

Girdharilal Vs. Krishan Datt

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Court : Punjab and Haryana

Decided On : Sep-30-1959

Reported in : AIR1960P& H575

Judge : D. Falshaw and; I.D. Dua, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100; Income-tax Act - Sections 66

Appeal No. : Second Appeal No. 138-P of 1952

Appellant : Girdharilal

Respondent : Krishan Datt

Judgement :

Dua, J.

(1) This is a defendants appeal from the judgment and decree of the learned District Judge, Kapurthala, dated 8th of May 1952 allowing the appeal and decreeing the suit of plaintiff Krishan Dutt which had been dismissed by the Subordinate Judge 1st class, Fatehgarh Sahib, by his judgment dated 8th August, 1951. The plaintiff and the defendant are real brothers, and their father admittedly died in 1928. The property in suit consists of 49 bighas and 6 biswas of land situated in village Nabipur Kalan; this property originally belonged to the erstwhile

Kalsia State and was put to auction sometime in September 1931. Plaintiff Krishan Dutt gave a bid for this property in the joint names of himself and his brother Girdhari Lal for a sum of Rs. 4,200/- which was accepted.

A sale certificate was consequently issued in October 1931, in favour of both the brothers, and on 8th of September 1932 mutation No. 249 was similarly attested in their favour. It appears that at the time of the mutation their mother alone was present, both the brothers being absent. It is also agreed that the defendant was born on 16th of July 1916, with the result that he was minor in September 1931 when the property was purchased. The present suit was instituted on 1st of July 1943 claiming declaration and possession with respect to the aforesaid land on the ground that it was the plaintiff who had paid the whole amount from his own pocket and secured the sale certificate as also possession of land a little later; the plaintiff being in service in those days, as an Overseer and the defendant who is his real brother, being a minor and reading in the school, his name was got entered along with that of the plaintiff in the auction papers as well as in the revenue records, merely by way of benami, the real and true owner being the plaintiff only.

The defendant having, a short while before the suit, started asserting his own title to the property to the extent of one-half and having also expressed intention to transfer the property in favour of some other person, the plaintiff had no other course but to claim relief from the Courts. The defendant denied that he was a benamidar and asserted that he was a joint owner of the property possessing similar title as the plaintiff. It was also pleaded that the property had been purchased in the names of both of them with the joint Hindu family funds and not only with the plaintiff's money. On the pleadings the following three issues were framed:

1. Whether the suit is within time?
2. Whether the plaintiff is the exclusive owner of the property in dispute and the defendant is a mere benamidar?
3. To what relief the plaintiff is entitled?

(2) The trial Court decided issue No. 1 in favour of the plaintiff holding the suit to be within limitation. Under issue No. 2 the trial Court came to the conclusion that the property had been purchased by the plaintiff with his own funds and not out of the joint family funds, but it also concluded on the strength of various documents and the conduct of the parties that the plaintiff had purchased the property in dispute for the benefit of himself and of the defendant and that by his subsequent conduct he had thrown the property in the common 'hotchpotch' and renounced all intentions of claiming it exclusively for his own self, with the result that the defendant could not be called a benamidar and the transaction in dispute a benami transaction. With these findings as already observed, the plaintiff's suit was dismissed.

(3) On appeal, the learned District Judge, in a very exhaustive judgment agreed with the finding of the trial Court that the suit was within time; he also agreed that the property had been purchased by the plaintiff with his own funds and not with those of the joint Hindu family. He expressly observed that the father of the parties had left no property from which they could derive any income which could be considered to be the nucleus for the purchase or extension of the family property. the learned Judge was also influenced in coming to this decision by the fact that the plaintiff had been an overseer in the Canal Department and therefore had certain additional facilities which were normally speaking, not available to the employees of other department.

On this finding, and also on a consideration of the other circumstances of the case, the lower appellate Court came to a positive finding that the defendant was a benamidar. While dealing with the question of the property having been put into the 'common stock', the learned Judge was considerably influenced by the fact that after the plaint had been amended by converting the relief for possession of the whole of the property into one for possession of half the land in dispute the defendant in his written statement included the additional ground of the property having been put into the 'common stock' which had not been his case in the first written statement.

The learned Judge after referring to O. 6, r. 17, C.P.C., felt that this additional plea was not only an afterthought but was unauthorised, having been made without the permission of the Court, and in this view he actually thought that it was not open to the defendant to urge this plea and therefore he considered it not lawful to consider this defence. To put in the words of the learned District Judge the variation in the written statement or the amendment in the written statement should be confined only to the amendment of the plaint and that if the defendant wishes to amend his written statement by adding an additional defence he must seek permission of the Court under O. 6, r. 17, C.P.C.

In spite of this view, however, the learned District Judge dealt with the defence that the property in dispute had been raised by the defendant. Dealing with this part of the case the Court below disagreed with the finding of the trial Judge and concluded that the defendant had failed to discharge the burden of proof that the property had been purchased for his benefit or that the plaintiff had voluntarily thrown the property in question in the 'common stock'.

(4) On second appeal the first question that arises for consideration is whether this appeal is governed by S. 100 of C.P.C., or by some different provision of law governing second appeals arising out of suits instituted in the territory of the erstwhile Kalsia State. I am inclined to take the view that it would be for the party who asserts that the law different from that in force in the Union of India governs particular proceedings, to prove affirmatively that the said proceedings are so governed and also what that law is. In the present case Mr. J. N. Kaushal has very frankly admitted that he has not been able to lay his hands on any material which would show that law, different from the provisions of section 100, Code of Civil Procedure, is applicable to the present appeal.

The present suit was instituted in July 1943. Mr. Lachhman Dass Kaushal has brought to our notice a copy of the report on the Administration of the Kalsia State for 1944-45 prepared by Diwan Ranbir Singh. In this report in Appendix No.1 which contains the list of laws in force in the State, Civil Procedure Code, Act No. 5 of 1908, is included at serial No.1 under the heading 'Civil Acts.' The counsel for the respondent states that it is permissible to presume that the Code was also in

force in the State in 1943 when the present suit was instituted unless the counsel for the appellant can show that the Code was introduced after July 1945. As mentioned above, the counsel for the appellant has not been able to secure the necessary information. In the result we shall proceed to dispose of this appeal on the assumption that section 100, Civil Procedure Code, applies to it.

(5) To begin with Mr. J. N. Kaushal has submitted that the finding on the question of benami nature of the transaction is a mixed question of fact and law and therefore it is open to attack in this Court. The counsel submits that on the findings on various items of facts that inference to be drawn is always a question of law and therefore, he submits, that, assuming all the facts found by the learned District Judge to be correct, the irresistible inference is that the land in question had been purchased not benami but genuinely in the name of the defendant to the extent of one half share. In support of his contention he has placed reliance on *Sree Meenakshi Mills Ltd. v. Commr, of Income-tax*, (S) AIR 1957 SC 49, where the following four rules were summed up:

1. When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the Court under section 66(1).

2. When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.

3. A finding on a question of fact is open to attack under section 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

4. When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

Though this case dealt with the scope of section 66 of the Income-tax Act, the counsel, however, submits that the principle applicable would equally cover the case of section 100, Code of Civil Procedure. He places his reliance on the second rule enumerated above.

(6) The next authority to which we have been referred is *Janki Bai Kutiani v. Najaf Ali Khan*, AIR 1918 Pat 632, head-note (a) of which reads thus:

'A question of benami or fraud is not one of pure fact; it is a mixed question of fact and law, and if a Court proceeds on mere suspicion and draws inferences from facts proved such as no reasonable man would draw, then it commits an error of law.'

In head-note (b) it is laid down that while a Court of second appeal cannot interfere with findings of fact based on legal evidence, it is fully competent to correct the inferences drawn from those facts.

(7) The next case is that of *Sirikishun Singh v. Jaimangal Singh*, AIR 1950 Pat 541. Narayan J., held, in this case, that if on the findings of the Courts of fact the necessary elements of a benami transaction are found to have been established for supporting the conclusion that the transaction was a benami one, then, the High Court in second appeal would not interfere with the decision of the lower appellate Court.

In this case another decision of a Division Bench of the same High Court in *Banarsi Das v. Mt. Bhawani Kuer*, AIR 1942 Pat 386, was also cited in which Harries C. J., and Manohar Lall, J., had observed that the question of benami was eminently a question of fact and the finding on this question could not be interfered with in second appeal. The learned Single Judge, however, reconciled the ratio of the two earlier Patna cases and made the observation noted above. In my opinion, this observation not only does not help the counsel for the appellant but goes against him. In *Sree Meenakshi Mills' case*, (S) AIR 1957 SC 49, also Venkatarama Ayyar J., who prepared the judgment on behalf of the Court (Das C. J., Ayyar and Imam JJ.), while examining the argument that a finding of benami is one of mixed law and fact observed as follows:

'The only basis for such a contention is that the finding that a transaction is benami is a matter of inference from various primary basic facts such as who paid the consideration, who is in enjoyment of the properties and the like. But that is not sufficient to make the question one of mixed law and fact unless, as already

stated, there are legal principles to be applied to the basic findings before the ultimate conclusion is drawn. But no such principles arise for application to the determination of the question of benami, which is purely one of fact, and none has been suggested by the appellant.'

In this case a reference was also made to *Gangadara Ayyar v. Subramanian Sastrigal*, AIR 1949 FC 88, where concurrent findings of benami were held not to be revisable by the Federal Court. Reference was also made to *Misrilal Nayak v. Mt. Suji*, AIR 1950 PC 28, where a finding of benami was considered to be one of fact not open to attack in second appeal. The judgment of the Supreme Court in *Sree Meenakshi Mills' case* (S) AIR 1957 SC 49, was approved in a later decision by the Supreme Court in *G. Venkataswami Naidu and Co. v. Commissioner of Income-tax*, Civil Appeal No. 709 of 1957: (AIR 1959 SC 359).

In view of the authorities, quoted above, I think the decision of the learned District Judge on the question of benami nature of the transaction is concluded by section 100 of the Code of Civil Procedure and it is not open to Mr. J. N. Kaushal to canvass the same before us. The counsel for the appellant also relied on certain passages from the 'Law of Benami Transactions in India' by A. Ghosh in which circumstances which are relevant for determining the benami nature of the transaction are described. This passage need not detain us because there is no dispute about the circumstances which are relevant for such determination.

The source of money and the actual possession or enjoyment of the property are, generally speaking, the main factors which have to be taken into account, although these tests are subject to the qualification of the absence of all other relevant circumstances. In the instant case both the Courts below have, after considering all the circumstances, come to the conclusion that the plaintiff had purchased the property with his own exclusive funds and that the continuation of the entry in the revenue papers in defendant's name along with the plaintiff's has been satisfactorily explained and that it does not outweigh the factor relating to the source of purchase money. It has been expressly observed that there was no intention to benefit the defendant, the theory of advancement not being applicable to India.

(8) The counsel next contended that there could be no partially benami transaction. His argument is that the transaction of purchase consisted of 49 bighas and 6 biswas and if admittedly with respect to half of this land the transaction was good having been rightly purchased in the name of the plaintiff then the same transaction with respect to the other half of the land could not be considered to be benami. In support of this contention the learned counsel has relied on Appa Dhond Savant v. Babaji Krishanji Ghogle, AIR 1922 Bom 107. The following observation of Macleod C. J., has been pressed into service by the learned counsel:

'Benami transactions, it may safely be assumed, are generally effected in order to conceal some fraud, or in order to support some object of a discreditable nature. But though the Courts have in the past recognised that the ostensible owner in a benami transaction can be ordered to restore the property to its original owner, I for my part would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion.'

In the reported case there was a conveyance by a deed of property consisting of three Thikans. With respect to one of the Thikans i.e., Thikan Modapa, the transaction was alleged to be benami in the sense that title was still claimed to remain in the vendor. This contention was described in the report case to be an extension of the law with regard to benami transactions because it amounted to splitting up the contents of a document relating to a transaction regarding immovable property in order to hold, that part of it was genuine while the other part was benami. In my opinion, the facts of the reported case are distinguishable and the observation made by the learned Chief Justice must be taken to have been made in their own context. Besides, even according to those observations the possibility of such a position was not completely ruled out.

(9) The next case on which reliance was placed by the counsel in Bans Narain v. Mt. Chandrani Kuer, AIR 1944 All 130, in which Appa Dhond Savant's case, AIR 1922 Bom, 107, was relied upon and it was observed that in a suit for a declaration that a certain transaction was benami, it is not open to a party to

contend or for a Court to hold, that a part of it is genuine and the other part benami. In this case also the trial Judge had come to the conclusion that the sale-deed in respect of half the property purchased was genuine and with respect to the other half fictitious and benami.

No other decided case has been brought to our notice by the counsel appearing for the parties. In my view, there is no well recognised rule of law or precedent based on any sound principle which prevents a plea being taken by a party, or a decision being given by a Court, that the name of a person has been added as a co-vendee or as a benamidar and the sale was intended not to confer any title on him. The facts of the two authorities cited by the counsel for the appellant appear to me to be distinguishable but if the observations contained in them are to be construed to cover the facts of the instant case, then I would, as at present advised, respectfully disagree with those observations.

(10) The last contention advanced by Mr. J. N. Kaushal is that on the evidence led on the record the property should be held to have been put into the 'common stock'. The learned counsel has submitted that the defendant was a minor at the time of the purchase, living with his mother; the father of the parties having died sometime in 1928. The bid having been offered by the plaintiff on behalf of himself and his brother and the mutation entries having been got effected by their mother in the absence of both the sons and the entries in their joint names having continued from 1931 right up to 1941 and the income having been utilized by the entire family, it has been contended, that on these facts, the conclusion is irresistible and indeed the counsel submits that the only reasonable conclusion is that the land in question must be considered to be the joint family property, having been intentionally and consciously thrown into the 'common stock'.

Reference has in this connection been made to para 227 of Principles of Hindu Law by Mulla at page 332 of the 12th Edition where it is stated that property which was originally the separate or self acquired of a member of a joint family may become joint family property if it has been voluntarily thrown by him into the 'common stock' with the intention of abandoning all separate claims upon it. Our attention has also been invited to a notice said to have been given by the plaintiff

to a tenant on 26th of March 1941 vide Exhibit D.W. 2/1.

In this notice it is stated that the tenant had paid the previous year's rent to Girdhari Lal who is the defendant in the present proceedings and that the current year's rent was to be paid to the plaintiff, Girdhari Lal not being entitled to receive rent for the second year. The counsel contends that this notice clearly shows that half the property in fact belonged to the defendant and that the income was being shared half and half. As against this, the learned counsel for the plaintiff-respondent has contended that the question whether the property has been voluntarily thrown into the 'common stock' with the intention of abandoning all separate claims on it, is also a finding of fact not open to attack in second appeal. In support of this plea reliance has been placed on *Deity Pattabhiramaswamy v. S. Hanumayya*, AIR 1959 SC 57, where a bench of three Judges of the Supreme Court while dealing with the scope of section 100, Civil Procedure Code, stated as follows:

'The provisions of section 100 are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence.'

The Supreme Court approved the Privy Council decisions in *Mt. Durga Choundhrain v. Jawahar Singh*, 17 Ind App 122, *Midnapur Zemindari Co., Ltd., v. Uma Charan Mandal*, AIR 1923 PC 187 and *Wali Mahomed v. Mahomed Baksh*, ILR 11 Lah 199: (AIR 1930 PC 91). In the reported case the facts show that the High Court had interfered with the finding of fact given by the learned District Judge on the question of title by taking a different view of the evidence accepted by the learned District Judge. The counsel for the appellant has submitted that the Bench of the Supreme Court deciding *Deity Pattabhiramaswamy's* case, AIR 1959 SC 57, has not purported to differ from the previous decision of other Benches of the Supreme Court where the proper legal effect of proved facts has been held to

be essentially a question of law.

In this connection the counsel has again referred us to Sree Meenakshi Mills' case, (S) AIR 1957 SC 49 in which at page 64 of the report, ILR 11 Lah 199: (AIR 1930 PC 91), approved by the Supreme Court in AIR 1959 SC 57, was also approvingly quoted by Venkatarama Ayyar J. In my opinion, the Supreme Court in the recent case has not departed from the rule of law established by the decisions of the Privy Council in a long chain of authorities which have been exhaustively considered and commented upon in Sree Meenakshi Mills' case, (S) AIR 1957 SC 49.

I am not unmindful of some decisions of the Supreme Court, where under article 136 of the Constitution, findings of fact have been reconsidered by it on the ground inter alia of the finding of fact being wholly inconsistent with the material produced on the record. But as no reliance has been placed on these authorities I would not like, as at present advised, to express any considered opinion as to how far the observations contained in them are helpful in determining the powers of this Court under section 100, Code of Civil Procedure, and also as to their effect on the ratio of the decision of the Supreme Court in Deity Pattabhiramaswamys case, AIR 1959 SC 57.

The question, however, remains whether in the instant case the finding that the property in question has not been incorporated in the joint family estate, which, normally speaking, would be a finding of fact, has been vitiated by any legal flaw or infirmity as contemplated by section 100, Code of Civil Procedure, so as to justify interference by this Court on second appeal. Property which originally is separate or self-acquired property of a member of a joint family can become a part of the co-parcenary property only if it has been voluntarily thrown by the owner into the 'common stock' with the intention of abandoning all separate claims upon it; this result can follow only if a clear intention to waive or give up his separate right is established; and mere permission to the other members of the family, inspired by affection, regard or kindness, to use it conjointly with himself would not give rise to an inference that it has been put into the 'common stock' or 'hotchpotch'.

Nor would such an inference be justified merely because a member has permitted income from the property to be used for supporting his brother or his mother; failure to keep separate accounts of the earnings from the property would be itself be equally insufficient to justify the required inference.

(11) The question whether the owner of self-acquired property has voluntarily thrown it into the joint stock with the clear intention of abandoning all separate claims on it must, normally speaking, be one of fact to be decided in the light of all the attending circumstances. In the present case the learned District Judge has considered all the surrounding circumstances and has come to a positive conclusion on this question. But then Mr. J. N. Kaushal argues that this finding is not supported by any evidence and he submits that a finding so arrived at is not binding on this Court; he also submits that the finding of the Court below is so contrary to the entire evidence on the record that it must be held to perverse and therefore not inviolable.

The counsel has submitted that the purchase of the property in the joint names of the brothers, the mutation in favour of both of them, absence of separate accounts of the property, existence of this state of affairs for no less than nearly eleven years, the language of the notice to the tenants, the allegations made in the application to the Collector for effecting a change in the revenue records, all point irresistibly to the conclusion that this property was from the very beginning, intended to augment the joint family property and that therefore it must be held to have been voluntarily thrown into the 'common stock' with the intention of abandoning all separate claims on it.

The argument of the learned counsel is certainly attractive, and if we had been dealing with this matter as a Court of original jurisdiction or even as a Court of first appeal, then we may perhaps have been inclined to uphold the contention and gone into the evidence ourselves. The difficulty, however, in our way, is that these pieces of evidence have been considered by the learned District Judge and, somehow, he has come to the conclusion that these pieces of evidence, considered individually or collectively, do not establish a clear intention on the part of the plaintiff to abandon all separate claims on the self-acquired property.

Even granting to the learned counsel for the appellant that this conclusion is erroneous, I am afraid the error is one of fact and in view of the Privy Council decision in 17 Ind App 122, which has been approved by the Supreme Court in Deity Pattabhircamaswamy's case, AIR 1959 SC 57, there is no jurisdiction in this Court to entertain a second appeal on the ground of erroneous finding of fact, however goes the error may seem to be. I am aware of the more recent pronouncements of the Supreme Court in two unreported cases, viz., Omar Salary Mohamed Sait v. Commissioner of Income-tax, Madras, C. A. No. 15 of 1958: (AIR 1959 SC 1938), and Messrs. Lal Chand Bhagat Ambica Ram v. Commissioner of Income-tax, Bihar, C. A. Nos, 679 and 680 of 1957: (AIR 1959 SC 1295), in which interference with findings of fact was considered justified when conclusions of fact were arrived at by indulging in suspicions, conjectures and surmises or by acting without any evidence or upon a view of facts which could not reasonably be entertained or when facts found were such that no person acting judicially and properly instructed as to the relevant law could have found or when the findings was, in other words, perverse.

The facts and the circumstances of the case before us, however, do not seem to be covered by the above dicta. As observed by Shadi Lal C. J., (with whom Broadway, J. agreed) in Shankar Das v. Bilbhadar Singh, 34 Pun LR 671, the High Court cannot entertain a second appeal upon any question as to the soundness of a finding of fact, and if there is evidence to be considered, the decision of the first appellate Court, however unsatisfactory it might be if examined, must stand as final. The mere fact that the High Court would have come to a different conclusion is no ground for entertaining a second appeal.

The onus of proving the assertion that admittedly self-acquired property has been thrown into the hotchpotch or the common stock lies heavily on the party making it, and if the final Court of fact thinks that the evidence led is not sufficient to discharge the burden, it would, in my view, be conclusion and not open to challenge on second appeal, as it is not the function of the Court of second appeal to reassess and evaluate the evidence on a question of fact. I may recall the fourth rule enumerated in Meenakshi Mills case, reproduced above, which has again received approval by the Supreme Court in Paras Nath Thakur v. Smt. Mohani

Dasi, C. A. No. 655 of 1957: (AIR 1959 SC 1204).

The view expressed by the lower appellate Court is, in my opinion, a possible view on the evidence on the opinion, a possible view on the evidence on the record, and whatever has been urged by Mr. J. N. Kaushal at the Bar has not induced us to hold that this view is so clearly opposed to the entire evidence on the record and the surrounding circumstances or is so unreasonable as to be considered perverse and therefore liable to attack on second appeal. No error or defect in the procedure nor any disregard of any rule of law within the contemplation of the above decision has been pointed out by the counsel except the contention discussed above.

(12) There is one more point which remains to be noticed and this relates to the respondent's contention about the inadmissibility of the defendant's plea that the property in question had been put in the 'common stock'. Basing himself on the observations of the learned District Judge, the counsel for the respondent has, during the course of his arguments, urged that under the defendant-appellant to raise the plea of the property having been put into the 'common stock' in the written statement filed by him on the 19th of January 1951.

It appears that during the pendency of the suit the plaintiff made an application for amendment of the plaint, on the ground that after the institution of the suit the defendant had forcibly taken possession of half the land in question, and so the suit for a declaration should be allowed to be suitably amended so as to convert it into a suit for possession with respect to half the land of which the defendant had taken possession after the initial institution of the suit. The amendment of the plaint as prayed was allowed on the 6th of January 1951.

In the written statement filed in reply to the amended plaint the defendant seems to have taken two more pleas, viz., (1) that the plaintiff had after the purchase brought the property in suit in the 'common stock', thus making it joint Hindu family property; and (2) that the plaintiff had purchased the land in suit to benefit the defendant and the former could not claim it solely for himself. No objection with respect to these additional pleas appears to have been pressed in the trial Court and the trial of the suit on the amended plaint seems to have proceeded on those

pleadings.

It is true that the language of the issues settled does not pointedly bring out these additional pleas specifically, but then they equally fail to bring out specifically the earlier plea of the property having been purchased out of the joint Hindu family property funds. But as observed by the learned District Judge in his judgment, considerable argument had actually been advanced on the additional pleas both in the trial Court and in his Court; evidence according to him on the additional pleas was similar and indeed common to both the old and the new pleas and he was also satisfied that the parties had on the whole understood the points on which they were at variance and were having a fight in the trial Court; in fact he also concluded that the parties had led substantially all the possible evidence on the points in controversy and had not be prejudiced by the absence of more precise issues.

Having held this, he appears also to have observed that the new pleas contained in the fresh written statement to the amended plaint were unauthorised and deserved to be rejected; for the purpose of completing the case, however, he considered it proper to give findings on the new pleas as well. On behalf of the respondent, observations of the lower appellate Court have been repeated, and the Counsel has submitted that the new written statement should not have contained any other additional plea except the one confined and restricted to the amended portion of the plaint, without the express permission of the Court as laid down in Order 6 rule 17, Code of Civil Procedure.

I am unable to uphold this contention. In the first place there is no rule of law, statutory or otherwise, which restricts or limits the defendant when he is called upon to file a written statement to an amended plaint, to contest the plaintiff's claim, to any particular pleas. The general scheme of the Code of Civil Procedure and the policy underlying the law of pleadings does not suggest any such restriction and the counsel has not been able to cite any precedent in support of his contention. Pleas in a written statement to an amended plaint are not exclusively controlled or governed by the provisions of Order 6 rule 17 of the Code; the provisions of Order 8 are equally--if not more--relevant and important in

this connection.

In my view the question does not appear, strictly speaking, to be one of amendment of the first written statement which could only be effected with the permission of the Court; it really pertains more to the right of the defendant to contest the suit as made out in the amended plaint read as a whole. The law relating to pleadings should not be construed and applied with undue rigidity and strictness if no prejudice or embarrassment towards fair trial of the suit is caused. It would of course be open to the Court to consider whether or not, being an afterthought, the pleas in question lacked merit, but the right of the defendant to raise the new pleas could hardly be negated by reference to the provisions of Order 6 rule 17 only.

Besides, it is not shown as to why could the defendant not resist, even the new amended relief claimed by the plaintiff, by pleading that the property had been purchased for his benefit and had thus been thrown into the 'common stock'. On no reasonable ground could the defendant be prohibited or debarred from urging the new plea in answer to the new relief. Again, if in the trial Court no such objection against the new plea being unauthorised had been pressed, it is doubtful if it could, for the first time, be raised in the Court of appeal.

Absence of a formal order authorising the amendment--if at all it was necessary--was in the present circumstances a mere irregularity not affecting the merits. The sole object of the pleadings is to see where the parties differ, and that each side may be fully alive to the questions that are about to be argued, so that they may adduce all appropriate evidence; and if this object has been achieved, then to rule out the amended pleadings would tend to defeat, instead of promoting, the cause of justice, for serving which alone the rules of procedure exist. I have therefore no hesitation in repelling the contention raised on behalf of the respondent.

(13) For the reasons given above, this appeal fails and is hereby dismissed. In the peculiar circumstances of the case, however, the parties are left to bear their own costs throughout.

Falshaw, J.

(14) I agree.

(15) Appeal dismissed.

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