(2001) 8 SCC 115	Distinguished.	Para 7
	(2002) 2 SCC 2	Distinguished.	Para 7
D	(2006) 4 SCC 385	Distinguished.	Para 7
	(2007) 6 SCC 167	Distinguished.	Para 7
	(1979) 4 SCC 163	Distinguished.	Para 9
E	(1982) 3 SCC 408	Distinguished.	Para 9

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 3592 of 2006.

F From the Judgment & Order dated 19.12.2005 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Civil Misc. Appeal No. 600 of 2003.

Shobha, Harish Sharma, Ramesh Pd. Yadav for the Petitioners.

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S.K. Keshote, H.D. Thanvi, Sarad Kr. Singhanian, P. Chaturvedi for the Respondents.

The Judgment of the Court was delivered by

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ALTAMAS KABIR, J. 1. One Bhavani Shankar, the father

of the Respondent Nos.1 and 2, Subhash Paliwal and Gopal Paliwal, was the owner of several properties, including the disputed shop room. After his demise, on 3rd January, 1998, Subhash Paliwal and Gopal Paliwal filed a suit against the petitioners for their eviction from the shop room in question on the ground of personal necessity and *bonafide* necessity of Sandeep, son of Subhash Paliwal, for his painting business. On 22nd July, 1998, the petitioners filed an application under Order XI Rules 12 and 14 of the Code of Civil Procedure, 1908, for a direction upon the respondents to produce on record the Will said to have been executed by their late father, Bhavani Shankar, on 21st July, 1989, whereby he was alleged to have bequeathed the disputed shop room to his younger son, Gopal Paliwal, thereby asserting that Subhash Paliwal was not the owner of the suit shop room and the suit for eviction for the *bonafide* need of his son was not, therefore, maintainable.

2. After hearing the submissions made on behalf of the respective parties, the learned Civil Judge dismissed the said application. Subsequently, the petitioners herein filed their written statement on 8th December, 1998, denying the averments made in the plaint, but without making any averment with regard to the existence of the Will said to have been executed by Bhavani Shankar. Ultimately, by judgment and decree dated 2nd August, 2000, the learned Trial Court decreed the suit for eviction and recovery of rent in favour of the respondents, against which the petitioners preferred First Appeal on 28th August, 2000.

3. On 3rd August, 2002, the petitioners filed an application in the pending appeal under Order VI Rule 17 of the Code of Civil Procedure for amendment of the written statement to incorporate the submissions that in view of the Will purportedly executed by Bhavani Shankar, Subhash Paliwal was not the owner of the suit property and could not, therefore, ask for eviction of the petitioners therefrom for the personal and *bonafide* requirement of his son. The learned Additional District

A Judge No.2, Udaipur, by his order dated 13th November, 2002,
 dismissed the application filed by the petitioners on the ground
 that despite having knowledge of the Will in question even at
 the time of filing written statement, no such averment had been
 made. The revisional application filed by the petitioners before
 B the High Court against the order dated 13th November, 2002,
 has been lying defective and no steps have been taken to
 proceed with the same.

C 4. According to the petitioners, on obtaining a certified
 copy of the Will dated 21st July, 1989, said to have been
 executed by Bhavani Shankar, the petitioners once again made
 an application under Order VI Rule 17 and under Order XLI
 Rule 27 of the Code of Civil Procedure for amendment of the
 written statement and for permission to bring on record
 D additional evidence on the ground that the Will in question was
 not in their possession prior to 18th November, 2002, as a
 result whereof they were unable to make any reference thereto
 in the written statement. The First Appellate Court by a
 reasoned order dated 20th May, 2003, allowed both the
 applications, against which the respondents filed Civil
 E Miscellaneous Appeal before the High Court and the High
 Court by its impugned order dated 19th December, 2005,
 allowed the appeal and rejected both the applications filed by
 the petitioners on 3rd January, 2003, under Order VI Rule 17
 CPC and Order XLI Rule 27 CPC.

F 5. Appearing on behalf of the petitioners, Ms. Shobha,
 learned Advocate, submitted that the High Court had erred in
 interfering with the reasoned judgment of the First Appellate
 Court since Subhash Paliwal did not fall within the definition of
 "landlord" as defined in Section 3(iii) of the Rajasthan Premises
 G (Control of Rent & Eviction) Rent Act, 1950 (hereinafter referred
 to as "the 1950 Act"), under Section 13 whereof a suit for
 eviction could be brought by the landlord on the ground of
 H *bonafide* necessity for the use or occupation for himself or his
 family. Ms. Shobha submitted that neither the brother nor the

brother's son of the exclusive owner would have any right to claim eviction after their rights were separated by the Will executed by Bhavani Shankar on 21st July, 1989. A

6. Ms. Shobha submitted that the powers of the Appellate Court were sufficiently wide to allow the introduction of additional evidence if the Courts below had wrongly declined to admit the evidence or if the parties seeking to bring the documents on record failed to produce the same despite due diligence, or if the Appellate Court thought it appropriate to have the said document on record for a proper adjudication of the *lis*. Ms. Shobha urged that the High Court had failed to gauge the importance of bringing on record the certified copy of the Will by way of additional evidence and had erred in disallowing the petitioners' prayer for amendment of the written statement on the basis thereof, as it went to the very root of the petitioners' case that Subhash Paliwal had no right to maintain the suit jointly with Gopal Paliwal for eviction of the petitioners from the suit shop room for the *bonafide* need of the nephew of the exclusive owner. B
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7. Ms. Shobha submitted that as was held by this Court in *Dondapati Narayana Reddy vs. Duggireddy Venkatanarayana Reddy* [(2001) 8 SCC 115], amendment of pleadings should be liberally allowed, unless it is established that the result would cause such injustice and prejudice against the opposite side as could not be compensated by costs or as would deprive him of a right accrued due to lapse of time. Reference was also made to a decision of this Court in *Prem Bakshi and others vs. Dharam Dev and others* [(2002) 2 SCC 2] in the context of an application for amendment filed under Order VI Rule 17 CPC, wherein it was observed that it was almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. It was observed that such amendments only serve advance notice to the other side as to the plea which a party might take up. Accordingly, a situation could not be envisaged E
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A where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable loss to any party. Reference was also made to the decision of this Court in *Rajesh Kumar Aggarwal vs. K.K. Modi* [(2006) 4 SCC 385], wherein the approach to be taken by the
B Courts in considering whether to permit amendment fell for consideration and it was held that the Courts should allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it did not cause injustice or prejudice to the other side. It was observed
C that 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. Similar views were also expressed in *Andhra Bank vs. ABN Amro Bank N.V.* [(2007) 6 SCC 167].

D 8. Ms. Shobha urged that although the Will in question may have been within the knowledge of the petitioners, without obtaining a certified copy thereof, it was not possible to include the same in the pleadings while filing the written statement, particularly when the application filed by the petitioners under
E Order XI Rules 12 and 14 for discovery of the said document had been rejected by the Trial Court.

9. It was further submitted that the High Court should have appreciated the fact that there was no bar to the Appellate
F Court permitting amendment of pleadings to enable a party to raise a new plea, as was held by this Court in *Pandit Ishwardas vs. State of M.P.* [(1979) 4 SCC 163]. In fact, this Court observed that all that was necessary was that the Appellate Court should observe the well-known principles subject to which amendments of pleadings are usually granted. Naturally, one
G of the circumstances which would be taken into consideration before an amendment was granted is the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the Trial Court. Ms. Shobha also referred to the decision of this Court
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in *Harcharan vs. State of Haryana* [(1982) 3 SCC 408], where A
it was observed that amendment of pleadings relating to the
main controversy should not be refused on mere technical
grounds.

10. Ms. Shobha then contended that the appeal in the High B
Court was not maintainable under Order 43 Rule 1 CPC against
an order passed either under Order 6 Rule 17 or Order 41 Rule
27 CPC.

11. Ms. Shobha concluded on the note that since by virtue C
of the Will executed by Bhavani Shankar, neither Subhash
Paliwal nor his son had any ownership rights over the disputed
shop room, the suit for eviction filed by Subhash Paliwal for the
bonafide need of his son was not maintainable being hit by
Section 13(1)(h)(i) of the 1950 Act. She urged that the High D
Court had exercised its jurisdiction erroneously in interfering with
the order of the Appellate Court.

12. Appearing for the Respondents, Mr. S.K. Keshote, E
learned Senior Advocate, contended that the submissions
made on behalf of the Petitioners was misconceived, since
even in their written statement filed on 8th December, 1998,
no reference had been made to the Will and the Petitioners
admitted the Respondents to be their landlords and had also
contended that the rents for the suit premises were being paid F
to them. Mr. Kishote submitted that the suit was ultimately
decreed by the Trial Court in favour of the Respondents on 3rd
August, 2000, and an appeal was filed by the Petitioners herein
against the said judgment and decree on 28th August, 2000.
Thereafter, it was only on 3rd September, 2002, that an
application was made for amendment of the written statement G
to incorporate the plea regarding the Will. By its order dated
13th November, 2002, the First Appellate Court dismissed the
said application on the ground that though the fact regarding
the execution of the Will was within the knowledge of the
Petitioners even at the time of filing of the written statement,
no such plea had been taken till the suit was decreed or even H

A in the Appeal when the same was filed.

13. Mr. Keshote submitted that no interference was, therefore, called for with the findings of the First Appellate Court regarding the lapse on the part of the Petitioners herein to amend the written statement during the trial of the Suit.

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14. On the question of maintainability of the Appeal before the High Court in view of the provisions of Order XLIII Rule 1 of the Code of Civil Procedure, Mr. Keshote submitted that under the amended provisions of clause (u) of Rule 1 of Order XLIII, which was brought into effect from 1st February, 1977, an Appeal against an order of remand under Rule 23-A of Order XLI CPC, is maintainable. For the sake of reference, the provisions of Order XLIII Rule 1(u) CPC are extracted hereinbelow :-

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D "Order XLIII Rule 1

Appeal from orders – An appeal shall lie from the following orders under the provisions of Section 104, viz.:-

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(a) to (t)

(u) an order under Rule 23 or Rule 23-A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

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(w)....."

15. Mr. Keshote then submitted that having admitted the relationship of landlord and tenant in their written statement, the Petitioners could not resile from their admissions and that too at the appellate stage. It was submitted that the application for amendment was not *bonafide* and had been correctly dismissed by the High Court. Mr. Keshote urged that once the prayer made by the Petitioners to get the certified copy of the Will on record before the Trial Court under the provisions of Order XI Rules 12 and 14 C.P.C. was rejected on 22nd July, 1998, the

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question of an application under Order XLI Rule 27 CPC for the same purpose, did not arise. A

16. We have carefully considered the submissions made on behalf of the respective parties and in view of the introduction of Rule 23-A in Order XLIII Rule 1(u) CPC, it can no longer be argued, as has been done by Ms. Shobha, that the Appeal was not maintainable. We are, therefore, satisfied that the Appeals before the High Court were maintainable and had been rightly entertained by the High Court. B

17. As far as Ms. Shobha's second submission regarding the *bonafide* requirements of the son of Respondent No.1, Subhash Paliwal, is concerned, we are unable to accept the same in view of the Petitioners' own admission in their written statement that Subhash Paliwal and Gopal Paliwal were their landlords in respect of the suit shop room and that they had been paying rents to them till the filing of the suit. In fact, the Petitioners would stand estopped from taking such objection under Section 116 of the Evidence Act. C
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18. It is no doubt true, as has been submitted by Ms. Shobha, that the power to allow amendment of pleadings is very wide and is to be applied liberally. However, in the context of the instant case, such an argument would not be available to the Petitioners since, as found by the Courts below, they were fully aware of the Will in question, but had not even mentioned the same in their written statement and had only made an application under Order XI Rules 12 and 14 CPC for a direction upon the Respondents to produce the same, which prayer had been rejected. It is only at the first appellate stage, and, that too, about two years after the Appeal had been filed, that the two applications were made under Order XLI Rule 27 and Order VI Rule 17 CPC for amendment of the plaint and for bringing on record the certified copy of the Will. By virtue of the said two applications, the Petitioners attempted to introduce a new story by way of defence in order to prolong the disposal of the appeal. E
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A 19. In such circumstances, we are of the view that
notwithstanding the new case attempted to be made out by the
Petitioners, the same is of little consequence in view of their
admission that the Respondents, Subhash Paliwal and Gopal
Paliwal, were their landlords and that they were paying rents
B for the suit shop room to them.

20. The various decisions cited by Ms. Shobha quite
unequivocally lay down the law relating to amendment of
pleadings, but they cannot be applied to the facts of this case
C in view of the admissions made on behalf of the petitioners that
they had been paying the rents for the suit shop room to the
respondents.

21. In view of such admission, little remains to be
considered in the present proceedings, notwithstanding Ms.
D Shobha's submission regarding the definition of "landlord" in
Section 3(iii) of the 1950 Act in support of her submission that
Subhash Paliwal did not fall within the description of "landlord"
in the Act. The Special Leave Petition is, accordingly,
dismissed.

E 22. There will, however, be no order as to costs.

N.J. Special Leave Petition dismissed.