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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

***Reserved on: 1st June, 2022***
***Pronounced on: 4th July, 2022***

\+ CM (M) 1030/2021 & CM APPL. 40806/2021

MR. VIJAY GUPTA ..... Petitioner
Through: Mr. Raman Gandhi, Adv.

versus

MR. GAGNINDER KR. GANDHI & ORS. ..... Respondents
Through: Mr. Manish Makhija, Adv. for R-1 & 2

**CORAM:**
**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**J U D G M E NT**

**% 04.07.2022**

**1.** The learned Principal District and Sessions Judge ("the learned Trial Court", hereinafter) has, vide the impugned order dated 22nd October, 2021 in CS DJ 10306/2016 (***Vijay Gupta v. Gagninder Kumar Gandhi & ors***), dismissed an application filed by the petitioner, as the plaintiff in the suit, under Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC), seeking to amend the suit.

**Facts**

**2.** CS DJ 10306/2016 has been filed by the petitioner, as plaintiff, against Respondents 1, 2 and 3 as Defendants 1, 2 and 3 therein. The issue in controversy being the rejection of the petitioner's application

for amendment of the suit, it is necessary to know, exactly, at the outset, the case set up by the petitioner, as plaintiff.

The Plaint

**3.** The present proceedings deal with a property situated at A-148, Defence Colony, New Delhi-110024 ("the suit property"). The petitioner averred, in the plaint, that he had, *vide* sale deeds dated 11th July, 2001 and 7th August, 2003, purchased the first and second floors, as well as the terrace of the suit property from Sumitra Devi, the mother of Respondent 3. The petitioner asserted that, while executing the aforesaid sale deeds, Sumitra Devi had also executed an undertaking on 11th July, 2001, wherein she undertook that (i) neither she, nor her legal heirs, would sell or transfer the ground floor of the suit property, without giving the petitioner a first option of purchase and (ii) in the event of sale by Respondent 3 or by her legal heirs of the ground floor of the suit property to any person other than the petitioner, the petitioner would have the right and authority to enjoy the parking space in the rear side on the ground floor of the suit property *as its owner*.

**4.** Sumitra Devi died on 21st April, 2012, intestate, resulting in Respondent 3, his brother and his seven sisters becoming co-owners, by succession, of the ground floor of the suit property. The seven sisters and their brother having relinquished their undivided share in the ground floor of the suit property, with all rights, title, interest and

privileges, in favour of Respondent 3, Respondent 3 became the absolute owner of the ground floor of the suit property.

**5.** The plaint alleged that, in violation of the undertaking given by Sumitra Devi on 11th July, 2001, Respondent 3 executed a sale deed, dated 26th August, 2014, in respect of the suit property, in favour of Respondents 1 and 2, which included the rear side parking area. The petitioner asserted, in para 10 of the plaint, that Respondent 3 was "bound to specify in the sale deed dated 26.08.2014 executed by him is the owner of the suit property in favour of the defendant No. 1 and 2 that *plaintiff is the owner of the parking space on the rear side of the suit property*". Para 11 of the plaint complained that "defendant No. 1 and 2 being not the party to the undertaking dated 11.07.2001 executed in favour of the plaintiff by the then owner of the suit property who happens to be the mother of the defendant No. 3 are not allowing the plaintiff to use the parking space in the rear side of the suit property *as the owner*". Thus, alleges para 13 of the plaint, "the legal right of the plaintiff in the rear side of the parking space on the ground floor of the property to use the same *as its owner* has been infringed by the defendant No. 3 which was created on execution of the undertaking on 11.07.2001 which is enforceable against him being the legal heir of the executed who is recorded to be bound by the same and was also aware at the time of closure of the litigations, had acted against it". Para 15 of the plaint, which sets out the various occasions when the cause of action, for filing the plaint, arose, asserts, *inter alia*, that "the cause of action for filing the present suit arose in favour of the plaintiff and against the defendants when the defendant No. 3 executed the sale deed dated 26.08.2014 in favour of the defendant

No. 2 and 3 in respect of the suit property while granting them the right to utilize the parking space at the ground floor *as owner which is in violation of the undertaking dated 11.07.2001* which conferred rights on the plaintiff…" Following the aforesaid recitals, the petitioner prays, in the suit, that the Court be pleased to, *inter alia*, "pass a decree of declaration declaring the plaintiff *to be the absolute owner of the rear parking space* of the property No. A-148, Defence Colony, New Delhi-24 *as owner* to the exclusion of the defendant No. 1 and 2".

**6.** It is clear, therefore, that the petitioner was, predicated on the undertaking dated 11th July, 2001 allegedly executed by Sumitra Devi, claiming, in the plaint, right over the rear parking space in the suit property *as its owner*. The prayer in the suit also sought a *declaration of ownership of the petitioner* in respect of the rear parking space of the suit property.

Written Statement

**7.** Respondent 3 did not choose to contest the suit, apparently because he had already executed sale deeds in favour of Respondents 1 and 2.

**8.** Respondents 1 and 2, in their written statement filed in response to the suit, alleged the purported undertaking dated 11th July, 2001, executed by Sumitra Devi, to be a fabricated and forged document. It was alleged that the said undertaking had also been relied upon, by the petitioner against Sumitra Devi in CS (OS) 940/2010 (***Vijay Gupta v.***

***Sumitra Devi***), which was withdrawn by the petitioner on his coming to know that the fraud would be unearthed. Para 13 of the written statement asserted that, even if it were admitted to be a genuine document, the alleged undertaking dated 11th July, 2001 did not create any rights in favour of the petitioner, who had "no right, title or interest in the rear side parking of the ground floor of the said property".

Application under Order VI Rule 17, CPC

**9.** Though the learned Trial Court directed the petitioner, as plaintiff, to file his affidavit-in-evidence, the petitioner, before doing so, moved an application under Order VI Rule 17 of the CPC, seeking to amend the plaint. Said application stands rejected by the learned Trial Court *vide* the order dated 22nd October, 2021, which is under challenge in the present proceedings.

**10.** Paras 3 to 6 of the application set out the reasons for seeking amendment of the plaint, thus:

> "3. That although the ownership over the first floor and 2nd floor portions of A-148, Defence Colony, New Delhi-24 was conveyed in favour of the plaintiff by virtue of registered sale deeds dated 11/07/2001 and 07/08/2003 but the right to enjoy the parking facility at the ground floor was conveyed in favour of the plaintiff by virtue of undertaking dated 11/07/2001 *since it was only a right to enjoy the facility of parking and was not a transfer of ownership of any portion of the ground floor in favour of the plaintiff.*
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> 4. That as per law, the right to enjoyment of such a facility i.e. in the present case the parking facility, being an

easement, is transferable and the plaintiff by virtue of the said undertaking dated 11/07/2001 acquired the right of enjoyment of parking facility in perpetuity.

5. That there has been a error in the description of prayer clause (a) of the plaint as filed by the plaintiff which claimed absolute ownership of the rear parking space as if it is in ownership claims to establish a right to a portion of the immovable property at the ground floor. The concept of ownership in property is different from the right of enjoyment of a facility or an easement and the prayer clause (a) of the plaint as filed by the plaintiff in claiming ownership over the rear parking space has been a result of confusion between the two branches of law.

6. That the plaintiff is filing the present application with a view to remove this confusion occurring by virtue of prayer clause (a) in the plaint and is seeking to only amend the prayer clause (a) with a view to clarify and elucidate the pleadings in the plaint so as to lay a claim of only of enjoyment in perpetuity over the said parking space."

**11.** Predicated on this reasoning, the petitioner sought to amend prayer (a) in the plaint, to read thus:

> "(a) pass a decree of declaration thereby declaring the plaintiff to have an absolute right of use and enjoyment, in perpetuity, of the car parking space in the rear side of ground floor of property number A-148, Defence Colony, New Delhi 24 as shown in red in the site plan annexed, to the exclusion of Defendant Nos 1 and 2".

The petitioner also prayed, in the application, for permission to place, on record, the site plan for the parking space in the suit property, invoking, for the purpose, Order VII Rule 14 of the CPC.

**The Impugned Order**

**12.** The learned Trial Court has, by the impugned order dated 22nd October, 2021, rejected the petitioner's application. After placing reliance on the judgements of the Supreme Court in ***Abdul Rehman v. Mohd. Ruldu***[1], ***Pankaja v. Yellappa***[2], ***A.K. Gupta & Sons Ltd. v. Damodar Valley Corporation***[3] and ***N.C. Bansal v. Uttar Pradesh Financial Corporation***[4] and the High Court of Bombay in ***Vaishnavi Sai Shri Mahalaxmi Jagdamba Shikshan Sanstha v. Purva Vidarbha Mahila Parishad***[5], the learned Trial Court has proceeded, in rejecting the petitioner's prayer for amendment, to reason thus:

> "22. It is evident from the contents of the plaint that the plaintiff was claiming ownership rights in the parking area in the rear side of the suit property on the basis of Undertaking dated 11.07.2001 and consequently sought a declaration of being an owner and also sought execution of further documents in his favour by way of mandatory injunction. He also sought that Clause 15 of the Sale Deed dated 26.08.2014 executed in favour of defendant is no. 1 and 2 vide which they had been allowed the use of entire parking area including the rear parking to be declared null and void. Significantly, the suit for declaration has been valued at ₹ 24.90 lakhs on which the court fee of Rs. 26,647/– has been paid. It is absolutely clear that what the plaintiff was claiming was a right of ownership on the basis of Undertaking and also sought execution of the documents to that effect. The plaintiff by way of amendment now wants to seek amendment in the clause (a) in the prayer paragraph to claim the right in the rear parking space of the suit property in perpetuity to the exclusion of the defendant no. 1 and 2.
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> 23. Learned counsel for the plaintiff has vehemently argued that there is no substantial change sought to be brought in the suit except to change the nature of prayer on

[1] **(2012) 11 SCC 341**
[2] **(2004) 6 SCC 415**
[3] **AIR 1967 SC 96**
[4] **(2018) 2 SCC 347**
[5] **2022 (1) Mah LJ 519**

the basis of the averments already contained in the plaint. This argument may be appealing in the first instance but the plaintiff is seeking to change the entire basis of his claim from that of an owner to the right to use the parking space in perpetuity to the exclusion of the defendants.

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30. By way of the proposed amendment, the plaintiff is not seeking to introduce an inconsistent plea which may be allowed under Order 6 Rule 17 CPC, but is retracting his claim of being an owner and substituted with a new case of having a right to use the parking space in the rear portion in perpetuity. Clearly, by way of proposed amendment, the new case is sought to be introduced from the case as was originally pleaded, and changes the entire nature of the suit and the evidence that would be required to prove the case, which is not permissible under Order 6 Rule 17 CPC.

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32. The present suit was originally instituted before the Hon'ble High Court on 27.04.2015 wherein on his claim of being an owner of parking area, an ex parte stay was granted in favour of the plaintiff. The plaintiff thus, derived a relief on his claim of ownership which is continuing till date. Subsequently, the case was transferred to this Court on account of change of pecuniary jurisdiction. Issues were framed on 20.05.2020 and affidavits in evidence dated 26.07.2021 has also been filed, though the same is yet to be tendered. There is no explanation whatsoever for the inordinate delay in filing of the amendment application which by no stretch of introduction can be termed as formal.

33. In view of the above discussions, the proposed amendment proposes to introduce a new case which is beyond the scope of the order 6 Rule 17 CPC. Hence the same is dismissed."

**13.** The learned Trial Court, in rejecting the petitioner's application, proceeded, essentially, on the premise that the petitioner was, by the

proposed amendment, "seeking to change the entire basis of his claim from that of an owner to the right to use the parking space in perpetuity to the exclusion of the defendants". The petitioner's contention that it was entitled to take alternative inconsistent pleas was accepted by the learned Trial Court who, however, held that the petitioner was not, by the proposed amendment, "seeking to introduce an inconsistent plea which may be allowed under Order VI Rule 17 CPC", but was "retracting his claim of being an owner and substituting it with a new case of having a right to use the parking space rear portion in perpetuity". The case that was being sought to be set up in the amended plaint was, therefore, according to the learned Trial Court, different from the case set up in the original plaint, and resulted in changing of the entire nature of the suit as well as the evidence which would be required to be produced in the case. The learned Trial Court also observed that, on the basis of the case as originally pleaded by him, the plaintiff had obtained interim relief from the Court. For all these reasons, the learned Trial Court held that the amendment in the plaint, sought to be effected by the plaintiff, could not be allowed under Order VI Rule 17, CPC. The application was therefore rejected.

**Rival Contentions**

**14.** Mr. Raman Gandhi appeared for the petitioner and Mr. Manish Makhija appeared for Respondents 1 and 2. Respondent 3 remained unrepresented. Learned Counsel were heard at length.

**15.** Mr. Gandhi submits that the learned Trial Court was in error in assuming that, by the proposed amendment, the petitioner was seeking to alter the nature and character of the case set up in the plaint. He submits that the amendment was being sought only because of an inadvertent error by the learned Counsel who had drafted the plaint in claiming ownership of the petitioner over the rear parking space on the basis of the undertaking dated 11th July, 2001. Prior to, and after, the proposed amendment, Mr. Gandhi points out that the petitioner was only claiming his due as per the undertaking dated 11th July, 2001 tendered by Sumitra Devi. A bare reading of the undertaking, he submits, indicates that it does not confer ownership rights, but merely confers, on the petitioner, the right to use the rear parking space, concomitant on sale of the ground floor of the suit property to a third party. This is all that, by the amendment, his client seeks to claim. Mr. Gandhi submits that the nature and character of the suit was not, thereby, altered or compromised, as the document on the basis of which the petitioner was staking his claim continued to remain the undertaking dated 11th July, 2001. It is not, therefore, as though the petitioner was seeking to alter the basis of the plaint in the suit. It was only the nature of the right which was available to the petitioner, under the aforesaid undertaking dated 11th July, 2001, and which had been wrongly claimed in the suit as originally drafted, that was being sought to be correctly claimed by the amendment. The inadvertent error on the part of the earlier learned Counsel who had drafted the suit, submits Mr. Gandhi, ought not to be regarded as a ground to disentitle the petitioner from claiming what was rightly due to him. Inasmuch as the original prayer in the unamended suit, and the

amended prayer, were both predicated on the undertaking dated 11th July, 2001, Mr. Gandhi submits that the learned Trial Court was not correct in holding that the amendment sought to change the very nature of the suit.

**16.** Mr. Gandhi submits that the prayer for amendment had been made before the commencement of trial, as affidavit-in-evidence was yet to be tendered by the petitioner. Trial commences, he submits, only when affidavit-in-evidence is filed by the party who has to lead evidence, for which purpose Mr Gandhi relies on the judgement of the Supreme Court in ***Mohinder Kumar Mehra v. Roop Rani Mehra***[6]. As such, the proviso to Order VI Rule 17 of the CPC would not, he submits, apply, and a liberal approach was justified in the matter.

**17.** Mr. Gandhi also places reliance on ***A.K. Gupta***[3], as well as the judgements of a learned Single Judge of this Court in ***Sarjit Singh Awla v. Kuldeep Singh Awla***[7] and ***GCG Transglobal Housing Project Pvt Ltd v. Surakshit Exports Pvt Ltd***[8].

**18.** Arguing *per contra*, Mr. Makhija compared the prayers in the original plaint filed by the petitioner, vis-à-vis the proposed amended prayer, in an attempt to convince the Court that the amendment amounted to abandoning the original claim as preferred in the plaint and setting up an entirely new case. This, submits Mr. Makhija, cannot be permitted under Order VI Rule 17 of the CPC, for which purpose he cites the judgement of the Supreme Court in ***M. Revanna***

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[6] **(2018) 2 SCC 132**
[7] **245 (2017) DLT 515**
[8] **2015 SCC OnLine Del 7263**

***v. Anjanamma***[9] as well as the judgement of the High Court of Bombay in ***Vaishnavi Sai Shri Mahalaxmi Jagdamba Shikshan Sanstha***[5]. Additionally, he placed reliance on order dated 6th September, 2013, whereby a Coordinate Bench of this Court disposed of CS (OS) 940/2010 *supra*. He submits that the petitioner had instituted the said suit against Sumitra Devi, and that the suit was disposed of on the basis of a settlement, resulting in a compromise deed dated 14th June, 2013. These documents, Mr. Makhija submits, have been suppressed by the petitioner, thereby disentitling him to relief from this Court. The claim now being set up by the petitioner, he submits, is in the teeth of the aforesaid settlement, on the basis of which CS (OS) 940/2010 was disposed of, as compromised.

**19.** No case exists, submits Mr. Makhija, for this Court to interfere, in exercise of the jurisdiction vested in it by Article 227 of the Constitution of India, with the view expressed by the learned Trial Court, while dismissing the petitioner's application under Order VI Rule 17, CPC.

**Analysis**

**20.** Order VI Rule 17 of the CPC reads thus:

> "**17. Amendment of pleadings**. – The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary

[9] **(2019) 4 SCC 332**

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."

**21.** A reading of Order VI Rule 17 reveals the following:

(i) The provision uses the word "may" as well as "shall". They are, however, used in different contexts, and, therefore, no confusion arises as a consequence. The provision states that the Court *may* at any stage of the proceedings allow amendment of the pleadings. The use of the word "may" is, in this context, clearly permissive and empowering in nature. It indicates that the Court is empowered, at any stage of the proceedings, to allow amendment of the pleadings. Additionally, even syntactically, no other word could be used in place of "may", as it is followed with the words "at any stage of the proceedings". These opening words of Order VI Rule 17, therefore, indicates that amendment of pleadings may be allowed by the Court at any stage of the proceedings.

(ii) The use of the word "shall", later in Order VI Rule 17 is, however, imperative and mandatory in nature. The clear intent of the legislature is that *all amendments*, which satisfy the criteria envisaged by Order VI Rule 17 shall be allowed. Rather, it casts an obligation and a duty to carry out,

necessarily, all such amendments as are necessary for the purpose of determining the real questions in controversy between the parties.

(iii) In this context, the use of the word "made", instead of "allowed" is also significant. Order VI Rule 17 does not say that "all such amendments shall be *allowed*". It states that "all such amendments shall be *made*". To my mind, the use of the word "made" is significant and purposeful. Amendments are *allowed* by the Court, but they are *made* by the litigant applying for the amendment. The use of the expression "shall be made", instead of "shall be allowed", therefore, indicates that the duty that is cast, by Order VI Rule 17, is cast on the litigant, rather than on the Court. Holistically, once, therefore, the Court, at any stage of the proceedings, allows a party to amend his pleadings, all such amendments shall be made as are necessary to determine the real questions in controversy between the parties. Having said that, judicial authorities have often read the word "made" as referring to the duty of the Court to allow such amendments.

(iv) The governing and delimiting expression, in Order VI Rule 17 is, unquestionably, "as may be necessary for the purpose of determining the real questions in controversy between the parties". To apply this clause, the following three questions have to be posed and answered:

(a) What is the controversy between the parties?

(b) What are the real questions in the said controversy?

(c) Are the amendments, being sought, necessary for determining the said questions? If they are, they *shall be made*.

(v) It is not open, therefore, for a Court to refuse to allow an amendment which is necessary for determining the real questions in controversy between the parties before it. At whatever stage the amendment is sought, it *has* to be allowed. (*This is, of course, subject to the proviso to Order VI Rule 17, to which I shall presently advert*.)

(vi) The import of the latter half of the main part of Order VI Rule 17 has, however, to be carefully understood. It states that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". This may be worded, otherwise, as "*if* the amendments are necessary for determining the real questions in controversy between the parties, *then* they shall be allowed". It would be erroneous, however, from this proposition, to deny the antecedent[10]. Order VI Rule 17, in other words, while setting out a circumstance in which the amendment shall be made, does

[10] "Denying of the antecedent", also known, in logic, as the "fallacy of the inverse" is a common fallacy in logic, by which, from the proposition "if A, then B", it is inferred that "if not A, then not B". This is well understood as an incorrect, and invalid, presumption in logic. From the truism that "if the water is boiling, the kettle is warm", it cannot be said, by inference, that "if the water is not boiling, the kettle is not warm". The kettle may be warm even if the water has not reached boiling point.

not delineate the circumstances in which the prayer for amendment may be refused. From the proposition "*if* the amendments are necessary for determining the real questions in controversy between the parties, *then* they shall be allowed", it would be fallacious, in logic, to infer that "if the amendments are *not* necessary for determining the real questions in controversy between the parties, then they shall *not* be allowed". To reiterate, therefore, while Order VI Rule 17 requires an amendment, which is necessary for determining the real questions in controversy between the parties to necessarily be allowed, it does not, by inference, state that all other amendments may be refused.

(vii) Neither does Order VI Rule 17, therefore, delineate, exhaustively, all circumstances in which a prayer for amendment *should* be allowed, nor does it identify the circumstances in which a prayer for amendment *should not* be allowed. It merely identifies *one* situation in which the amendment is necessary for determining the real issues in controversy between the parties as *one circumstance* in which the amendment is mandatorily required to be allowed.

(viii) The circumstances in which a prayer for amendment of pleadings may justifiably be refused are not, therefore, set out in Order VI Rule 17. They have, however, been explained in judicial precedents, over a period of time, to which I would presently allude.

(ix) Delay in applying for amendment, or possibility of the proceedings getting protracted were the prayer for amendment to be allowed, are not, therefore, statutorily envisaged as grounds on which a prayer for amendment of pleadings may legitimately be denied. On the proposition that delay in applying for amendment cannot be a sole ground to reject the prayer, the judgement of the Supreme Court in ***Andhra Bank v. ABN Amro Bank N.V.***[11] is a clear authority.

(x) The expression "as may be necessary for the purpose of determining the real questions in controversy between the parties" is an extremely fluid expression. The contours of the said expression have been delineated, over the course of time, by various precedents of the Supreme Court. They would be dealt with, presently.

(xi) The proviso to Order VI Rule 17, however, envisages a circumstance in which the provision would *not* apply. A proviso is, per definition, an exception to the main provision. If the proviso applies, therefore, there is no occasion to refer to the main provision at all. It is legitimate, therefore, for the Court to examine, in the first instance, whether the proviso applies. If it does, applicability of the main part of Order VI Rule 17 stands *ipso facto* ruled out.

[11] **(2007) 6 SCC 167**

(xii) The proviso to Order VI Rule 17 prohibits, again in absolute terms (as is apparent from the use of the word "shall"), allowing of an application for amendment after commencement of the trial, *unless* the Court finds that, in spite of due diligence, the party could not have raised the matter prior thereto. The latter part of the proviso, which excepts its application where the Court is satisfied that, despite due diligence, the amendment being sought could not have been raised before trial commenced is, of course, a matter entirely within the subjective discretion of the Court. ***Chander Kanta Bansal v. Rajinder Singh Anand***[12] adopts, to understand the expression "due diligence", the following definition from Words & Phrases, Pmt Edition, 13A, of the expression:

> "'Due diligence' in law means doing everything reasonable, not everything possible. 'Due diligence' means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

Having relied on the above definition, the Supreme Court, in ***Chander Kanta Bansal***[12], defined "due diligence" as meaning "the diligence reasonably exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation". ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department***[13], in like terms, defined "due diligence" as "a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under

[12] **(2008) 5 SCC 117**
[13] **(2008) 7 SCC 169**

the particular circumstances". Importantly, therefore, "due diligence" connotes *reasonable* diligence, keeping in view *the circumstances of the case*. These twin considerations have, therefore, to inform the Court seized with the issue of whether a litigant, before it, had exercised "due diligence". The elasticity of the expression is self-evident. If trial has commenced, the Court would then have to examine, on facts, whether the party was unable to raise the matter before trial commenced, despite due diligence.

(xiii) In this context, the word "allowed", as used in the proviso to Order VI Rule 17, may call for a nuanced interpretation where, for example, the application is filed before trial commences, but is taken up by the Court after trial has commenced. One way of avoiding such an unwholesome situation would, of course, be that, if a party informs the Court that an application for amendment has been moved, the Court should take up the application first, instead of proceeding with trial, so that the application is not hit by the proviso. If, however, despite moving an application for amendment, the applicant does not disclose this fact to the Court, and permits trial to commence, it would be inequitable to allow the applicant to later claim amnesty from the application of the proviso to him on the ground that, prior to commencement of trial, he had moved the application. Though the present case does not involve any such fact situation, in my opinion, if, prior to commencement of trial, an application seeking amendment is moved, it would be for the applicant to ensure that the

application is listed and taken up before trial commences. Once trial commences, the proscription engrafted in the proviso to Order VI Rule 17 applies, inexorably and absolutely.

**22.** Analysing Order VI Rule 17, the Supreme Court, in ***Rajkumar Gurawara v. S.K. Sarwagi & Co. (P) Ltd.***[14], held thus:

> "**13.** To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso."

**23.** Which brings us to the three most important aspects to be examined, while considering an application seeking amendment of pleadings under Order VI Rule 17, viz.

(i) when trial can be said to commence (in relation to the proviso),

(ii) whether the amendment is necessary to determine the real issue in controversy between the parties (in which case the amendment has necessarily to be allowed), and

[14] **(2008) 14 SCC 364**

(iii) if the answer to (ii) is in the negative, whether the prayer for amendment deserves to be rejected for any reason (if not, the amendment would have to be allowed).

When does trial commence?

**24.** Mr. Gandhi contended that, in the present case, trial had not commenced till the date when the impugned order came to be passed, as affidavit-in-evidence on behalf of the petitioner (as plaintiff) was yet to be filed by him. For this purpose, Mr. Gandhi relied on ***Mohinder Kumar Mehra***[6].

**25.** Paras 17 to 20 and 22 of the report in ***Mohinder Kumar Mehra***[6] read thus:

> "**17.** Although Order 6 Rule 17 permits amendment in the pleadings "at any stage of the proceedings", but a limitation has been engrafted by means of proviso to the effect that no application for amendment shall be allowed after the trial is commenced. Reserving the court's jurisdiction to order for permitting the party to amend pleading on being satisfied that in spite of due diligence the parties could not have raised the matter before the commencement of trial. In a suit when trial commences? Order 18 CPC deals with "hearing of the suit and examination of witnesses". Issues are framed under Order 14. At the first hearing of the suit, the court after reading the plaint and written statement and after examination under Rule 1 of Order 14 is to frame issues. Order 15 deals with "disposal of the suit at the first hearing", when it appears that the parties are not in issue of any question of law or a fact. After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences.

**18.** This Court in ***Vidyabai* v. *Padmalatha***[15], held that *filing of an affidavit in lieu of examination-in-chief of the witnesses amounts to commencement of proceedings*. In para 11 of the judgment, the following has been held: (SCC p. 413)

> "11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. *The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did.* The date on which the issues are framed is the date of first hearing. *Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding*"."

**19.** Coming to the facts of the present case, it is clear from the record that *issues were framed on 17-5-2010* and *case was fixed for recording of evidence of the plaintiff on 10-8-2010. The plaintiff did not produce the evidence and took adjournment and in the meantime filed an application under Order VI Rule 16 or 17 on 17-1-2011. Thereafter the Court on 26-7-2011 has granted four weeks' time as the last opportunity to file the examination-in-chief.* It is useful to quote para 4 of the order, which is to the following effect:

> "4. In view of the above, it is directed as follows:
>
> (i) Having regard to the delay which has ensued, subject to the plaintiff paying costs of Rs 5000, each to the contesting Defendants 1 and 5 within a period of one week, the plaintiff is permitted four weeks' time as a last opportunity to file the examination-in-chief of his witnesses on affidavit.
>
> (ii) The matter shall be listed before the Joint Registrar for recording of plaintiff's evidence on 29-8-2011.

[15] **(2009) 2 SCC 409**

(iii) The case shall be listed before the Court for direction on 18-1-2012.

(iv) Needless to say in case IA No. 1001 of 2011 is allowed, appropriate orders for evidence of the plaintiff would be made."

**20.** Thus, *technically trial commenced when the date was fixed for leading evidence by the plaintiff but actually the amendment application was filed before the evidence was led by the plaintiff. The parties led evidence after the amendment application was filed.* In this context, it is necessary to notice the order of the High Court dated 14-2-2014, which records that evidence of both the parties have been concluded. Most important fact to be noticed in the order is that the Court recorded the statement of the plaintiff's counsel that parties have led evidence in view of the amendment sought in the plaint. The order dated 14-2-2014 is to the following effect:

"The evidence of both the parties has been concluded. The matter has been listed for final disposal. The learned counsel for the plaintiff has pointed out the order dated 26-7-2011 wherein observation was made that in case IA No. 1001 of 2011 under Order VI Rule 17 CPC for amendment of the plaint is allowed, appropriate order for evidence of the plaintiff would be made. As a matter of fact, the plaintiff's counsel stated that the parties have also led evidence in view of amendment sought in the plaint and the same covered in the evidence produced by the parties. The defendants, however, alleged that the said amendment was unnecessary and was opposed by the defendants and issue involved in the said circumstances be considered at the time of final hearing of suit as Defendant 1 is more than 85 year old lady, the suit itself be decided.

List this matter in the category of short cause on 22-5-2014…."

*****

**22.** The proviso to Order 6 Rule 17 CPC prohibited entertainment of amendment application after commencement

> of the trial with the object and purpose that *once parties proceed with the leading of evidence, no new pleading be permitted to be introduced.* The present is a case where actually *before parties could lead evidence, the amendment application has been filed* and from the order dated 14-2-2014, it is clear that the plaintiff's case is that parties have led evidence even on the amended pleadings and the plaintiff's case was that in view of the fact that the parties led evidence on amended pleadings, the allowing of the amendment was a mere formality. The defendant in no manner can be said to be prejudiced by the amendments since the plaintiff led his evidence on amended pleadings also as claimed by him."
>
> **(Emphasis supplied)**

**26.** The position in law as enunciated in the afore extracted passages from ***Mohinder Kumar Mehra***[6] is interesting. The Supreme Court noted, clearly and with no equivocation whatsoever that, in ***Vidyabai***[12], it had been held that "filing of an affidavit in view of examination-in-chief of the witnesses amounts to commencement of proceedings". (Though the Supreme Court has used the phrase "commencement of proceedings", one may regard the Supreme Court as having meant "commencement of trial", as the enunciation was with relation to the proviso to Order VI Rule 17 of the CPC.) Having thus noted the position in law, as enunciated in ***Vidyabai***[12] regarding commencement of trial, the Supreme Court went on to observe, with respect to the facts before it, that "*technically* trial commenced when the date was fixed for leading evidence". There appears, therefore, to be some discordance between ***Vidyabai***[12] and ***Mohinder Kumar Mehra***[6] with respect to the date when the trial could be said to commence, as ***Vidyabai***[12] held that trial commenced on the date *when the affidavit in evidence was filed*, whereas ***Mohinder Kumar Mehra***[6] held that, "technically", trial commenced *when a date was fixed for*

*leading evidence*. However, this slight discordance, if any, need not concern us as, even in ***Mohinder Kumar Mehra***[6], the Supreme Court held that the application for amendment, filed before evidence was actually led by the plaintiff, would not be hit by the proviso to Order VI Rule 17 of the CPC. The relevant date for applying the proviso to Order VI Rule 17 would, as per ***Mohinder Kumar Mehra***[6], therefore, be *the date when the plaintiff led evidence*.

**27.** The first step in leading of evidence is either production of the witness for examination or, at the very least, filing of the affidavit-in-evidence of the witness by the party who is required, by the Court, to lead evidence in the first instance; generally, the plaintiff. Whether one applies ***Vidyabai***[12], therefore, or ***Mohinder Kumar Mehra***[6], the trial could not be stated to have commenced, for the purpose of applicability of the proviso to Order VI Rule 17 of the CPC, before the affidavit-in-evidence of the plaintiff is filed even if, prior thereto, the Court has directed filing of affidavit-in-evidence by a particular date.

**28.** Even while applying the proviso to Order VI Rule 17, the Supreme Court has, in ***Gurbakhsh Singh v. Buta Singh***[16] , adopted a somewhat relaxed approach, even while remaining within the discipline of the proviso. The appellants in that case sought leave to amend the plaint filed by them after issues had been framed and two official witnesses examined. Clearly, therefore, the prayer for amendment was made after trial had commenced. Applying the proviso to Order VI Rule 17, the learned Trial Court dismissed the

[16] **(2018) 6 SCC 567**

application for amendment, observing that the appellants had failed to exercise due diligence, and that the facts sought to be introduced by amendment could have been placed before issues were framed. The appellants challenged the decision of the learned Trial Court before the High Court by way of Civil Revision, in which it was submitted that the appellants only chose to introduce, by the proposed amendments in the plaint, the specific *Khasra* numbers of the land in dispute. The Civil Revision having been dismissed by the High Court, the appellants appealed to the Supreme Court.

**29.** The High Court, in dismissing the appellant's petition, relied solely on Order VI Rule 17, observing, significantly, that, though the amendment proposed did not change the nature of the suit, nonetheless, it could not be allowed, in view of the proscription contained in the proviso to Order VI Rule 17, given the fact that the specifics that the appellants sought to introduce by amendment were known to them prior to commencement of trial. The Supreme Court set aside the judgement of the High Court, holding, in the process, in para 5 of the report, thus:

> "**5.** *In the present case the record of Civil Suit No. 195 of 1968 in which ex parte decree was passed on 30-6-1969 is not traceable. In the circumstances, there could possibly be some inability in obtaining correct particulars well in time on part of the appellants*. At the time when the application for amendment was preferred, only two official witnesses were examined. The nature of amendment as proposed neither changes the character and nature of the suit nor does it introduce any fresh ground. The High Court itself was conscious that the amendment would not change the nature of the suit. In the given circumstances, in our view, the

> amendment ought to have been allowed. In any case it could not have caused any prejudice to the defendants."

The Supreme Court was, thus, persuaded to set aside the judgement of the High Court as (i) only two official witnesses had been examined, (ii) the amendment sought did not alter the nature or character of the suit, or introduce any new ground, (iii) the amendment did not result in any prejudice to the respondents and (iv) "there could possibly be some inability in obtaining correct particulars well in time on the part of the appellants", especially as the record of the earlier Civil Suit was not traceable.

**30.** This judgement indicates that, even while examining the aspect of "due diligence" under the proviso to Order VI Rule 17, the Court is required to adopt an expansive and liberal, rather than a pedantic and literal, approach. Of course, even if after adopting such an approach, it is found that the applicant seeking amendment could have, by exercising due diligence, raised the matter being sought to be raised by amendment before commencement of the trial, the proviso would operate absolutely, to discredit the plea for amendment.

Application of the proviso to Order VI Rule 17 to the facts of the present case

**31.** In the present case, the petitioner has clearly averred, on oath, that the finding of the learned Trial Court, that trial had commenced in the present case, was incorrect, as evidence of the parties had not yet begun, and the petitioner was yet to tender his affidavit by way of examination-in-chief. The respondents, in the reply, have not

contested this claim. As such, it is apparent that trial had not, in the present case, commenced when the impugned order came to be passed on 22nd October, 2021. The proviso to Order VI Rule 17 of the CPC, therefore, has no application in the present case.

When the prayer for amendment *should* and when the prayer for amendment *can* be allowed

**32.** Once it is asserted that the case does not attract the proviso to Order VI Rule 17, the court is thereafter required to examine whether the amendment sought is necessary to determine the real issue in controversy between the parties (being the test expressly stipulated in Order VI Rule 17) and, in the event the answer to the said question is in the negative, whether the amendment sought is required to be allowed or rejected on any other ground. These issues juxtapose into one another, and their answers would become apparent if one scans the evolution of the law through decisions rendered by the Supreme Court and other judicial authorities on the point.

**33.** On a reading of the judgments rendered by the Supreme Court on the scope of ambit of Order VI Rule 17, the following propositions emerged:

(i) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is

mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17[17].

(ii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings,

provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations)[18].

(iii) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

[17] **Rajesh Kumar Aggarwal v. K. K. Modi, (2005) 4 SCC 385; Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil, AIR 1957 SC 363; Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy, (2001) 8 SCC 115**

[18] **Estrella Rubber v. Dass Estate (P) Ltd, (2001) 8 SCC 97**

(iii) the prayer for amendment is *malafide*, or

(iv) by the amendment, the other side loses a valid defence[19].

(iv) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs[20].

(v) The proscription against allowing an application for amendment, where the amendment results in setting up a time barred claim, is not absolute. In ***Pirgonda Hongonda Patil v. Kalgonda Shingonda Patil***[21] and ***Muni Lal v. Oriental Fire & General Insurance Co. Ltd.***[22]**,** it was held that, as the proposed amendment set up a case which, since institution of the suit, had become time barred, it would cause prejudice to rights which vested in the other side, the amendment should not be allowed. At the same time, in ***L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.***[23], the Supreme Court held that the fact that the claim which was sought to be introduced by the amendment was time barred was not an absolute bar and that a time barred claim could also be sought to be introduced by amendment if the court felt it necessary to do so, *ex debito justitiae*.

[19] **Punjab National Bank v. Indian Bank, AIR 2003 SC 2284**
[20] **B.K. Narayana Pillai v. Parameswaran Pillai, AIR 2000 SC 614**
[21] **AIR 1957 SC 363**
[22] **AIR 1996 SC 642**
[23] **AIR 1957 SC 357**

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment was required to be allowed.[24]

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.[25]

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.[26]

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer[27]. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.[28]

(x) An amendment which results in substitution of one distinct cause of action for another, or in changing the subject matter of the suit, cannot be allowed; else, it can.[29] Certain illustrative examples may be noted thus:

(a) Where the original prayer in a plaint was against demolition, and demolition actually took place during the

[24] **Ramchandra Sakharam Mahajan v. Damodar Trimbak Tanksale, (2007) 6 SCC 737**
[25] **A.K. Gupta and Sons v. Damodar Valley Corporation, AIR 1967 SC 96**
[26] **V.S. Achuthanandan v. P.J. Francis, AIR 1999 SC 2044**
[27] **Andhra Bank v, ABN Amro Bank N.V., AIR 2007 SC 2511**
[28] **Ragu Tilak D. John v. S. Rayappan, AIR 2001 SC 699**
[29] **Ma Shwe Mya v. Maung Mo Hnaung, AIR 1922 PC 249**

pendency of the suit, an application seeking amendment of the prayer to claim damages was required to be allowed, as held in ***Ragu Tilak D. John v. S. Rayappan***[28].

(b) In a suit for allotment of properties, an amendment of the schedule of properties in the suit was sought on the ground that some properties had been incorrectly described and some properties had inadvertently left out. In ***C.M. Vareekutty v. C.M. Mathukutty***[30], it was held that the amendment was required to be allowed.

(c) The plaintiff sought eviction of the defendant on the ground that the defendant was a licensee. In his written statement, the defendant claimed that he was not a licensee but a lessee. After trial had commenced, the defendant sought to amend the written statement (i) to incorporate an alternate plea, in case the court found him to be a licensee, that the license was irrevocable, (ii) to plead that two of the prayers in the suit were time barred and (iii) to plead that, as the defendant had executed works of a permanent nature and had incurred expenses therefor, the license could not be revoked in view of Section 60(b) of the Indian Easements Act, 1882. The Supreme Court, in ***B.K. Narayan Pillai***[20], held that the amendment was required to be allowed as the plaintiff

[30] **(1980) 1 SCC 537**

could be compensated by costs, subject to the defendant paying arrears of licence fee.

(d) A prayer for amendment in a suit seeking specific performance, by adding a necessary averment which was inadvertently left out owing to mistake of counsel, was allowed as it did not result in any fresh cause of action, in ***Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar***[31]**.**

(e) In ***Vijendra Kumar Goel v. Kusum Bhuwania*** [32] and ***K. Raheja Constructions Ltd. v. Alliance Ministries***[33]**,** it was held that an injunction suit could not, by amendment, be allowed to be converted into a suit for specific performance where, by that time, a suit for specific performance would have become barred by time.

(xi) Applying these principles, in ***Jagan Nath v Chander Bhan***[34], it was held that once, in his written statement, the defendant had admitted the fact of tenancy, he could not, thereafter, seek to amend the written statement and withdraw the admission, as it would amount to taking an altogether new plea and divesting the opposite party of a valuable right. Introduction of a prayer for *mesne* profits was, to the extent

[31] **(1990) 1 SCC 166**
[32] **(1997) 11 SCC 457**
[33] **1995 SUPP 3 SCC 17**
[34] **1988 (3) SCC 57**

permissible within limitation, allowable by amendment, as held in ***Haridas Girdhardas v Varadaraja Pillai***[35].

**34.** The principles governing applications seeking amendment of pleadings, moved under Order VI Rule 17 CPC, are, therefore, well-settled. By judicial fiat, however, these principles have been subjected to exceptions where allowing the amendment would result in irreparable injustice to the opposite party, or where, by the amendment, the party seeking amendment withdraws or resiles from an admission or pleading made by him during the proceedings, thereby resulting in injustice to the opposite party. A time barred claim, too, ordinarily, cannot be sought to be introduced by an amendment in a plaint; this principle, however, is not absolute and, in certain circumstances, a court may permit introduction of a time barred claim by amendment *ex debito justitiae*. Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

**35.** A golden thread that runs through all these principles is that, where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to

[35] **AIR 1971 SC 2366**

meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed.

The impugned order, examined in the light of the above principles

**36.** The learned Trial Court has, in the impugned order, correctly understood and recognized these principles. In applying them, however, I am of the opinion that the learned Trial Court has erred. Inasmuch as the consequence of the error is divestiture, by the learned Trial Court, of a jurisdiction which, in my considered opinion, did vest in it, resulting in the petitioner being completely non-suited in the matter of urging a right which, according to the petitioner, flows from the undertaking dated 11th May, 2001, executed by Sumitra Devi, the error committed by the learned Trial Court, in my view, requires correction in exercise of the supervisory jurisdiction vested in this Court by Article 227 of the Constitution of India.

**37.** Admittedly, the only amendment sought by the petitioner was in the prayer clause. Earlier, the petitioner was seeking a declaration that the petitioner was the owner of the rear side parking in the suit property. By the amendment, the petitioner, gave up his claim to

ownership, and substituted it with the claim for right to use the rear parking space in perpetuity.

**38.** The learned Trial Court has rejected the prayer for amendment, holding that, by converting a suit claiming ownership into a suit claiming merely a right to use the suit property in perpetuity, the petitioner had completely altered the very nature and character of the suit. Inasmuch as it is not permissible for a litigant to, by amending the plaint under Order VI Rule 17 CPC, change its nature and character, the learned Trial Court has rejected the prayer for amendment.

**39.** Mr. Gandhi, however, disputes the finding, of the learned Trial Court, that the petitioner was, by the amendment that he sought to make in the suit, altering its nature and character. I confess that I am inclined to agree with Mr. Gandhi. Whether in its amended or its unamended form, the petitioner was seeking enforcement of the right which, according to the petitioner, flowed to the petitioner under the undertaking dated 11th May, 2001 executed by Sumitra Devi.

**40.** The undertaking speaks for itself. It would be for the court to interpret the undertaking. The contention of the petitioner is that, though the undertaking confers, on the petitioner, only a right to use the rear parking space, the petitioner, by mistake, claimed ownership of the said space. The petitioner merely seeks to amend the plaint to, instead, pray that, on the basis of the undertaking dated 11th May,

2001, the petitioner was entitled to right to use the rear parking space in perpetuity.

**41.** In either case, the claim was predicated on the undertaking dated 11th May, 2001. The case of the petitioner, as set up in the plaint, was that Sumitra Devi had, at the time of executing sale deeds in favour of the petitioner in respect of the second and third floor of the suit property, executed an undertaking on 11th May, 2001, undertaking not to sell the ground floor to any third party without offering the petitioner a right of first purchase and, in the event of such sale, to allow the petitioner to use the rear parking space at the ground floor of the suit property "as owner". The petitioner, in these circumstances, sought a declaration that he was the owner of the rear parking space. Apparently having re-read the undertaking, the petitioner now seeks to urge that the right which flowed to him under the undertaking was only a right to use the rear parking space and that ownership had, therefore, been claimed by mistake.

**42.** The issue, pre- or post- amendment, only involves interpretation of the undertaking. It would be for the court to take a view as to whether the undertaking vests a right of ownership on the petitioner, or a right to use the rear parking space in perpetuity, or vests no right at all.

**43.** The substituted prayer is predicated on the very same factual material on which the original prayer was predicated. The petitioner has, in fact, scaled down the relief that he has sought, from a claim of ownership to a claim of user. It cannot, however, be said that, by

doing so, the petitioner has altered the nature and character of the suit. Whether in its original, or its proposed amended *avatar*, the suit questions the right of Respondent 3 to sell the ground floor of the suit property to Respondents 1 and 2 in the teeth of the undertaking dated 11th May, 2001, and seeks the relief which, according to the petitioner, flows to it from the undertaking.

**44.** I am unable, therefore, to agree with the learned Trial Court that, by seeking amendment in his plaint, the petitioner was altering the nature and character of the suit filed by him. All that the petitioner was doing was seeking an amendment of the prayer for declaration, as contained in the suit, from a prayer for a declaration that the undertaking conferred Right X on the plaintiff, to one that the undertaking conferred Right Y. In either case, as already noted, what the court is required to do is to analyze the undertaking, along with the objections to its veracity as raised by the respondent, and determine whether, in terms of the undertaking (if it is found to be genuine and convincing) the petitioner was entitled to the relief sought by him. A mere change in the relief that was being sought, predicated as it was, in either case, on the undertaking and without involving any new facts, could not be regarded as altering the cause of action in the suit.

**45.** The "bundle of facts" that the petitioner was required to prove, to entitle him to relief, in either case, involved the sale deed executed by Sumitra Devi in respect of the first and second floors of the suit property and the undertaking purportedly executed by Sumitra Devi on 11th May, 2001.

**46.** It is well settled that the CPC, as a procedural statute, cannot be so interpreted as to defeat substantive rights[36]. If, indeed, the undertaking dated 11th May, 2001 (assuming it to be genuine and reliable), in fact, grants the petitioner right of user of the rear parking space, consequent on sale of the ground floor by the legal heirs of Sumitra Devi to Respondent 1, the petitioner cannot be disentitled from enforcing this right merely because, at the time of drafting and filing of the plaint, the case set up was of ownership. It is always open to the respondents to oppose the petitioner's claim, on facts as well as in law. Trail has not yet commenced, as affidavit in evidence has yet to be filed by the petitioner.

**47.** I am, therefore, of the considered opinion that the amendment in the prayer clause in the plaint, sought to be effected by the petitioner via its application under Order VI Rule 17 of the CPC, deserved to be allowed, and that the learned Trial Court, in holding otherwise, has erred.

Arguments regarding easements

**48.** One of the contentions advanced by Mr. Gandhi, appearing for the petitioner, was that the right claimed by the petitioner under the amendment that it sought to effect in the prayer clause in the plaint, was an easementary right, and that easementary rights are also, in a way of speaking, rights of ownership.

[36] **Mahila Ramkali Devi v. Nandram, (2015) 13 SCC 132**

**49.** There is a fundamental fallacy in this submission. In India, easementary rights are codified and governed by the Indian Easements Act, 1882. Section 4 of the said Act (to the extent it is relevant) defines "easement" thus:

> "**4. "Easement" defined. –** An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own."

**50.** A bare reading of Section 4 of the Easements Act indicates that easementary rights are not rights of ownership. In fact, easementary rights are claimed qua land of which an other person is the owner. They are rights of enjoyment, in the manner permitted by Easements Act, of the land of another. Though the right is claimed by an owner of land, the right claimed is not in respect of land of which he is the owner, but in respect of the land of another. As such, easementary rights are not rights of ownership, in any manner of speaking.

**51.** That apart, the original plaint in CS DJ 10306/2016 did not claim easementary rights. It is not open to the petitioner, therefore, to urge, by amending the prayer, that the petitioner was claiming easementary rights urging such right also to be a specie of the rights of ownership.

**52.** In any event, as I have held that the application for amendment deserves to be allowed even on merits, under Order VI Rule 17 of CPC, this aspect does not continue to retain any significance.

## Conclusion

**53.** In view of the aforesaid discussion, I am unable to concur with the findings of the learned Trial Court that the amendment, sought by the petitioner in the prayer clause in CS DJ 10306/2016, was liable to be rejected under Order VI Rule 17 of CPC.

**54.** To my mind, the prayer for amendment did not alter the nature or character of the suit set up by the petitioner, which was essentially ventilating the rights which, according to the petitioner, enured in the petitioner's favour, by virtue of the undertaking purportedly executed by Sumitra Devi on 11th May, 2001.

**55.** Treating the nature and character of the suit as changed, merely because the petitioner, instead of claiming ownership over the rear parking space on the basis of the undertaking, chose to claim only a right to use the rear parking space in perpetuity, as altering the nature and character of the suit, would, in my view, be an unduly restricted manner of applying Order VI Rule 17, as either claim was predicated on the undertaking and on the undertaking alone.

**56.** For the aforesaid reasons, I am unable to sustain the impugned order dated 22nd October, 2021 passed by the learned Trial Court in CS DJ 10306/2016. The impugned order is accordingly quashed and set aside. The application for amendment, preferred by the petitioner under Order VI Rule 17 CPC, is allowed.

**57.** No costs.

**58.** Pending applications, if any, do not survive for consideration and are accordingly disposed of.

**C. HARI SHANKAR, J.**

**JULY 4th, 2022**/*dsn*