Heeralal vs Kalyan Mal & Ors on 19 November, 1997

Equivalent citations: AIR 1998 SUPREME COURT 618, 1998 (1) SCC 278, 1998 AIR SCW 219, 1997 (7) SCALE 196, 1998 SCFBRC 1, 1998 ( ) HRR 120, 1998 (1) UJ (SC) 155, 1998 (1) BLJR 1, 1998 (1) ALL CJ 518, 1998 UJ(SC) 1 155, 1998 ALL CJ 1 518, 1998 BLJR 1 1, (1998) 2 CIVLJ 658, (1998) 1 HINDULR 474, (1998) 1 LANDLR 428, (1998) 1 MAD LJ 101, (1997) 7 SCALE 196, (1998) 1 APLJ 58, (1998) 1 ALL RENTCAS 1, (1997) 4 CURCC 141, (1998) REVDEC 140, (1997) 10 SUPREME 56, (1998) 1 CALLT 45, (1998) 1 CIVILCOURTC 1, (1998) 1 CURLJ(CCR) 254, (1998) 1 GUJ LH 605, (1998) 1 MAD LW 340, (1998) 1 RAJ LW 70, (1998) 1 RECCIVR 140, (1998) 1 RENTLR 528, (1998) 2 ICC 55, (1998) 32 ALL LR 442

Author: S.B. Majmudar

Bench: S.B. Majmudar, M Jagannadha Rao

PETITIONER:
HEERALAL

Vs.

RESPONDENT:
KALYAN MAL & ORS.

DATE OF JUDGMENT: 19/11/1997

BENCH:
S.B. MAJMUDAR, M JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:

THE 19TH DAY OF NOVEMBER, 1997 Present:

Hon'ble Mr. Justice S.B. Majmudar Hon'ble Mr. Justice M. Jagannadha Rao Sushil Kumar Jain, Pradeep Aggarwal, A.P. Dhamija, Advs. for the appellant A.K. Goel, and Mrs. Sheela Goel, Advs. for the Respondents.

J U D G M E N T The following Judgment of the Court was delivered:

S.B. Majmudar, J.

Leave granted.

Heard learned counsel for the appellant as well as learned advocate for respondent nos. 1 and 2, who are original defendant nos. 1 and 2 and are the only contesting parties in this appeal. The appeal was taken up for final disposal forthwith by their consent.

Appellant-Plaintiff had filed a civil suit for partition of 10 items of immovable properties mentioned in schedule-A of the plaint and also for partition of other properties listed in Schedule-B of the plaint. The suit was filed in 1993 in the Court of District Judge, Bundi for partition of the suit properties mentioned in diverse schedules annexed to the plaint. The contesting respondent nos. 1 and 2, who are defendant nos.1 and 2 in the suit, being real brothers of the plaintiff filed a joint written statement on 01st October 1993 in the Trial Court. In the written statement a definite stand was taken by the contesting defendants that out of the listed properties in Schedule-A only three properties at items 4,9 and 10 were exclusively belonging to the contesting defendants and were not joint family properties of the plaintiff and defendant nos. 1 and 2. Meaning thereby that the other seven properties listed in Schedule-A were admitted to be joint family properties. Not only that but in para 11 of the written statement it was submitted that 'the plaintiff is only entitled for partition regarding the properties of Schedule-A except items 4,9 and 10 and all the properties mentioned in Schedule-B. They also stated in the said para 11 of the written statement that so far as admitted properties were concerned, the plaintiff was entitled to 1/3rd share and remaining 2/3rd share belonged to defendant nos. 1 and 2. It appears that thereafter the suit remained pending for trial for number of years. On the basis of the aforesaid stand taken by the contesting parties in the written statement, issues were framed by the Trial Court.

Issue No.2. amongst others, read as under:

"Whether the property mentioned in Item No.4, 9 & 10 of Schedule "Aa"

attached with the plaint is the property of Hindu Undivided Family?"

Obviously this issue was framed in the light of the admission of the contesting defendants in the written statement that rest of the items listed in Schedule-A were

joint family properties wherein the plaintiff had a share along with the defendants.

In the light of the aforesaid admitted position between the parties qua these properties the plaintiff moved an application for appointment of a receiver in connection with 7 admitted properties in Schedule-A. It was at that stage and that too after a passage of about 18 months from the moving of such application for appointment of receiver by the appellant that defendant no.1 came forward with an amendment application to amend his written statement. In the amendment application it was submitted that because of incomplete information supplied by him to his counsel the written statement came to contain the so-called admissions regarding 5 out of 7 items of the properties in schedule-A and that he had suffered a heart attack in 1989 and therefore when the written statement was moved in 1993 this error crept in. He also wanted to insert a further averment in the written statement regarding Schedule-6 properties that they had ceased to remain in possession of defendant no.1 and were in possession of trespassers. Learned Trial judge took the view that the application for amendment was not a bone fide on and it was moved only with a view to protract the proceedings as the suit was at the stage of trial by then. learned Trial Judge was not inclined to accept the reasons put forward for moving such an amendment application at such a late stage and that too for getting out of the admissions made by defendant nos. 1 and 2 in connection with the relevant suit properties. The result was that the amendment application was dismissed. The first defendant carried the matter in revision under Section 115 of the Code of Civil procedure (`CPC') before the High Court. Learned single Judge of the High Court who heard the revision application was of the view that it was settled legal position that admissions made earlier could be explained and could be given a go by in appropriate cases and as defendant no.1 wanted to go behind his earlier admission which amounted to an inconsistent stand on his part, such an inconsistent stand in written statement could not be said to be prohibited by the procedural law. For arriving at that conclusion of his, reliance was paced on some of the judgements. of this Court to which our attention was invited by the learned counsel for the respondents in support of the judgment and to which we will make a reference hereafter. Resultantly, the revision application moved by the respondent was allowed by the High Court. That is how the plaintiff is before us in this appeal.

In our view, the order passed by the High Court under Section 115, CPC, allowing withdrawal of earlier admissions of defendant nos.1 and 2 in their original written statement about 5 out of 7 items of Schedule -A properties cannot be sustained. The reason is obvious, so far as Schedule-A properties were concerned, a clear admission was made by defendant nos. 1 and 2 in their joint written statement in 1993 that 7 properties out of 10 were joint family properties wherein the plaintiff had 1/3rd share and they had 2/3rd undivided share. Once such a stand was taken, naturally it must be held that there was no contest between the parties regarding 7 items of suit properties in Schedule-A. The learned Trial Judge, therefore, was perfectly justified in framing Issue No.2 concerning only remaining three items for which there was

dispute between the parties. In such a situation under order XV Rule 1 of CPC the plaintiff even would have been justified in requesting the court to pass a preliminary decree forthwith qua these 7 properties. The said provision lays down that, where at the first hearing of a suit it appears that the parties are not at issue on any question of law of fact, the Court may at once pronounce the judgment'. Even that apart, the defendant-respondents did not think it fit to move any amendment application for getting but of such admission till the plaintiff moved an application for appointment of receiver regarding admitted items of properties. It is only thereafter that the application for amendment was moved. Learned Trial Judge was right when he observed that even the grounds made out in the application were not justified. Consequently, there is no question of taking inconsistent stand which would not have affected prejudicially the plaintiff as wrongly assumed by the High Court. We also fail to appreciate how the decisions on which strong reliance was placed by the learned counsel for the respondents can be of any assistance to him. We may briefly refer to them.

In the case of Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary (Dead) Through LRs. and others [1995 Supp. (3) SCC 179] the plaintiff had filed a suit claiming that defendant was a licensee whose licence was terminated and, therefore, possession under Section 41 of the presidency small Causes Court. Act Should be granted to him The defendant earlier took up a stand that he was a joint tenant along with others. Subsequently he tried to rely upon Section 15-A of the Bombay Rents, Hotel and Lodging House Rates control Act, 1947 by submitting that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of the said section. This Court held that such a defence which is inconsistent could have been validly taken by the defendant. It has to be appreciated that in that case even though inconsistent stand was permitted to be taken by the defendant, the stand by itself did not seek to displace any admission on the part of the defendant in favour of the plaintiff. The defendant from the inception contended that the plaintiff's suit should be dismissed but the ground on which dismissal was claimed was sought to be changed by an alternative plea. Therefore, there was no question of any prejudice to the plaintiff if such an inconsistent stand was allowed. That is how this Court in the aforesaid decision held that such amendment in written statement could have been granted. Such is not the case before us. Here if the amendment is granted, the whole case of the plaintiff qua admitted joint family properties would get displaced as the defendants themselves had in clear terms admitted that in 7 items of properties in Schedule-A plaintiff had 1/3rd undivided interest. On that basis even preliminary decree could have been passed by the court at that stage. As that right which had accrued to the plaintiff, as noted earlier, would be irretrievably last if such amendment is allowed qua five of these seven items in Schedule-A of the plaint for which by the impugned amendment the earlier admissions were sought to be recalled.

> Our attention was also invited to another decision of a bench of two learned judges of this Court in the case of Akshaya Restaurant v. P. Anjanappa and another [1995 Supp. (2) SCC 303]. In that case the plaintiff had filed a suit on the basis of an agreement of sale entered into by the defendant with the plaintiff agreeing to sell the suit property for a sale consideration of Rs. 29,87,000/- on 25th January 1991. The defendant in the written statement had earlier stated that it was true that the defendant entered into such an agreement but by an amendment an averment was sought to be introduced in the written statement to the effect that it is incorrect to state that the defendant agreed to enter into agreement of sale. it is true that the defendant had entered into an agreement with the plaintiff on 25th January 1991 but it was for development of the suit schedule land for the mutual benefit of the parties. This amendment was held to be justified by this Court.

Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind his admission that there was an agreement of 25th January 1991 between the parties but the nature of agreement was sought t be explained by him by amending the written statement by submitting that it was not agreement of sale as such but it was n agreement for development of land. The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondents. Even that apart the said decision of two learned judges of this Court runs counter to a decision of a Bench of three learned judges of this court in the case of Modi Spinning & Weaving Mills Co. Ltd. & Anr. v. Ladha Ram & Co. [(1977) 1 SCR 728]. In that case Ray, CJ., Speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff complete from the admissions made by the defendants in the written statements cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000/- against the defendants. The defendants in their written statement admitted that by virtue of an agreement date 07th April 1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under order Vi Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockist- cum-distributor. Such amendment was rejected by the Trial Court and the said rejection was affirmed by the High Court in Revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned judges of this the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the ace of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the notice of the Bench of two learned judges that decided the case in Akshaya Restaurant (supra). In the latter case it was observed by the Bench of two learned judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid

observations in the decision in Akshaya Restaurant (supra) proceed on an assumption tat it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However the aforesaid decision of the three member Bench of this Court in Modi Spinning (supra) is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff's case the cause him irretrievable prejudice.

Consequently it must be held that when the amendment sought in the written statement was of such nature as to displace the plaintiff's case it could not be allowed as ruled by a three member Bench of this Court. this aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view.

We were then taken to another decision of this Court in the case of Panchdeo Narain Srivastava v. km. Jyoti Sahay and another [1984 (Supp.) SCC 594]. In that case the plaintiff was held entitled to amend his plaint by submitting that though earlier he stated that the defendant was uterine brother, the plaintiff by amendment in his plaint could submit that the defendant was his brother and the word `uterine' could be dropped. Even in that case the main case put forward by the plaintiff did not get changed as the plaintiff wanted submit that the defendant was his brother. whether the was uterine brother or real brother was a question of decree and depended on the nature of evidence that may be led before the Court. Therefore, the deletion of word 'uterine' was not found to be displacing the earlier case of the plaintiff. On the facts of the present case also, therefore, the aid decision cannot be of any assistance to the learned counsel for respondents.

In our view, therefore, on the facts of this case and as discussed earlier, no case was made out by the respondents, contesting defendants, for amending the written statement and thus attempting to go behind their admission regarding 5 out of 7 remaining items out of 10 listed properties in Schedule-A of the plaint. However, so far as Schedule-B properties are concerned from the very inception the defendants' case qua those properties was that plaintiff had no interest therein. By proposed amendment they wanted to introduce an event with reference to those very properties by submitting that they had been in possession of trespassers. Such amendment could not be said to have in any way adversely or prejudicially affected the case of the plaintiff or displaced any admission on their part qua Schedule-B properties which might have resulted into any legal right in favour of the plaintiff. Therefore, so far as Schedule-B properties were concerned, the amendment could not be found fault with. Hence exercising the powers under Article 136 of the Constitution of India we would not be inclined to interfere with that part of the decision of the High Court tallowing the amendment in the written statement, even though strictly speaking High Court could not have interfered with even this part of the order under Section 115, CPC.

In the result, this appeal is partly allowed. The respondents' application for amending the written statement in so far as it sought to withdraw earlier admission about 5 properties out of the remaining seven items of Schedule-A of the plaint shall stand dismissed. However, order regarding a

part of the application for amending the written statement qua Schedule-B properties, which was allowed by the High Court will remain untouched. No costs.