Gurdial Singh & Ors vs Raj Kumar Aneja & Ors on 4 February, 2002

Equivalent citations: AIR 2002 SUPREME COURT 1003, 2002 AIR SCW 718, 2002 (1) SLT 688, (2002) 1 JT 633 (SC), 2002 (1) JT 633, 2002 (3) SRJ 33, 2002 (2) SCC 445, 2002 SCFBRC 268, 2002 (2) SCALE 13, 2002 HRR 126, 2002 (1) UJ (SC) 718, (2002) 1 RENTLR 420, (2002) 1 CURCC 142, (2002) 2 CIVILCOURTC 1, (2002) 2 LANDLR 278, (2002) 2 MAD LJ 55, (2002) 3 MAD LW 568, (2002) 3 MAHLR 336, (2002) 1 PUN LR 835, (2002) 1 RENCJ 126, (2002) 1 RENCR 194, (2002) 1 SCJ 606, (2002) 1 SUPREME 488, (2002) 2 SCALE 13, (2002) 48 ALL LR 635

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Bench: R.C. Lahoti, Brijesh Kumar

CASE NO.:
Appeal (civil) 2896 of 2001

PETITIONER:
GURDIAL SINGH & ORS.

Vs.

RESPONDENT:
RAJ KUMAR ANEJA & ORS.

DATE OF JUDGMENT: 04/02/2002

BENCH:
R.C. Lahoti & Brijesh Kumar

JUDGMENT:

R.C. Lahoti, J.

There is a property described as 'Gurdial Complex' situated at SCO 1108-1109, Sector 22-B, Chandigarh. Admittedly, the property is owned by Sqn. Ldr. Gurdial Singh (Retd), Mrs. Jasmer Kaur, Mrs. Jagjit Kaur, Miss Sonia Bal and Vikram Singh Bal. Gurdial Singh holds general power of attorney on behalf of other four co-owners. Collectively they will be referred to as 'Owners' for the

sake of brevity.

Kashmiri Lal Goyal, Advocate, defendant No.1 before the Rent Controller (respondent No.3 herein) claims to be a tenant, also alleged to be so by owners and will be referred to as 'Goyal'. Out of the persons inducted in possession of the premises by Goyal, only two, namely Raj Kumar Aneja and Rakesh Sharma, Advocate were revision petitioners before the High Court and are respondents Nos. 1 and 2 before us. There is a dispute as to the character of occupation and the status of these two ___ whether they are sub-tenants or tenants under the owners. They will be collectively referred to as 'occupants'. On 6th January, 1988, a registered Deed of Lease was executed between owners and Goyal whereby 750 sq. ft. area on the first floor of Gurdial Complex was taken on lease by Goyal on a monthly rent of Rs.5,000/-. The duration of lease was to expire on 31st December, 1990. However, on 26th April, 1990, there was a fresh Deed of Lease executed between owners and Goyal whereby a portion of the first floor of Gurdial Complex, shown in green lines annexed with the Deed of Lease, was taken on rent at the rate of Rs.16,000/- p.m. by Goyal. The lease commenced w.e.f. 1st May, 1990. Duration of lease was three years, terminable even in between by three months' notice on either side. The relevant terms of the lease may briefly be noticed. The lease rent of Rs.16,000/- p.m. was payable in advance by seventh day of the current calendar month and if that was so done, Goyal was entitled to a rebate of Rs.3,000/-. An amount of Rs.26,000/- was deposited as interest free security with the owners to be retained during the currency of the lease and till Goyal remained in occupation of the premises as lessee. In specified cases of delay in payment of lease rent, interest @ 18% was leviable for the period of delay. Goyal was to vacate the leased premises on or before 30th April, 1993. However, the lease agreement could be renewed for another period of three years by mutual consent and agreement in writing in which case lease rent was to be revised with an increase in rate of rent by 15%. There could be yet another renewal of three years expiring with 30th April, 1999 subject to another upwards revision in rate of rent at 15%. However, the incentive of Rs.3,000/- for advance payment of rent before seventh day of current month was to remain the same in spite of first and second renewals. It was expressly stipulated that Goyal would not sublet any portion of the leased premises, partially or in full, to anyone under any condition and circumstances. In the event of subletting, apart from legal consequences flowing from subletting, Goyal was to lose the privilege of earning rebate of Rs.3,000/- p.m. and also to become liable to pay a penalty @ Rs.5,000/- p.m. for the entire period till the premises were got vacated from the sub-tenants and possession handed back to owners.

On 16.10.1993, owners filed a petition under Section 13 of East Punjab Urban Rent Restriction Act, 1949 impleading Goyal and other alleged sub-lessees including the two occupants, namely, respondents Nos. 1 and 2 herein. It was alleged that defendants Nos. 2 to 8 were inducted as sub-lessees by Goyal, the defendant No.1, and let in exclusive possession of different parts of the tenancy premises by allowing cabins to be constructed without the written consent of owners; that drastic additions and alterations made in the premises have materially impaired the value and utility of the premises and that Goyal had failed to pay or tender the monthly rent of the premises from 1.5.1993 and was running into arrears. Goyal, in his written statement, admitted that he was a tenant under the Deed of Lease dated 26.4.1990 but pleaded that rent upto 30.4.1993 was paid to owners whereafter payment was discontinued as the lease was not renewed. He also pleaded that the cabins were fabricated and sublet on the oral request of Gurdial Singh himself. At the end of the

written statement, Goyal submitted that he was ready to vacate the premises and he had no objection if necessary orders of eviction were passed against the sub-tenants.

The occupants filed separate written statements. In substance the plea taken by them was that there did not exist any relationship of landlord and tenant between Goyal and them. The appellants (i.e. the petitioners thereat) were put to strict proof of their ownership and existence of landlord-tenant relationship between them and Goyal under the Lease Deed said to have been executed and registered between them. They pleaded that they were inducted into possession of the premises as licensees under agreements duly executed between Goyal and themselves and, therefore, they were not tenants under Goyal so as to be held sub-tenants and expose themselves to the risk of eviction under Section 13(2)(ii)(a).

Replications were filed. On 7.7.1994, the occupants sought for amendment in their written statements. It was stated in the applications seeking amendment that subsequent to the filing of the written statement it had come to the knowledge of the occupants that Goyal was not a tenant under owners but on the contrary he was simply an agent appointed for collecting the rent and this arrangement appointing Goyal as rent collecting agent, but outwardly as a tenant, and the tenant i.e. Goyal inducting the occupants as licensees, was a fraud on Rent Restriction Act by devising means for short circuiting the beneficial provisions intended to protect tenants. Each of the applications for amendment was accompanied by a new written statement sought to be placed on record. This written statement was completely a new written statement substantially in departure from the pleadings contained in the original or first written statement filed by the occupants.

The Rent Controller, by order dated 24.2.1995, rejected the prayer for amendment. The occupants preferred a revision. By order dated 16.8.1995, the civil revision was allowed. A perusal of the order of the High Court shows that there was no indepth comparative examination of the first written statement and the second written statement which was proposed to be filed as amended written statement. The High Court passed a brief order wherein a learned single Judge of the High Court expressed __ "Without going into the merit of the controversy I am of the view that amendment sought is just and proper in the circumstances of the case and will help the Court in finally adjudicating the contentious issues raised by the parties. Accordingly, I accept the revision petition, set aside the order of the Rent Controller and allow the petitioners' application for amendment of the written statement. Amended written statement be filed within a fortnight from today". The principal plea now urged by the occupants through their amended written statements is that Goyal, defendant No.1, was an agent of the owners for collecting the rent from the defendants Nos. 2 to 8 and the entire arrangement between the petitioners and their agent, the defendant No.1, was designed for circumventing the law and amounted to playing fraud on the defendants. Goyal, the defendant No.1, is a practicing advocate and by no stretch of imagination can be said to be in need of an accommodation at a monthly rent of Rs.16,000/- p.m. Goyal simply collected the rent and handed over the same to the petitioner Gurdial Singh. This arrangement was a brain wave of the petitioner Gurdial Singh and the defendant Goyal to overcome the chilling effects of East Punjab Rent Restriction Act, 1949. The tenancy between owners and Goyal was a sham transaction. The arrangement, which outwardly appears to be a tenancy between owners and Goyal and licensing by Goyal in favour of the occupants, was in effect the occupants being inducted as tenant of owners.

Gurdial Singh was himself running his business in the same complex and was well aware from the very beginning of cabins having been constructed and then let out to the occupants by inserting advertisement in the newspapers. The rebate of Rs.3,000/- provided in the Deed of Lease between owners and Goyal is a mode of paying commission for collection of rent by Goyal. It was prayed that a court of law should not uphold such an arrangement which circumvented the law and amounted to playing fraud.

In the oral evidence, Gurdial Singh examined himself and proved the Deed of Lease executed between Goyal and himself. On behalf of the occupants, the two occupants (respondents Nos. 1 and 2 herein) examined themselves. Narinder Pal Singh, RW3 who had at one point of time occupied a cabin in the suit premises but had subsequently vacated and Jagdish Singh, RW4, who was still occupying a cabin stated that Goyal was merely a collecting agent for Gurdial Singh. The statement of Narinder Pal Singh does not give any facts but is merely his ipse dixit that Goyal was a collecting agent. Jagdish Singh is in litigation with Goyal. Anup Singh, RW5 is a tenant on the second floor who deposes to a similar arrangement having been devised by Gurdial Singh and Goyal in respect of the second floor. He too is having criminal litigation with Goyal.

On an evaluation of evidence, the Rent Controller upheld the pleas raised in the written statements and directed the eviction petition to be dismissed. Owners preferred an appeal which was allowed. The Appellate Authority held that there were no weighty and material circumstances enabling drawing of an inference contrary to the apparent tenor of the transaction and relationship created by documents in writing. The Appellate Authority found the averments made in the eviction petition proved and hence directed the tenant- Goyal and sub-tenants-the occupants to be evicted. The occupants preferred a revision petition before the High Court. The High Court has entered into re-evaluation of the entire evidence, drawn factual inferences and, based thereon, held that the Lease Deed incorporated a sham transaction intended to get over the restrictions of the Rent Act. The High Court also held that subletting and changes in the suit premises were with the oral consent of Gurdial Singh. In the result, the High Court has directed the eviction petition to be dismissed. The owners, petitioners before the Rent Controller, have preferred this appeal by special leave.

Having heard the learned counsel for the parties we are of the opinion that the appeal deserves to be allowed and judgment of the High Court deserves to be set aside.

It is true that in spite of the availability of a registered Deed of Lease executed between owners and Goyal, the occupants are not debarred from taking a plea that the transaction between owners and Goyal was not what it apparently appears to be just by reading of the Lease Deed. The occupants, by raising a plea which they have taken in the written statements, are not proposing to put in issue and let in oral evidence of the terms of the Lease Deed. They are also not raising a plea or adducing oral evidence for the purpose of contradicting varying, adding to or subtracting from the terms of the Lease Deed. They are not parties to the Lease Deed. Therefore, Sections 91 and 92 of the Evidence Act, 1872 are not attracted. The occupants are impeaching the outward validity of Lease Deed by submitting that what has been described on paper is not the real intention of the parties to do; the Lease Deed and the transaction spelled out by it was a sham or fictitious transaction not intended to be acted upon rather intended to overcome or avoid the effect of Rent Control Legislation. It is

permissible to take such a plea and adduce evidence to substantiate the same. The plea can be taken though the onus would lay on the shoulders of the party taking such a plea. To discharge the onus, direct evidence may or may not be available and it would be permissible to draw an inference from tell-tale circumstances. However, the inference to be drawn from the circumstances should be an irresistible one and not merely a matter of conjectures and surmises.

In the present case, the testimony of two independent witnesses, namely Narinder Pal Singh and Jagdish Singh (RW3 and 4), does not lead us anywhere. Anup Singh, RW5 does not depose to anything about first floor which is the suit accommodation. The rest is oath against oath ___ Gurdial Singh on one side and the occupants on the other side. We do not have the benefit of testimony of the star witness, Goyal, who has conveniently chosen to keep himself away from the witness box except for admitting in part the claim of owners as contained in his pleadings. In such a case, we do not think the High Court could have, in exercise of its limited revisional jurisdiction, reversed the finding of fact arrived at by the Appellate Authority. The High Court has also erred in holding "oral consent for subletting and making the changes" and finding availability of grounds for eviction under Section 13(2)(ii)(a) and Section 13(2)(iii) of the Act. Section 13(2)(ii) contemplates a ground for eviction where the tenant has transferred his rights under the Lease or sublet the building or any portion thereof without the written consent of the landlord. When the law speaks of written consent, the High Court could not have substituted 'oral consent' in place thereof. Between owners and Goyal there is a registered Deed of Lease bringing into existence landlord-tenant relationship which, the oral evidence as adduced by the parties and available on record, is not enough to show that the transaction was sham or fictitious. Between the occupants and Goyal there are again deeds in writing showing nature and character of occupation of the occupants. The occupants have been placed in possession of cabins and given right to use the same. Agreements executed between the occupants and Goyal appoint licence fee for the use of the cabin premises, payable month by month and in advance on or before third day of each month. Electricity charges are to be borne by the licensees. The cabins are to be used for office purpose. The licence is for a period of eleven months and renewable by mutual consent subject to escalation of licence fee at a minimum of 5%. Either party seeking eviction of the licensee can do so by serving a three months' notice. The minimum period of licence is eleven months before which the licensees cannot vacate the premises. Licensee has to arrange for fire insurance of the cabins/premises and has to bear the loss, if any, caused by fire and so on. The Lease Deed executed between owners and Goyal does not permit licensees being inducted by Goyal and on the contrary contains specific prohibition against subletting. A clear case for eviction under Section 13(2)(ii)(a) was made out. So also constructing several cabins in the hall enabling use of several cabins as independent office premises certainly impairs materially the value or utility of the building which was a hall and, therefore, attracts applicability of Section 13(2)(iii). The High Court was not justified in holding that availability of the said two grounds was not made out. We are, therefore, of the opinion that the order of the High Court cannot be sustained. However, by way of abundant caution, we would like to make it clear that we have held the arrangement between the owners and Goyal to be real as evidenced by the Deed of Lease and not a sham transaction on the evidence adduced and material placed on the record of this case. This factual finding would not preclude a different finding being arrived at in any other appropriate case based on adequate pleadings and evidence of that case.

Before parting we feel inclined to make certain observations about the loose practice prevalent in subordinate Courts in entertaining and dealing with applications for amendment of pleadings. It is a disturbing feature and, if such practice continues, it is likely to thwart the course of justice. The application moved by the occupants for amendment in their written statements filed earlier did not specifically set out which portions of the original pleadings were sought to be deleted and what were the averments which were sought to be added or substituted in the original pleadings. What the amendment applicants did was to give in their applications a vague idea of the nature of the intended amendment and then annex a new written statement with the application to be substituted in place of the original written statement. Such a course is strange and unknown to the procedure of amendment of pleadings. A pleading, once filed, is a part of the record of the Court and cannot be touched, modified, substituted, amended or withdrawn except by the leave of the Court. Order 8 Rule 9 of CPC prohibits any pleadings subsequent to the written statement of a defendant being filed other than by way of defence to a set-off or counter-claim except by the leave of the Court and upon such terms as the Court thinks fit. Section 153 of CPC entitled "General power to amend" provides that the Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. Order 6 Rule 17 of the CPC confers a discretionary jurisdiction on the Court exercisable at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The rule goes on to provide that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Unless and until the Court is told how and in what manner the pleading originally submitted to the Court is proposed to be altered or amended, the Court cannot effectively exercise its power to permit amendment. An amendment may involve withdrawal of an admission previously made, may attempt to introduce a plea or claim barred by limitation, or, may be so devised as to deprive the opposite party of a valuable right accrued to him by lapse of time and so on. It is, therefore, necessary for an amendment applicant to set out specifically in his application, seeking leave of the Court for amendment in the pleadings, as to what is proposed to be omitted from or altered or substituted in or added to the original pleadings.

In Pleadings : Principles and Practice by Jacob & Goldrein (1990 Edition) it is stated that a party served with a pleading which is subsequently amended may not amend his own pleading and may rely on the rule of implied joinder of issue but "if he does amend his own pleading, he is not entitled to introduce any amendment that he chooses. He can only make such amendments as are consequential upon the amendments made by the opposite party" (at page 193). "In all cases except where amendment is allowed without leave, the party seeking or requiring the amendment of any pleading must apply to the Court for leave or order to amend. The proposed amendment should be specified either by stating them, if short, in the body of the summons, notice or other application or by referring to them therein. In practice leave to amend is given only when and to the extent that the proposed amendments have been properly and exactly formulated, and in such case, the order giving leave to amend binds the party making the amendment and he cannot amend generally." (at pages 206-207).

The Court may allow or refuse the prayer for amendment in sound exercise of its discretionary jurisdiction. It would, therefore, be better if the reasons persuading the applicant to seek an amendment in the pleadings as also the grounds explaining the delay, if there be any, in seeking the amendment, are stated in the application so that the opposite party has an opportunity of meeting such grounds and none is taken by surprise at the hearing on the application. How an amendment allowed by the Court is to be effectuated in the pleadings? English practice in this regard is stated in Halsbury's Laws of England (Fourth Edition, Vol.36, para 63, at pages 48-49) as under:-

> 63. Mode of amendment. A pleading may be amended by written alterations in a copy of the document which has been served, and by additions on paper to be interleaved with it if necessary.

However, where the amendments are so numerous or of such nature or length that to make written alterations of the document so as to give effect to them would make it difficult or inconvenient to read, a fresh document must be prepared incorporating the amendments. If such extensive amendment is required to a writ it must be reissued. An amended writ or pleading must be indorsed with a statement that it has been amended, specifying the date on which it was amended, the name of the judge, master or registrar by whom any order authorizing the amendment was made and the date of the order; or, if no such order was made, the number of the rule in pursuance of which the amendment was made. The practice is to indicate any amendment in a different ink or type from the original, and the colour of the first amendment is usually red.

Stone and Iyer in Pleadings (Second Edition) state the practice in regard to incorporating amendments in pleading as under (at page

165):-

> "In England it often happens that before the case comes into Court and while still the Master is exercising the powers conferred by a Summons for Directions, Counsel seek leave to amend not once but several times. The practice is to amend first in red and make later amendments in different coloured inks. A practice which we think might, with advantage, be followed would be to place before the Court, as one places before a Master in England, the proposed amendments. These may or may not be allowed as proposed, or may be altered before leave is given. Leave having been given, a new plaint or written statement showing the old pleading and with the amendments written or typed in might then be prepared and taken on the file of the Court. In cases where the addition is substantial it may be necessary to deliver a copy of the pleading as amended. If old matter is scored out, it must be done in such a manner as to show the original pleading and the alteration. Under Order VI, Rule 17, C.P.C., a party has apparently to amend his pleading while it is in Court. Under the old Code it was returned to him for amendment. The Court may even now have power to return it if it is necessary to do so. Where leave to amend is asked for, the actual amendment must be formulated before leave is given. If it is proposed to apply for amendment, it is desirable to inform the other side so that there can be no question of surprise and no

> adjournment may be necessary on allowing the amendment. Pursuant to the leave granted the proceedings should be amended before the judgment is pronounced."

Thus, once a prayer for amendment is allowed the original pleading should incorporate the changes in a different ink or an amended pleading may be filed wherein with the use of a highlighter or by underlining in red the changes made may be distinctly shown. The amendments will be incorporated in the pleading by the party with the leave of the Court and within the time limited for that purpose or else within fourteen days as provided by Order 6 Rule 18 of the CPC. The Court or an officer authorized by the Court in this behalf, may compare the original and the amended pleading in the light of the contents of the amendment application and the order of the Court permitting the same and certify whether the amended pleading conforms to the order of the Court permitting the amendment. Such practice accords with the provisions of Code of Civil Procedure and also preserves the sanctity of record of the Court. It is also conducive to the ends of justice in as much as by a bare look at the amended pleading the Court would be able to appreciate the shift in stand, if any, between the original pleading and the amended pleading. These advantages are in addition to convenience and achieving maintenance of discipline by the parties before the Court. Amendments and consequential amendments, allowed by the Court and incorporated in the original pleadings, would enable only one set of pleadings being available on record and that would avoid confusion and delay at the trial. Most of the High Courts in the country follow this practice, if necessary by making provisions in the rules framed by the High Court for governing the subordinate Courts and their Original Side, if there be one. In fact in the State of Punjab and Haryana and Union Territory of Chandigarh, there is a local amendment whereby the text of Rule 17 in Order 6 of the CPC has been renumbered as sub-rule (1) and the following sub-rule (2) added:-

> "(2) Every application for amendment shall be in writing and shall state the specific amendments which are sought to be made indicating the words or paragraphs to be added, omitted or substituted in the original pleading"

The abovesaid rule appears to have been completely over-looked while moving the application for amendment. It is expected that the Courts in Punjab, Haryana and Chandigarh would follow the rule in letter and spirit.

When one of the parties has been permitted to amend his pleading, an opportunity has to be given to the opposite party to amend his pleading. The opposite party shall also have to make an application under Order 6 Rule 17 of the CPC which, of course, would ordinarily and liberally be allowed. Such amendments are known as a consequential amendments. The phrase "consequential amendment"

> finds mention in the decision of this Court in Bikram Singh & Ors. Vs. Ram Baboo & Ors. AIR 1981 SC 2036. The expression is judicially recognized. While granting leave to amend a pleading by way of consequential amendment the Court shall see that the plea sought to be introduced is by way of an answer to the plea previously permitted to be incorporated by way of amendment by the opposite party. A new plea cannot be permitted to be added in the garb of a consequential amendment, though it can be

applied by way of an independent or primary amendment.

Some of the High Courts permit, as a matter of practice, an additional pleading, by way of response to the amendment made in the pleadings by opposite party, being filed with the leave of the Court. Where it is permissible to do so, care has to be taken to see that the additional pleading is confined to an answer to the amendment made by the opposite party and is not misused for the purpose of setting up altogether new pleas springing a surprise on the opposite party and the Court. A reference to Order VI Rule 7 of the CPC is apposite which provides that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

In the case before us the application for amendment moved by the occupants did not satisfy the abovesaid requirements. Again we have grave doubts if the High Court could have, in exercise of its revisional jurisdiction, granted leave to amend the written statements by a cursory order. However, the trial has taken place on the amended pleadings and yet the occupant-defendants have failed on merits. We therefore leave the matter at that only.

The appeal is allowed, the impugned judgment of the High Court is set aside, the judgment of the Appellate Authority is restored. No order as to the costs.

.....J (R.C. LAHOTI) ...J (BRIJESH KUMAR) February 4, 2002