APPELLATE CIVIL

Before Gurdev Singh, J.

GURDIP KAUR,—*Appellant*

versus

KEHAR SINGH AND ANOTHER,—*Respondents*

S.A.O. No. 21 of 1968

July 17, 1969

Code of Civil Procedure (V of 1908)—Order 6 rule 17—Amendment of pleadings on payment of costs—When not to be allowed—Suit for partial pre-emption—Amendment of plaint after the period of limitation—Whether should be allowed—Discretion in the matter of amendment of pleadings—Exercise of—When to be interfered with by the appellate Court.

Held, that it is true that one of the principles which guide the Courts in allowing the amendment is that all amendments may be allowed if the opposite party can be adequately compensated by the costs but this principle is of no help to a plaintiff where the defect sought to be removed is fatal to the suit and the period of limitation has expired. No amount of costs for amendment in such a case can place the defendant in the position in which he was before the amendment. (Para 11)

Held, that if a suit as framed originally is for partial pre-emption and the period of limitation has expired, a valuable right accrues to the vendee because such a suit cannot succeed and no amendment is to be allowed, if its effect is to take away that right which has accrued to the opposite party. Amendment is not to be allowed where the error in the plaint has arisen because of negligence of the person drafting the plaint. What has to be enquired into is whether it is a case of inadvertent mistake or unintentional omission. (Paras 9 and 10)

Held, that the jurisdiction to amend the plaint under order 6 rule 7 of the Code vests certain discretions in the Court and if the discretion exercised is in accordance with sound judicial principles, the appellate Court will be extremely reluctant to interfere with it. It is only where the exercise of discretion is arbitrary and in violation of judicial principles that the appellate Court may step in and correct the error. (Para 12)

Second Appeal from order of the Court of Shri S. C. Goyal, Additional District Judge, Karnal, dated 2nd December, 1967, reversing that of the Additional Sub-Judge, Karnal, dated 27th April, 1965, remanding the suit under order 41 Rule 23, Civil Procedure Code to the lower Court with the

direction that the plaintiff appellant would file an amended plaint so as to include the Kacha *house as well in the plaint and thereafter the suit would be tried on merits according to law.*

T. S. MUNJRAL AND S. K. PIPAT, ADVOCATES, for the Appellant.

Y. P. GANDHI, ADVOCATE, for the respondents.

JUDGMENT

GURDEV SINGH, J.—By means of a registered sale-deed dated the 25th May, 1964, Shingara Singh respondent No. 1, sold 50 *kanals* and 16 *marlas* of his land situate in village Pakhana along with all rights appurtenant thereto and a kutcha house situate in the *abadi* for Rs. 7,620 to Smt. Gurdeep Kaur. As the limitation was about to expire, on 31st of May, 1965, the vendor's son Kehar Singh brought a suit for pre-emption out of which this appeal has arisen. He claimed possession of the land sold to Shrimati Gurdeep Kaur along with all other rights mentioned in the sale-deed on payment of Rs. 6,620, alleging that the market value of the land did not exceed this amount and the consideration cited in the sale-deed (Rs. 7,620), had been inflated in order to ward off the pre-emptors. It may be noticed here that in the plaint which was drafted by an Advocate and bears his signatures, no mention of the *kutcha* house, which was included in the sale-deed, was made either in paragraph No. 1, while setting out the description of the property, or in the prayer clause which is in these words :—

> "Hence it is prayed that a decree for possession of *land*, by right of pre-emption, mentioned in paragraph No. 1, of the plaint, and in the sale-deed, may kindly be passed in favour of the plaintiff and against the defendant along with all other rights sold,—*vide* registered sale-deed dated 25th May, 1964 on payment of Rs. 6,620, the amount actually paid along with the costs of the suit and the plaintiff may be awarded any further relief to which he is found to be entitled to in the interest of justice.".

(2) In contesting the suit, the vendee Smt. Gurdeep Kaur pleaded, *inter alia*, that the kutcha house situate in the *abadi* which formed part of the property sold having not been included in the plaint for pre-emption, the suit was liable to dismissal as partial pre-emption could not be allowed. This plea formed the subject matter of a distinct issue (being issue No. 5) which was struck on the 16th September, 1965, and runs as follow :—

> **"Whether the suit is bad for partial pre-emption."**

(3) The trial of the suit proceeded and while the evidence was being examined, on 24th February, 1966, the pre-emptor applied to the Court for amendment of the plaint so as to include the *kutcha* house situate in the village *abadi* both in the relief clause and paragraph 1 of the plaint. This application, which was admittedly made long after the period of limitation for filing the suit had expired, was vehemently opposed by the defendant-vendee and after due consideration of the matter, the learned trial Judge disallowed the amendment by his order dated 22nd of March, 1966, primarily on the ground that as the period of limitation had expired, a valuable right had accrued to the vendee and it was not fair to allow the plaintiff to incorporate a new prayer in his plaint. No attempt was made to challenge this order by way of revision to this Court and the suit was allowed to proceed for determination on merits. After trial, the learned Subordinate Judge dismissed it solely on the finding that it was for partial pre-emption, the *kutcha* house stated in the sale-deed having been left out. Against this decree of the Additional Subordinate Judge dated 27th April, 1966, the pre-emptor appealed to the Court of the District Judge. It may be mentioned here that though the suit had been dismissed solely on the ground that it was for partial pre-emption and earlier the trial Court had disallowed the application for the amendment of the plaint so as to include the *kutcha* house situate in the *abadi*, in the course of the appeal filed in the District Court no grievance was made of the fact that the application for amendment had been wrongly disallowed. It was during the pendency of the appeal that the pre-emptor or his counsel suddenly woke up and realised that without amendment of the plaint the suit must fail. This risk was sought to be warded off, by making a fresh application for amendment of the plaint, this time to the appellate Court. In this application, which was presented on 20th of November, 1967, to the Additional District Judge, before whom the appeal was then pending, the prayer for amendment of the plaint was sought to be justified on the plea of inadvertent omission. In paragraph 2 of that application it was stated :—

> "That through inadvertence the *kacha* house alleged to have been sold,—*vide* sale-deed, dated 26th May, 1964, was not mentioned in the plaint, although the plaintiff filed a suit for all the rights appurtenant to the land, in suit, as mentioned in the sale-deed, but the plaintiff did not mention the *katcha* house, which was also allotted along with the land in dispute specifically."

(4) This application was heard when the appeal came up for hearing on merits. The learned Additional District Judge by his order dated 2nd December, 1967, accepted the appeal. directed the trial Court to allow the amendment and remanded the case under order 41, Rule 23 of the Code of Civil Procedure to proceed with the trial of the suit on merits according to law after the amendment has been made in the plaint. It is against this order dated 2nd December, 1967, of the lower appellate Court that the vendee Smt. Gurdeep Kaur has come up in appeal.

(5) The learned Additional District Judge has accepted the appeal by reversing the finding of the trial Court on issue No. 5, relating to the partial pre-emption that has been reproduced earlier. He has not doubted the correctness of the view taken by the trial Court that if the suit is for the partial pre-emption of the property sold then it is liable to dismissal. He has reversed the finding on issue No. 5 by allowing the amendment of the plaint. His judgment goes to show that his attention was not invited to the order of the trial Court by which the application for amendment made to that Court was dismissed. The learned Additional District Judge appears to have granted the prayer for the amendment of the plaint on the basis of the averment made in the application for amendment filed before him on 20th of November, 1967 wherein, as noticed earlier, it was stated that it was through inadvertence that the *kutcha* house was not included in the suit. S. Tirath Singh Munjral appearing for the appellant has vehemently argued that the learned Additional District Judge had made out a new case for the pre-emptor which was not even pleaded by him in the trial Court and deprived the appellant of a very valuable right by permitting amendment after the period of limitation for the relief sought by the pre-emptor had long expired. He contends that the learned Additional District Judge acted contrary to the principles governing the question of amendment and was not justified in interfering with the discretion exercised by the trial Court in refusing amendment asked for during the trial.

(6) Mr. Gandhi appearing for the respondent-pre-emptor has attempted to defend the order of the lower appellate Court permitting amendment of the plaint on the plea that the amendment was merely formal as it was specifically stated in the plaint that the suit was not only for the land alone but for all rights appurtenant thereto as well and in any case the amendment had been rightly allowed as it was because of inadvertent omission or mistake

that the *kutcha* house was not included in the property for which the relief of pre-emption was sought. In support of his contention he has relied solely upon the decision of the Punjab Chief Court in *Jalal Din and others* v. *Qaim Din and others* (1). This is the very authority from which the learned Additional District Judge has sought support for his opinion that the amendment to the plaint should be allowed. The facts of that case disclose that the property sold consisted of 41 *kanals* 18 *marlas* of land, the second floor of a house, share in a well and share of *shamilat*. In the suit for pre-emption, the property was merely described as 41 *kanals* 18 *marlas* and after the expiry of the period of limitation prescribed for the suit an application was made to amend the plaint on the plea that the plaintiff had not intended to renounce any part of the claim but had by *kitabi ghalti* (clerical error) omitted the house. The Court allowed the amendment which was duly made by including the house among the property claimed. Still the share in the well and of the *shamilat* was left out. This having been brought to the notice of the Court by the vendee's pleader the plaint was returned for amendment and the defect was remedied. In holding that the amendment was rightly allowed Johnstone, J., who delivered the judgment of the Court, observed as follows :—

> "In our opinion everything points to the conclusion that we have here merely a case of inadvertence and misdescription of property claimed."

(7) Adverting to rule 17 of order 6 of the Code of Civil Procedure, the learned Judge observed; "Rule 17 allows amendment of any part of a plaint, of course, provided the amendment does not alter the character of the suit or introduce a different cause of action." Reference was then made to an earlier decision of that Court in *Jasmir Singh* v. *Rahmatulla* (2), and it was pointed out that what was laid down in that case was that the test was whether the matter to be added had been purposely excluded in the original prayer.

(8) This decision of the Punjab Chief Court came up for consideration before Dua, J. in *Gulzar Singh and another* v. *Gurbax Singh and others* (3), which was also a case of amendment of the plaint in a pre-emption suit after an objection had been taken that the

(1) 62 P.R. 1914.
(2) 7 P.R. 1896.
(3) C. R. 833 of 1964 decided on 5th March, 1965.

suit was bad for partial pre-emption. The learned Judge distinguishing *Jalal Din's case* (1) (supra) observed—

> "In *Jalal Din's case,* amendment in a suit for pre-emption was allowed by permitting inclusion of some property sold inadvertently left out on the finding that it was a case of inadvertence and misdescription of property claimed and not of an intentional omission."

Dua, J. adverted to the principles laid down by the Supreme Court in *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil, etc.* (4), wherein the observations of Batchelor, J. in *Kishandas Rup Chand* v. *Rachappe Vithoba* (5), were quoted with approval laying down that all amendments should be allowed which satisfied 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. Dealing with the question of amendment on these principles, Dua, J. observed as follows :—

> "A decision of Kapur, J. in *Messrs. Gox and Kings Agents Ltd.* v. *Messrs. Pheonix Oil Co. (India) Ltd.* (6), was cited before the learned Subordinate Judge in support of the argument that the plaintiff cannot be allowed to amend his plaint if the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time, but somewhat surprisingly, the learned Subordinate Judge, though conceding the force of the ratio, managed to take the present case out of the principle cited by observing that the case in hand was simply a case of negligence and inadvertence, the counsel for the plaintiff having drafted, the plaint without consulting the sale-deed. It is not easy to appreciate the distinction sought to be made by the learned Judge. If the defendant has acquired a vested right on account of expiry of limitation and the plaintiff is merely asserting an aggressive right of pre-emption, I do not think, consistently with the principle laid down by the Supreme Court and by this Court, any case for allowing amendment was made out by the plaintiff. The order

(4) A.I.R. 1957 S.C. 363.
(5) I.L.R. 33 Bom. 644.
(6) 1954 P.L.R. 237.

of the Court below is, in my opinion, clearly vitiated by a material irregularity and illegality in the exercise of its jurisdiction."

(9) I respectfully agree with these observations. Mr. Gandhi has tried to distinguish this case by pointing out that Dua, J. was dealing with a case in which the suit was admittedly for one-fourth of the land and not the entire land and it was in this situation that the learned Judge held that it was not a case of inadvertent mistake, but of intentional giving up of a part of the property covered by the sale-deed. That distinction is no doubt there, but the observations quoted above lay down the principles on which the questions of amendment have to be determined. It is clear from those observations that the learned Judge was not disposed to allow amendment where the error in the plaint has arisen because of negligence of the person drafting the plaints.

(10) The principles that should guide the Courts in the questions of amendment of the plaints have been reiterated by their Lordships of the Supreme Court recently in *A. K. Gupta and Sons Limited* v. *Damodar Valley Corporation* (7). Among these principles are that no amendment is to be allowed if its effect is to take away a valuable right that has accrued to the opposite party. It is apparent that if the suit of the plaintiff as framed originally is for partial pre-emption and the period of limitation has expired, a valuable right has accrued to the vendee because it is not disputed that the suit for partial pre-emption cannot succeed. The case in hand stands on a stronger footing than the one with which Dua, J. was dealing and even if we accept the test laid down by the Division Bench of the Chief Court in *Jalal Din's case* (1), (supra) I am of the opinion that the amendment in this case should not have been allowed. In this connection what has to be enquired into is whether it was a case of inadvertent mistake or omission. The relevant facts are that in the sale-deed, apart from the land which is mentioned in the plaint the kutcha house is specifically mentioned and it is stated that it was situate in the *abadi*. It is thus obvious that the house was not on the land itself and cannot be considered to be an appendage of that land or a right appurtenant to the land itself. It is a separate and distinct property. In paragraph 1 of the plaint no mention is made of this house and in the prayer clause (Paragraph 9) relief is sought only in respect of the *land* specifically as mentioned in the plaint. At the very first hearing of the suit when the written statement was put in

(7) A.I.R. 1967 S.C. 96.

an objection was promptly taken that the suit was for partial pre-emption as the kutcha house had not been included in the property claimed. If there was any inadvertent omission or mistake in drafting the plaint one would have expected the plaintiff and his counsel to immediately seek the permission of the Court to amend the plaint and to put forward the plea of inadvertent mistake or omission. The plaintiff-however, did not adopt any such course. On the contrary, they joined issue on the point with the result that a specific issue along with the issues on merits was framed. It was subsequently in the course of the trial while the evidence was proceeding that an application for amendment was moved. Curiously enough in that application there was no assertion that the mistake in the description of the property had occurred because of the inadvertent mistake. In fact no attempt was made to disclose how the house property had been omitted to be mentioned in the plaint and no relief sought regarding it. On the other hand, what was stated in respect of the prayer for amendment was that the house-property had not been specifically mentioned and in the interests of justice the amendment in the plaint be allowed. As has been observed earlier, the learned trial Judge rejected this prayer pointing out that the application for amendment was belated and if the amendment was allowed it would take away a valuable right that had accrued to the opposite party. Even thereafter the correctness of this order was not challenged and no grievance was made even in the grounds of appeal to the District Court that the amendment was wrongly refused. It was not even asserted in the memorandum of appeal that the omission to include the kutcha house in the plaint was due to any mistake. In these circumstances when the plaintiff had persisted all along in contesting the issue regarding partial pre-emption and had not even alleged that the mistake was inadvertent or unintentional, his subsequent plea which has been accepted by the lower appellate Court that the mistake was unintentional was untenable. It is again significant that even in the application made in the lower appellate Court for amendment it is not explained how the mistake occurred and by whom it was committed. The plaint was drafted by a counsel. It is signed by him and he has not come forward to explain why the house was not included in the property in respect of which the right of pre-emption was claimed.

(11) It is true that one of the principles which guide the Courts in allowing the amendment is that all amendments may be allowed if the opposite party can be adequately compensated by the costs but that principle is of no help to the plaintiff in this case as by allowing the amendment the learned Additional District Judge had

prevented the dismissal of the suit. No amount of costs for amendment could have placed the defendant in the position in which she was before the amendment was allowed as according to the judgment of the trial Court the suit must fail because of partial pre-emption.

(12) The order of the learned Additional District Judge allowing amendment suffers from yet another defect. The jurisdiction to amend the plaint under Order 6, rule 17 of the Code of Civil Procedure vests certain discretions in the trial Court. In this case that discretion had been exercised by the learned Subordinate Judge against the appellant. It is well settled that if discretion exercised is in accordance with the sound judicial principles the appellate Court will be extremely reluctant to interfere with it. It is only where the exercise of discretion is arbitrary and is in violation of judicial principles that the appellate Court may step in and correct the error. In this case the order made by the trial Court, while rejecting the application for amendment moved by the plaintiff, does not suffer from any such error. The principles on which that order proceeds are unexceptional and the learned Additional District Judge has not found that on the basis of the facts stated in the first application for amendment which was made to the trial Court any case for exercise of the discretion to amend the plaint had been made out. He has allowed the amendment on the basis of the averment made by the plaintiff in the second application for amendment which was made before the appellate Court and in which it was stated for the first time that the mistake was inadvertent. Since this plea was clearly an after thought, the learned Additional District Judge ought not to have accepted it light-heartedly. In fact in accepting this plea he has not adverted to the history of the litigation or even to the earlier application for amendment and the order of the trial Court on it.

(13) For all these reasons, I am of the opinion that amendment of the plaint could not be allowed. In view of this finding it is obvious that the plaintiff's suit being for partial pre-emption, as held by the trial Court, had to be dismissed.

(14) Mr. Gandhi has pointed out that the learned Additional District Judge has not expressed the opinion whether the suit was liable to dismissal if it was for partial pre-emption and for determining this matter it may be necessary to remit the case to the lower appellate Court. The question raised is one of law. Mr. Gandhi has further contended that even without the amendment of the

plaint the suit could not be considered to be one of partial pre-emption and it was not necessary or incumbent upon the plaintiff to specifically mention the *katcha* house among the property sought to be pre-empted. In support of this argument he relies upon the fact that in the sale deed no separate value of the house is stated and the house was allotted to the plaintiff's father by the same order under which he got the land in dispute. After going through the sale-deed I find myself unable to accept this contention. The land and the house are separately described in the sale-deed. The house is not situate in any part of the agricultural land but in the *abadi*. The mere fact that both the items of the property were allotted to the plaintiff's father by the same order does not warrant the assumption that they constitute one property and whoever takes the land takes the house along with it. The fact that the value of the land and the house is not separately specified in the sale-deed also does not prevent the rule of partial pre-emption being applied to the case. Quite often more than one items of property are sold by a single sale-deed without specifying their separate values. If in a case there are two distinct properties covered by a sale-deed and the two are situate in different localities and are of different types, it will be idle to contend that merely because separate value of each of them is not stated in the sale-deed the pre-emptor is at liberty to pre-empt one and exclude the other when his right of pre-emption extends to all. No authority on this point has been cited before me and I am of the opinion that even in such a case the suit must be considered to be one for partial pre-emption.

(15) As the suit must fail on the finding on issue No. 5, there is no occasion to remit the case back to the lower appellate Court. I, accordingly, accept the appeal, set aside the order of the learned Additional District Judge and affirm the judgment and decree of the trial Court. In the circumstances of the case I leave the parties to bear their own costs.

N.K.S.

CIVIL MISCELLANEOUS

Before Gurdev Singh and A. D. Koshal, JJ.

RAJINDER SINGH,—*Petitioner*

versus

THE PUNJAB STATE AND ANOTHER,—*Respondents*

Civil Writ No. 2514 of 1967

August 14, 1969

Constitution of India (1950)—*Article* 311(2)—*Proviso* (*a*)—*Punjab Civil Services* (*Punishment and Appeal*) *Rules* (1952)—*Rule* 7(2)—*Proviso*