

**Sunil Kumar Sen Vs. Union of India**

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**Court :** Kolkata

**Decided On :** Sep-17-1999

**Reported in :** (2000)1CALLT332(HC)

**Judge :** Mahammad Habeeb Shams Ansari, J.

**Acts :** High Court Original Side Rules

**Appeal No. :** Ordinary Original Civil Jurisdiction G.A. No. 1676 of 1999 Suit. No. 686 of 1975

**Appellant :** Sunil Kumar Sen

**Respondent :** Union of India

**Advocate for Def. :** Mr. Nirmal Mitra

**Judgement :**

**M.H.S. Ansari, J.**

1. The instant application has been assigned to this court.
2. The plaintiff is the applicant in the instant case and filed the instant application praying for amendment of the plaint in the manner Indicated in red ink in a copy thereof, annexed to the application.

3. Despite best efforts, it is stated by Mr. Nirmal Mitra, learned senior counsel appearing with Mr. R.P. Banerjee for the respondent/defendant, the affidavit-in-opposition could not be filed despite sufficient opportunity and time having been afforded by court in that behalf. Mr. Mitra, however, made oral submissions opposing the said application for amendment of the plaint.

4. The suit as originally filed by the plaintiff was for a decree for specific delivery of 5(five) electric transformers mentioned in scheduled 'A' to the plaint; decree for Rs. 5.53.075/- towards loss and damages suffered by plaintiff, particulars whereof were mentioned in scheduled 'B' to the plaint. In scheduled 'B' the quantification of damage to the said five electric transformers have been specified. In the alternative, the plaintiff claimed a decree for the sum of Rs. 7,50,000/- being the value of the said transformers in May, 1973 when the goods ought to have been delivered to the plaintiff. The said amount was claimed as damages for negligence.

5. The foundation for the said claims was that on or about October 2, 1972, the plaintiff delivered five electric transformers for carriage by railway at Railway risk rates from Bhadroswareghat Railway Yard to Udaypur in the State of Rajasthan. On February 17, 1973, the said transformers were rebooked for carriage by railway from Udaypur to Bhadreswareghat On 21st April, 1973, the railways Intimated the plaintiff that the said transformers had arrived at Bhadreswareghat Railway Yard. On inspection, the same were found to be In completely damaged conditions. A Joint inspection was agreed to be undertaken to ascertain the extent of damages which the defendants failed to do and, therefore, the said suit

6. According to the plaintiff, the said transformers were required for hire at Udaypur at the rate of Rs. 11,000/- per day for four (4) years starting from 1st November, 1972. The plaintiff. It is claimed in the instant application is entitled to loss of profit and/or hire charges which it was to receive from the hirer. The plaintiff discovered certain documents on or about 28th February, 1999. The said documents marked B, C and D to the instant application, it is averred, are relevant for the purpose of the suit and required to be disclosed. The plaintiff, therefore, sought amendment of the plaint by Incorporating additional paragraphs 14A to

14F.

7. In the proposed paragraph 14A, the plaintiff has claimed that he had to pay and bear as and by way of damages a sum of Rs. 5,00,000 A to the hirer for breach of contract. The plaintiff claimed reimbursement of the said sum of Rs. 5,00,000/- with interest from April 7, 1975 to April 6, 1999 at 18% per annum amounting to Rs. 21,60,000/-. The aggregate amount claimed on this account is Rs. 26,60,000/- . Future interest has also been claimed on the said sum.

8. In paragraphs 14B and 14C, plaintiff has claimed loss of profit which the plaintiff would have earned from the hirer at Rs. 11,000/- per day for four years. The particulars have been set out In the proposed paragraphs 14C as under;

#### Particulars

(a) Principal Amount Rs. 1,60,60,000.00

(b) Interest at the rate of

18% p.a. from the date

of termination (1.8.73 to

1.4.1999).

(25 years 8 months). Rs. 8,74,06,400.00

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Total : Rs. 10,34.66.400.00

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9. In the proposed paragraph 14D, the plaintiff states that the said sum claimed Is In addition to its other claims.

10. In paragraph 14E, the plaintiff states that the Advocate, Receiver lifted the transformers to the go-down provided by the plaintiff but as the same could not be

sold, the transformers are lying and the cost of space occupied by the transformers is Rs. 750/- per month which the plaintiff claims from the defendant.

11. in the proposed paragraph 14F, the said claim has been quantified at Rs. 2,04,000A being the cost of space from August 5, 1976 to April 5. 1999 at Rs. 750/- per month.

12. Mr. Nirmal Mitra. learned senior counsel for the respondent submitted that the instant application is misconceived and not tenable in law. The basic principle of law, the learned counsel submitted, is that the amendment introducing a new cause of action should not be and cannot be allowed. It was further submitted by the learned counsel that the suit was instituted in 1975. The reliefs claimed therein are for specific delivery of the transformers; the damages said to have been sustained by the plaintiff in respect of the alleged damage to the transformers and alternatively decree for a specified sum of money towards the value of the said transformers as in May. 1973. The proposed amendments, it was submitted, introduced a totally new cause of action apart from raising new claims which are barred by limitation and cannot, therefore, be incorporated.

13. It is further submitted that the suit is at the stage of cross examination of the plaintiff and the last hearing took place in July 17, 1989 as averred by the plaintiff In the Instant application in paragraph '6' thereof.

14. Mr. Promit Roy, appearing with Mr. Sandip Ghosh, learned counsels for the petitioner, submitted that the delay by itself cannot deny the plaintiff, the right to seek amendment of the plaint, Liberal principles guide the exercise of discretion in allowing amendments as have been laid down in numerous decisions of the Supreme Court. It was the submission of the learned counsel for the plaintiff that the amendments sought for in the Instant application do not alter the character of the suit and no prejudice of an Irremediable character has been inflicted on the opposite party. The Rules of court, It was urged by learned counsel for the plaintiff, are Intended to secure proper administration of justice and that the amendment of pleadings could be allowed at any stage of the proceedings for the purpose of determining the real controversy between the parties. It was submitted by the learned counsel for the plaintiff that neither the character of the suit which was

Inter alia, for damages has been altered by the proposed amendments nor any new cause of action has been Introduced. According to the learned counsel for the plaintiff, an additional approach to the same facts has been sought by way of amendment and the same can be allowed.

15. Having heard the learned counsel for the respective parties and scrutinising the proposed amendments which I have referred to hereinbefore, it is apparent that the plaintiff is seeking to include new cause of action and set up an additional case. Although the suit as instituted was one where the plaintiff inter alia, claimed damages, by proposed amendment, additional damages have been claimed on the ground that the plaintiff suffered damages in a sum of Rs. 5 lakhs which he paid to the hirer on or about 7th April, 1975 and reimbursement thereof was sought from the defendant together with interest therefor from 7th April, 1975 to 6th April, 1999. Loss of profit at the rate of Rs. 11,000/- per day for 4 years is claimed. Allegedly, the said loss was suffered by the plaintiff when the transformers were not delivered to the hirer in or about 1972 and the contract with the hirer and the plaintiff was determined. The plaintiff has claimed an aggregate sum of Rs. 10 lakhs. The third claim is with regard to the space said to have been provided by the plaintiff to the Receiver appointed by court for sale of the transformers.

16. In my view, the proposed amendments are based on new facts and new cause of action. For the said new cause of action, the claim of the plaintiff is barred by the statutory period of limitation prescribed therefor. In my view, therefore, the said amendments cannot be allowed.

17. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors.*, reported in : [1957]1SCR595, the Supreme Court observed that with regard to the principles governing amendment of pleadings, correct principles were enunciated by Batchelor J. in his Judgment reported in 33 Bom. 644, where it was stated thus;

'All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties ..... but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the

same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same : can the amendment be allowed without injustice to the other side, or can it not?'

18. In *A.K. Gupta & Sons Ltd. v. Damodar Valley Corporation*, reported in : [1966]1SCR796 , the majority view was that in the matter of allowing the amendment of pleading, the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when the suit on the new cause of action is barred, it was also held therein that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of statutory period of limitation. The expression 'cause of action' in relation to application of amendments of pleadings was declared in the following terms;

'The expression 'cause of action' in the present context does not mean 'every fact which it is material to be proved to entitle the plaintiff to succeed' as was said in *Cooke v. Gill*, (1873) 8 CP 107 (116). in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Unicos Property Corporation Ltd.* (1962)2 All ER 24, and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of facts': *Dornan v. J.W. Eells and Co. Ltd.* (1962)1 All ER 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of facts to the prejudice of any right

acquired by any party by lapse of time.'

19. It is a well settled principle of law that a suit must be tried on original cause of action. If circumstances changed, they can form the subject of some other proceedings. To this proposition, there are few exceptions. Some times it happens that the original relief claimed becomes inappropriate or the law changes affecting the rights of the parties. In such cases, court's may allow an amendment, pleading in the changed circumstances. See : ( Nalr Service Society Ltd. v. K.C. Alexander & Ors.. reported in : [1968]3SCR163 ).

20. In Suraj Prakash v. Raj Rani, reported In : AIR 1981 SC485 , the Supreme Court observed thus;

'6. The liberal principles which guide the exercise of discretion in allowing amendments have been laid down in numerous decisions of this court. Multiplicity of proceedings being avoided is one criterion. Amendments which do not totally alter the character of the action are readily granted while care is. taken to see that injustice and prejudice of an Irremediable character are not indicted on the opposite party under pretence of amendment of pleadings. The court must be guided by the rule of justice expressed by the Privy Council in Ma Stuve Mya v. Maung Po Haung AIR 1922 PC 249. All rules of court are nothing but provisions intended to secure the proper administration of Justice and it is therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless, no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit'

21. The Principles emerging from the decisions cited above are that liberal principles governing the exercise of discretion In allowing amendments to pleadings. Amendments can be allowed at any stage of the proceeding for the purpose of determining the real question in controversy between the parties. However, such amendments should not be based on new facts and new cause of action and that the amendment should not cause Irremediable prejudice to the other side. Where, however, the proposed amendment amounts to merely a

different or additional approach to the same facts, the amendment was to be allowed even after expiry of the statutory period of limitation. Amendments introducing a new cause of action and particularly when they are barred by time, such amendments cannot be allowed.

22. Applying the above principles to the Instant case, the amendment sought by the plaintiff introduces a new case based on a new cause of action. The said new claims have been made on the basis of new facts. Such amendment introducing new case cannot be allowed when the proposed claims are barred by limitation. For the reasons aforesaid, the Instant application deserves to be dismissed and is accordingly dismissed, however, without any order as to costs.

23. Application dismissed

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