CASE NO.:
Appeal (civil) 5294 of 2006

PETITIONER:
State Bank of Hyderabad

RESPONDENT:
Town Municipal Council

DATE OF JUDGMENT: 01/12/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No. 21178-21179 of 2005)

S.B. Sinha, J.

Leave granted.

Appellant -Bank filed a suit against the respondent. The suit related to ownership of a plot admeasuring 610 ft. x 250 ft. situated in the town Yadgir. It was purchased by the plaintiff in a public auction. Allegedly, the respondent is now claiming back the said amount. The suit was initially filed for a decree for injunction. The respondent filed another suit in the same court also for a suit for permanent injunction restraining the Bank from constructing any building. The suit of the appellant was dismissed whereas the suit of the respondent was decreed. Appeals were preferred there against by both the parties. In the said appeals, an application was filed for grant of leave to amend the plaint. The said application for grant of leave to amend the plaint was allowed by the appellate court by an order dated 7.04.2003. The appellate court remanded both the suits to the trial court for their disposal afresh on merits. Second Appeals were filed by the respondent herein before the High Court. The High Court by reason of the impugned judgment opined that the said application for amendment was not maintainable in view of the proviso appended to Order VI, Rule 17 of the Code of Civil Procedure (Code). On the said finding not only the order granting leave to amend the plaint was set aside, the appeals were also allowed and the matter was remitted to the first appellate court for its consideration afresh in accordance with law.

The appellant is, thus, before us.

The short question which arises for consideration is as to whether the proviso appended to Order VI, Rule 17 of the Code is applicable in the instant case.

Order VI, Rule 17 of the Code reads, thus:

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Proviso appended thereto was added by the Code of Civil Procedure (Amendment) Act, 2002 which came into force with effect from 1.07.2002. It reads as under:

"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."

Section 16(2) of the Amending Act of 2002 reads as under:

"16(2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897 \026
(a) *** ***
(b) the provisions of rules 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of this Act;"

In view of the said provision there cannot be any doubt whatsoever that the suit having been filed in the year 1998, proviso to Order VI, Rule 17 of the Code shall not apply.

The High Court relied upon the said proviso and opined that having regard thereto the plaintiff was obligated to establish that in spite of due diligence it could not have raised the matter before commencement of the trial of the suit. The High Court evidently committed an illegality in relying upon the said provision.

The learned counsel appearing on behalf of the respondent, however, would submit that the application for amendment being belated, the same should not have been entertained.

It is one thing to say that the application for amendment suffers from delay or laches but it is another thing to say that thereby the defendant was prejudiced. It is also not a case of the respondent that by reason of such an amendment, the relief which could not be granted having regard to the law of limitation has become available. The court even in such a case is not powerless although the question as to whether the relief sought for would be otherwise barred by limitation is a relevant factor to determine the issue.

This aspect of the matter has been considered by this Court in L.J. Leach and Company Ltd. v. Jardine Skinner and Co. [(1957) SCR 438] in the following terms:

"It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice\005"

L.J. Leach and Company Ltd. (supra) was referred to in Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Others [(1957) SCR 595] holding:

"\005We think that the correct principles were enunciated by Batchelor J. in his judgment in the same case, viz., Kisandas Rupchand’s case, when

he said at pp. 649-650 : "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 amendments 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 ?" Batchelor J. made these observations in a case where the claim was for dissolution of partnership and accounts, the plaintiffs alleging that in pursuance of a partnership agreement they had delivered Rs. 4,001 worth of cloth to the defendants. The Subordinate Judge found that the plaintiffs did deliver the cloth, but came to the conclusion that no partnership was created. At the appellate stage, the plaintiffs abandoned the plea of partnership and prayed for leave to amend by adding a prayer for the recovery of Rs. 4,001. At that date the claim for the money was barred by limitation. It was held that the amendment was rightly allowed, as the claim was not a new claim."

[See also Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, Pankaja and Another v. Yellappa (Dead) By LRs. and Others, (2004) 6 SCC 415, Baldev Singh & Ors. v. Manohar Singh & Anr. etc. JT 2006 (7) SC 139, Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar (1990) 1 SCC 166 and A.K. Gupta and Sons v. Damodar Valley Corporation, (1966) 1 SCR 796]

As the High Court has failed to invoke the law as it then existed, we do not think that it was correct in its view.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed and the matter is remitted to the High Court for consideration of the appeal afresh in accordance with law. All contentions of the parties shall, however, remain open.