REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2023
(@ SLP (C) NO. 28377 OF 2018)

GANESH PRASAD ….APPELLANT(S)

VERSUS

RAJESHWAR PRASAD & ORS. ….RESPONDENT(S)

J U D G M E N T

J. B. PARDIWALA, J.

1. Leave granted.

2. For the sake of convenience, the appellant herein shall be referred to as, 'the Original Defendant or Defendant' and the respondents herein shall be referred to as, 'the Original Plaintiffs or Plaintiffs'.

3. This appeal is at the instance of the Original Defendant of Suit No. 154 of 2009 instituted by the Plaintiffs in the Court of Civil Judge (J.D.), Eastern, District Ballia for possession of the suit property upon redemption of mortgage and is directed against the order passed by the High Court of Judicature at Allahabad dated 04.07.2018 in the Civil Miscellaneous W.P. 1346 of 2015, thereby affirming the order passed by the Additional District Judge dated 25.02.2015, permitting the Plaintiffs to amend the plaint under the provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short, 'the CPC').

FACTUAL MATRIX

4. The subject matter of the civil suit is a property in the form of a Shop in Block No. 2-5, A. No. 25, 26, 27, 28, 29 situated at Chowk, City Ballia, Pargana and District Ballia. The Plaintiffs claim to be the lawful owners of the suit property. It is the case of the Defendant that the father of the Plaintiffs had executed a mortgage deed in favour of the father of the Defendant in respect of 1/3rd portion of the suit property described above and was put in possession of the shop. Thus, according to the Defendant, the father of the Plaintiffs was the mortgagor and his father was the mortgagee. The said registered mortgage deed is said to have been executed on 12.02.1957.

5. From 1957 till 2005, the mortgagee continued to remain in possession of the suit property as neither the mortgage money was paid nor the mortgage was redeemed and upon lapse of 30 years' time period, the mortgagor's right in the mortgaged property stood extinguished in terms of Article 61A of the Schedule to the Limitation Act, 1963 (for short, 'Act, 1963'). Sometime in the year 2005, the father of the Defendant i.e., the mortgagee, namely, Shree Gulab Chand died.

6. On 15.03.2007, the Plaintiffs instituted, the Small Cause Suit No. 3 of 2007 against the Appellant Defendant herein and four others in the Court of Small Causes Judge (Senior Division) for a declaration that the Plaintiffs are the lawful owners of the suit property i.e., the shop and the same had been let out to the father of the Appellant Defendant herein and after the demise of the father of the Defendant, he stopped paying the rent to the Plaintiffs and illegally inducted defendant Nos. 2 to 5 resply as sub-tenants in the shop in question. Thus, the Plaintiffs prayed for a decree of possession of the shop.

7. The following reliefs were prayed for in the Small Cause Suit No. 3 of 2007 instituted by the Plaintiffs:

> *"A. Decree for eviction from the said shop as given in detail below boundary in favour of Plaintiffs against the Defendants may be passed and if they do not vacate within period ordered by the Court then it may be vacated through Court and possession thereof may be given to us the Plaintiffs.*

B. Decree for payment of 4500/- Rupees as given in detail below against Defendants and in favour of Plaintiffs may be passed.

C. That 500/- Rupees damages decree during pendency of suit may be passed against the Defendants and in favour of the Plaintiffs.

D. Costs of the suit may be directed to be paid by the Defendants to us the Plaintiffs. Apart from these reliefs if Plaintiffs are entitled to any other relief in the Court's opinion that may also be decreased in favour of the Plaintiffs against the Defendants."

8. In the aforesaid Suit No. 3 of 2007, the Appellant Defendant filed his written statement denying the entire case put up by the Plaintiffs and further stating that the father of the Plaintiffs had executed a mortgage deed dated 12.02.1957 in respect of the suit property and i.e., how the father of the Defendant was put into possession of the suit property. Neither the father of the Plaintiffs nor his legal heirs at any point of time redeemed the mortgage.

9. The cause of action pleaded in the plaint of the Small Cause Suit No. 3 of 2007 reads thus:-

"That the cause of action arose on date 13-11-2006 when registered notice was sent and on date 15-11-2006 when notice was served and on date 31-12-2006 when inspite of service of notice shop was not vacated nor rent arrear rent was paid and comes within the jurisdiction of the Court."

10. It appears from the materials on record that the Small Cause Suit No. 3 of 2007 referred to above came to be dismissed for non-prosecution *vide* order dated 20.10.2010. The order dismissing the Small Cause Case No. 3 of 2007 reads thus:-

*"**20-10-10-***

Called out. Record presented. Plaintiff absent. No application for opportunity has been given. In the Plaintiff's absence the suit is dismissed."

11. After the Small Cause Case No. 3 of 2007 came to be dismissed as aforesaid, the Plaintiffs preferred another suit (i.e. the present suit) in the Court of the Civil Judge (J.D.) Eastern, District Ballia under Section 83 of the Transfer of Property Act, 1882 (for short, 'the TP Act'), which came to be numbered as Suit No. 154 of 2009.

12. In the said Suit No. 154 of 2009, the cause of action pleaded by the Plaintiffs reads thus:

> *"That the cause of action arose on date 03-09-2008 on getting knowledge of the mortgage deed and on date 31/3/09 on refusal to take amount of mortgage deed and comes within City Ballia, Paragana and District Ballia."*

13. The reliefs prayed for in the Suit No. 154 of 2009 read 2009 as under:-

> *"A. By the Court notice may be given to the Defendant to take mortgage deed amount 700/- Rupees other expenses 5100/- Rupees total 58,00/- Rupees within the period prescribed and give possession of the below mentioned room to us the Plaintiffs.*
>
> *B. Cost of litigation may be awarded to us the Plaintiffs against the Defendant.*
>
> *C. Apart from this any alternative relief or other relief that the Plaintiffs are entitled to in the opinion of the Court may also be decreed in favour of the Plaintiffs and against the Defendants."*

14. In the Suit No. 154 of 2009, the Defendant filed his written statement *inter alia* stating as under:

> *"4. That Para-4 of plaint is false and baseless. Father of the Plaintiffs had himself executed registered mortgage deed dated 12-02-57 in favour of father of the Defendants. In such circumstances there was no need to give them knowledge about the registered mortgage deed. The Defendant's father or grandfather were never tenant of the father or grandfather of the Plaintiffs. The Plaintiffs themselves had full knowledge about this fact that the father of the Plaintiffs had executed mortgage deed dated 12-02-57 in favour of father of the Defendant. No rent was ever paid by the Defendant's father or the Defendant to the Plaintiffs.*
>
> *Xxx xxx xxx*
>
> *6. That Para-6 of the plaint is vague and indefinite. Plaintiffs have deliberately not given particulars of the case. It is true that according to correct facts I the Defendant filed my true written statement in Small Cause Suit No. 3/Year 2007 filed by the Plaintiffs in the Court of Judge Small Causes Civil Judge (S.D.) Ballia. This case was dismissed on date 20.10.2010.*
>
> *7. That Para-7 of the plaint is false and baseless, not admitted. Plaintiffs had the knowledge about the mortgage deed from the beginning. The mortgage money was never returned by the father of the Plaintiffs Original mortgage deed is till today in the custody of I the Defendant.*

Father of the or I the Defendant have never been the tenant of the Plaintiffs or their father.

Xxx xxx xxx

Additional Statement

Xxx xxx xxx

2. That factually as mentioned above Plaintiffs' father had executed registered possessory mortgage deed on date 12.05.57 time limit for redemption whereof 30 years was till 12-02-87. Father of the Plaintiffs was a habitual litigant. He willingly did not redeem the mortgage within the time limit. Death of the father of the Plaintiff also happened 6 years after the end of this time period. Thus father of the Defendant became owner and in possession of the room mentioned below on the basis of adverse possession. Suit is barred by limitation.

Xxx xxx xxx

4. That the suit of the Plaintiff is not legally maintainable.

5. That the suit is barred by issue estopped and acquiescence.

6. That the Plaintiffs filed Small Cause Suit No.3/year 2007 Rajeshwar etc. versus Dr. Ganesh Prasad etc. which was dismissed on date 20-10-2010. Thus this suit was finally decided against the Plaintiffs and in favour of me the Defendant. Present suit is barred on this ground also by res-judicata."

15. It further appears from the materials on record that in the Suit No. 154 of 2009, the Plaintiffs filed an application seeking to amend the plaint under Order VI Rule 17 of the CPC. The amendment prayed for, reads thus:-

"1. That in the title of the case after the name and address of Defendant No. 1 where the word "Defendant" has been written, after that the words "First Party" may be added and below the name and address of Defendant No. 1 names and addresses of the following persons may be added as Defendant Nos. 2 to 5.

2. Rajeev Kumar age about 35 years
3. Munna age about 33 years — *Sons of late Om Prakash*
4. Golu age about 23 years

5. Shyam Devi age about 57 years wife of late Om Prakash R/o Joplinganj, City Ballia, Paragana and District Ballia.

…. Defendants Second Party

2. That in the plaint line above Para-1 may be cut and in its place the following words may be written-

"The aforesaid Plaintiffs submit as follows"

3. That in the plaint last line of Para 1 may be cut.

4. That in the plaint in the last line of Para-2 the word "effort" is written which may be cut and in its place word "throughout" may be written.

5. That in the plaint in second line of Para-4 the words written after the word "following" may be curt and in its place the following words may be added-

"In respect of any portion of the described room disputed tenancy the possessory mortgage registered dated 12-02-57 was written and executed, rather true fact is that Defendant No. 1's grandfather Laxman Prasad remained in capacity of tenant in the disputed room from the year 1953 at 23/- monthly rent, subsequently Defendant No. 1's father Gulab Chand remained as tenant in the disputed room throughout his life till the year 2005 and after death of Defendant No. 1's father Defendant No. 1 is continued as tenant, and he lived and the rent increased from time to time and it was paid, and during the life time of Defendant No. 1's father Gulab Chand rent of the disputed room became 300/- Rupees and rent was paid from time to time by late Laxman Prasad and Gulab Chand and father of Plaintiffs and the Plaintiffs against receipt, and in this manner till 31-03-06, the rent had been paid as advance amount by Defendant No. 1's father whereas he died in 2005."

6. That in the plaint after amended Para-4 as Para 4(a) is as follows:

May be added as follows

"4(a) That in the portion of Plaintiffs' father in the house out of the tenants some tenants had filed two cases Case No. 492/87 Rajaram etc. versus Harihar etc. and Case No. 493/87 Ram Narain etc. versus Harihar etc. in the Court of Munsif Eastern Ballia for permanent injunction mandatory and prohibitory which was disposed of a settled in the said Case No. 493/87 Ram. Narayan ji versus Harihar etc. grandfather of Def. No. 1 Late Laxman Prasad was party to the case as Plaintiff No. 3 and he had filed suit claiming being in the disputed room from the year 1953 on 25 Rupees monthly rent and the said case was disposed of through settlement document No. 58 Ka1, settlement document No. 58 Ka1 was treated as part of decree. In this manner it is apparent that grandfather of Defendant No. 1 throughout his life never showed himself to be in the disputed tenanted room as mortgagee on the basis of mortgage deed.

7. That in the plaint after Para-5 one para as Para-5(a) below written may be added as follows:-

"Para 5(a)- That against of Def. No. 1 from 01.04.06 rent remained in arrears and Def. No. 1 inducted Defendants Second Party in the disputed tenanted room and himself opened clinic with the name "Shivam Hospital" in front of Gate of Tehsil School Ballia and started practising as doctor. Then legal notice was given for arrears of rent and on the basis of sub-letting of the disputed room to sub-tenants for vacating the disputed shop and for arrears of rent and damages and subsequently after service of notice Small Cause Suit No. 3/2007 was filed, in the Court of Judge Small Cause Civil Judge (S.D.) Ballia Rajeshwar etc. versus Dr. Ganesh Prasad on date 15-03-07 which was dismissed without examination after filing of the above case. By dismissal of the suit Def. No. 1 does not get any legal right nor can he get the above suit dismissed, the above suit is not barred by principles of res judicata by order of dismissal of the said suit without examination.

8. That in the plaint in second line of Para-7 after the words "it came to be known" and before the words "We the Plaintiffs", the words "father of Def. No. I" may be added and in the same line after the words "father" and before the words "mortgage" the words "Late Harihar Prasad" may be added.

9. That in the plaint in fourth line of Para-8 where the words "close" is written after that the words "Sandhi" may be added.

10. That in the plaint in the fifth line of Para-9 after the words "can be of the owner" the entire line may be cut, and the following words may be added-

"and nor can be. Since the Plaintiffs aforesaid case which relates to Landlord and owner dispute regarding the disputed room and ownership right of the said disputed room did not get transferred on the basis of the said possessory mortgage in favour of Def. No. 1's father or Def. No. 1 rather in respect of the disputed room of the tenancy rights between the Plaintiffs and Def. No.1. The ownership right and Landlordship right remain in existence which Defendant has denied in the written statement filed by him in the case mentioned above and written statement filed in the case Small Cause Case No. 3/07 mentioned above. In such circumstances from the disputed room described below on the basis of Def. No. 1's claim of ownership rights and possession the tenancy right of Def. No. 1 has automatically ceased, and through notice also tenancy has been terminated and Def. No. 1 has by inducting Defendants Second Party as sub-tenant misused his right, on the basis of which also the Defendants

are liable to be evicted, for which the desired relief is being claimed in this suit."

11. That in the plaint after Para-9 further Para 9(a), 9(b), 9(c), 9(d) may be added as below:

Para 9(a) That after coming to know about the document of possessory mortgage dated 12-02-57 shown by the Def. No. 1 its copy was obtained on date 10.09.2008 and on getting correct information about the document of mortgage deed then to avoid any legal complication to pay by hand the amount 700/- Rupees mentioned in the mortgage deed and other expenses 5100/- Rupees total 5800/- rupees and to take the original document visited the Def. No. 1 many times when on date 31-03-09 he finally refused to take the said amount or any other amount or to return the possessory mortgage deed dated 12-02-57, therefore in the aforesaid case only claim for discharge of mortgage is being made and in the aforesaid case only separate application for deposit of 5800/- Rupees amount under Section 83 of Transfer of Property Act is being given and in respect of the said amount deposited in the Court for sending notice to Def. No. 1 and after deposit of original document in the Court to authorize receipt of the said deposited amount 5800/- Rupees prayer has been made which is also under consideration.

Para-9(b) That in the end of the plaint the description of the room only 1/3 portion has been mortgaged by Plaintiffs' father Harihar Prasad in favour of Def. No. 1's father Gulab Chand on date 12-02-57 rent of entire room 700/- Rupees in lieu of interest of principal debt after deducting has been mentioned in the possessory mortgage deed. In this manner apart from 700/- Rupees principal amount no other amount remains payable to father of Def. No. 1 but as abundant precaution for deposit of 700/- + 5100/- Rs. 5800/- Rs. amount under section 83 of Transfer of Property Act in the Court application is being given.

Para 9(c) That late Harihar Prasad son of the Plaintiffs remained mortgagor of 1/3 portion of the disputed tenanted room described below in the plaint after whose death the Plaintiffs are the legal representatives of the mortgagor whose mortgagee father of Def. No. 1 after whose death Def. No. 1 is the legal representative of the mortgagor. Particulars of the said document are as below:-

Ka-Date of Mortgage Deed	*Date 12-02-57 whose Registration was done in Register No. 1 Volume No. 1364 Page 309 to 311 at No. 364 on 13-02-57*
Kha-Names of Mortgagee and Mortgagor	*Harihar Prasad son of late Sitaram Prasad, mortgagee Gulab Chand*

	son of Laxman Prasad, Mortgagor
4a. Type of Document	*Possessory Mortgage*
Gha. Security amount	*700/- (Seven hundred Rupees)*
ga-Rate of interest and condition of Possessory Mortgage Deed	*Neither would there be claim of rent and in whichever year on Jethsudi Purnawan principal amount without interest would be paid and discharged then this the executor will have no concern with this document and the room. If there is any hindrance in possession of the Mortgagee then from the date of dispossession at the rate of 1/- Rupees per hundred monthly till the date of payment the mortgagor and his heirs would be responsible to pay*
Cha-Property under mortgage	***1/3 (one third) share in one room Block No. 2-5 in A. No. 25, 26, 27, 28, 29 in City Ballia, Chowk Paragana and District Ballia***
	Boundary-
	East-Road Government
	West-Room of Plaintiffs
	North-Room of Plaintiffs
	South-Katra Lane

9(d) That the Def. No. 1 on the basis of the said document mortgage deed after his father's death the 1/3 portion of the tenanted room in dispute is in possession of the mortgagor and in respect of 1/3 portion of mortgaged room in possession of Def. No. l during the limitation period no notice was given by father of Def. No. 1 or Def. No. 1 as mortgagor for payment of amount 700/- to the Plaintiffs' father or the Plaintiffs nor was any such notice served nor was any claim for recovery of the said amount ever made by Def. No. 1's father or Def. No. 1 nor was any suit for foreclosure or sale of possessory mortgage ever filed m respect of 1/3 portion of the tenanted room in respect of ownership and possessory rights thereof, therefore the Plaintiffs' right of discharge of 1/3 portion of the disputed room is in live condition, Plaintiffs' suit is in all conditions within limitation.

12. That in the plaint after the last line of para-10 before the words "refused" and "left with no choice", words "2/3 portion of the disputed tenanted room which was not mortgaged and only 1/3 portion of the

disputed room remained mortgaged in the possessory mortgage and in respect of that 1/3 portion relation between mortgagor and mortgagee continued and Def. No. 1 denied the Plaintiffs; title of the entire room and has claimed ownership of ground below the disputed tenanted room which is three storeyed therefore suit for eviction from the disputed room of Def. No. 1 and his sub-tenants Defendants Second party" may be added.

13. That in the plaint after second line of para-11 after the words "mortgage deed" and before the word " mauja" the following words may be added-

"And by refusing to return mortgage deed document and taking mortgage amount of 1/3 portion of room amount 700/ Rs. or amount 5800 and releasing 1/3 portion of the room and by denying Plaintiffs' ownership right over disputed room described dated 03-09-08 in the case Small Cause Case No. 3/2007 in the Court of Judge Small Cause Civil judge (S.D.) Parameshwar Prasad etc. versus Dr. Ganesh Prasad etc. and by denial in written statement filed against aforesaid plaint".

14. That the words in Para 12 of the plaint may be cut and the following words may be added-

"That value of the suit since mortgage deed amount in respect of 1/3 portion of the disputed tenanted room is 700/- and other expenses amount 5100/- total amount 5800/- Rs. paid as abundant caution for discharge and possession of the mortgaged room 1/3 for prayer (a) is being fixed and on the basis of denial of ownership right and possession of owner Plaintiffs in the filed suit for dispossession prayer (A-1) valuation amount at the rate Rs. 300/- Rs. monthly twelve times amount 3600/- Rupees is being fixed. In this manner total value amount 5800 +amount 3600 = Rs. 9400/- on which Court fees is payable.

15. That in the plaint after para 12 and before the prayer before the words "Plaintiffs" "Para 13" may be written.

16. That in the plaint present prayer (a) may be cut and in its place the following prayer as prayer "(a)" and "(aa) as follows may be added-

"(a) That by the Court decree may be passed for discharge of registered possessory mortgage deed dated 12.02.57 described below in the plaint may be passed to the effect that the security amount 700/- mentioned in the possessory mortgage deed and other expenses amount 5100/- total amount 5800/- deposited by the Plaintiff in the Court may be informed to Def. No. 1 and original document possessory mortgage described in Para 9 (c) of the plaint may be deposited in the Court by Def. No. 1 and. Def. No. 1 may be authorized to take the said amount and decree for discharge

of possessory mortgage may be passed in favour of Plaintiffs and against the Def. No. 1 and in the event of failure by the Court the document mortgage deed dated 12.02.57 in below para 9(c) of plaint may be discharged and possession of portion of the disputed tenanted room may be given to the Plaintiffs and the original possessory mortgage deed dated 12.02.57 may be deposited in the Court and Def. No. 1 may be authorized to take the said deposited amount a decree may be passed.

(A-1) That a decree for possession of the Plaintiffs over the disputed tenanted room described below in the plaint and dispossession of the Defendants may be passed by the Court and Defendants may be ordered to remove the tenanted room described below from their possession under inspection of the Court and give possession thereof to the Plaintiffs and in the event of failure execution of the decree may be done through an officer of the Court/Advocate Commissioner a decree may be passed in favour of the Plaintiffs and against the Defendants.

17. That below the words "description" below the Prayer in the plaint and above the boundary entire words may be cut and in its place the following words may be added-

"One room in Block No. 2-5 A. No. 25, 26, 27, 28, 29 in City Ballia Chowk, Paragana, Ballia, whose 1/3 portion only is mortgaged in the document mortgage deed 2/3 portion is not mortgaged and the entire room given in the boundary is disputed"

16. The aforesaid amendment as prayed for by the Plaintiffs was opposed by the Defendant by filing his reply.

17. The Civil Judge *vide* order dated 20.05.2013, declined to allow the amendment as prayed for by the Plaintiffs and accordingly, rejected the application.

18. The Plaintiffs challenged the aforesaid order passed by the learned Civil Judge by filing a civil revision application in the Court of the Additional District Judge, Ballia. The District Court *vide* order dated 25.02.2015, allowed the revision application and permitted the Plaintiffs to amend the plaint, as prayed for. However, as the amendment application was filed after 3 years from the date of the institution of the suit, the revisional court thought fit to impose costs of Rs. 3,000/- upon the Plaintiffs.

19. The Defendant being dissatisfied with the order passed by the Additional District Judge allowing the revision application filed by the Plaintiffs as aforesaid,

challenged the said order before the High Court by filing a petition under Article 227 of the Constitution. The High Court declined to interfere with the order passed by the District Court in exercise of its supervisory jurisdiction and accordingly, rejected the application filed by the Defendant herein *vide* order dated 04.07.2018.

20. The relevant part of the impugned order passed by the High Court reads as under:

> *"Sri Chandra Bhan Gupta, learned counsel for the defendant petitioner submits that the plaintiff-respondents filed the suit in question alleging that suit property was mortgaged and possession of the same may be given to them. By the amendment application the plaintiff-respondents claim deletion of Section 83 of the suit and also set up the claim of possession with the defendant-petitioner. The amendment application was rejected by the trial court on 20.5.2013 on the ground that it changes the nature of the suit. Aggrieved with the aforesaid order, the plaintiffs-respondents filed the civil revision and the same has been allowed on 22.2.2015. He further makes submission that the entire nature of the suit has been changed by the amendment application and as such, this Court should come for rescue and reprieve the petitioner.*
>
> *On the other hand, Sri Rajesh Kumar, learned counsel for the plaintiff-respondents states that the present writ petition was filed in the year 2015 in which an interim order was passed on 10.4.2015 staying the operation of the revisional order dated 25.2.2015. The matter is pending since the year 2015 and the suit itself is also pending since the year 2009. On account of the aforesaid interim order, the matter is pending consideration before the trial court. There was no infirmity or illegality in the revisional order and the writ petition is liable to be dismissed.*
>
> *The Court has proceeded to examine the record in question and also perused the revisional order and finds that after considering the entire facts and circumstances of the case, the revisional court was of the view that the amendment does not change the nature of the suit and no injustice should be done on the fault of the advocate. Finally, he has allowed the civil revision in question and set aside the order of the trial court dated 20.5.2013. He has also allowed the amendment application 35- Ka with cost of Rs. 3000/-.*
>
> *The Court does not find any infirmity or illegality in the order of the revisional court and the same is approved. However, for substantial justice, the amendment application ought to have been allowed with cost of Rs. 5000/- and the same is accepted by the parties. In case, the plaintiff-*

> *respondents deposit Rs. 5000/- within three weeks from today, the trial court will proceed in the matter and finalise the proceeding in accordance with law without affording any unnecessary adjournment to the parties."*

21. In view of the aforesaid, the Defendant is here before this Court with the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT-DEFENDANT

22. Mr. Rajeev M. Roy, the learned counsel appearing for the Appellant Defendant, vehemently, submitted that the High Court committed a serious error in passing the impugned order. The principal argument of the learned counsel is that the impugned order of the High Court is a non-speaking order. No reasons have been assigned in the impugned order.

23. The learned counsel further submitted that the High Court failed to appreciate an important question of law that the amendment has changed the entire nature of the suit. He would submit that when the first suit was filed in the Small Causes Court, the Defendant was shown to be a tenant in arrears of rent and it was further alleged that the Defendant had inducted sub-tenants in the suit property. The learned counsel would argue that after the dismissal of the suit filed in the Small Causes Court for non-prosecution, the Plaintiffs filed a fresh suit in the Civil Court labelling it as one under Section 83 of the TP Act. Later, the Plaintiffs by way of amendment could not have said that the suit is not under Section 83 of the TP Act but the tenancy of the Defendant be terminated and he be directed to hand over the possession of the shop. In other words, it is argued that the Plaintiffs could not have reintroduced the case of the tenancy and pray for a decree of possession.

24. The learned counsel vehemently submitted that even while permitting the Plaintiffs to ament the suit, the courts below ought to have kept the provisions of Order IX Rule 9 of the CPC in mind, as the Suit No. 154 of 2009 is not maintainable on the same cause of action. In other words, by way of proposed amendment, the Plaintiffs are trying to reintroduce the cause of action pleaded in the previous suit which stood dismissed for non-prosecution. This according to the learned counsel is not permissible in law.

25. It was further argued that as the suit is one for possession of the property in question, the same could have been instituted only in the Small Causes Court and not before the Civil Court.

26. The learned counsel placed strong reliance on the decision of this Court in the context of ***Revajeetu Builders and Developers v. Narayanaswamy & Sons and Others*** reported in (2009) 10 SCC 84, to submit that when the proposed amendment constitutionally or fundamentally changes the nature and character of the case then the court should not permit the plaintiffs to amend the plaint.

27. In such circumstances referred to above, the learned counsel appearing for the Appellant Defendant prays that there being merit in his appeal, the same may be allowed and the impugned order be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENT-PLAINTIFFS

28. On the other hand, this appeal has been, vehemently opposed on behalf of the Original Plaintiffs submitting that no error not to speak of any error of law could be said to have been committed by the High Court while passing the impugned order. The learned counsel would submit that the High Court rightly declined to interfere with the order passed by the District Court permitting the Plaintiffs to amend the plaint in exercise of its supervisory jurisdiction under Article 227 of the Constitution.

29. According to the learned counsel appearing for the Plaintiffs, the provisions of Order IX Rule 9 of the CPC have no application to the facts of the present case. He would submit that for the applicability of Order IX Rule 9 of the CPC, the cause of action in the second suit should be the same. However, the cause of action in both the suits are different.

30. The learned counsel further submitted that the issue of Order IX Rule 9 of the CPC has nothing to do with the question of whether the Plaintiff should be permitted to amend the plaint under the provisions of Order VI Rule 17 of the CPC.

31. In such circumstances referred to above, the learned counsel prays that there being no merit in the present appeal the same may be dismissed.

ANALYSIS

32. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for our consideration is whether the High Court committed any error in passing the impugned order.

33. There cannot be any doubt or dispute that the courts should be liberal in allowing applications for leave to amend pleadings but it is also well settled that the courts must bear in mind the statutory limitations brought about by reason of the Code of Civil Procedure (Amendment) Acts; the proviso appended to Order VI Rule 17 being one of them. In ***North Eastern Railway Administration, Gorakhpur v. Bhagwan Das*** reported in (2008) 8 SCC 511, the law has been laid down by this Court in the following terms: (SCC p. 517, para 16)

> *"**16.** Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil [AIR 1957 SC 363] which still holds the field, it was held that 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. 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. (Also see Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar [(1990) 1 SCC 166].)"*

34. In the case of ***P.A. Jayalakshmi v. H. Saradha and Others*** reported in (2009) 14 SCC 525, the above observations were reiterated by this Court and in the light of the same, this Court in para 9 held as under:

> *"9. By reason of the Code of Civil Procedure (Amendment) Act, 1976, measures have been taken for early disposal of the suits. In furtherance of the aforementioned parliamentary object, further amendments were carried out in the years 1999 and 2002. With a view to put an end to the*

practice of filing applications for amendments of pleadings belatedly, a proviso was added to Order 6 Rule 17 which reads as under:

> *"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 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.""*

35. In ***B.K. Narayana Pillai v. Parameswaran Pillai*** ***and Another*** reported in (2000) 1 SCC 712, this Court referred to the following passage from ***A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation*** reported in AIR 1967 SC 96 wherein, it was held as follows:-

> *"**4.** This Court in A.K. Gupta & Sons Ltd. v. Damodar Valley Corpn. [AIR 1967 SC 96 : (1966) 1 SCR 796] held:*
>
> > *"The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon v. Neal [(1887) 19 QBD 394 : 56 LJ QB 621]. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: See Charan Das v. Amir Khan [AIR 1921 PC 50 : ILR 48 Cal 110] and L.J. Leach and Co. Ltd. v. Jardine Skinner and Co. [AIR 1957 SC 357 : 1957 SCR 438]*
> >
> > *The principal reasons that have led to the rule last mentioned are, first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (Cropper v. Smith [(1884) 26 ChD 700 : 53 LJ Ch 891 : 51 LT 729]) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended (Kisandas Rupchand v. Rachappa Vithoba Shilwant [ILR (1909) 33 Bom 644 : 11 Bom LR 1042] approved in Pirgonda*

Hongonda Patil v. Kalgonda Shidgonda Patil [AIR 1957 SC 363 : 1957 SCR 595]).

The expression 'cause of action' in the present context does not mean 'every fact which it is material to be proved to entitle the plaintiff to succeed' as was said in Cooke v. Gill [(1873) 8 CP 107 : 42 LJCP 98 : 28 LT 32] in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corpn. Ltd. [(1962) 2 All ER 24 (CA)] and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas': Dornan v. J.W. Ellis and Co. Ltd. [(1962) 1 All ER 303 (CA)] This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

Again in Ganga Bai v. Vijay Kumar [(1974) 2 SCC 393] this Court held: (SCC p. 399, para 22)

"The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court."

In Ganesh Trading Co. v. Moji Ram [(1978) 2 SCC 91] it was held: (SCC p. 93, para 4)

"4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."……"

36. In one of the recent pronouncements of this Court, in the case of ***Life Insurance Corporation of India v. Sanjeev Builders Private Limited and Another***, Civil Appeal No. 5909 of 2022 dated 01.09.2022, the position of law has been explained as under:

> *"70. ….. (ii) 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 of the CPC.*
>
> *(iii) 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).*
>
> *(iv) 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,*
>
> *(iii) the prayer for amendment is malafide, or*
>
> *(iv) by the amendment, the other side loses a valid defence.*
>
> *(v) 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.*
>
> *(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 should be allowed.*
>
> *(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.*

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

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

(x) 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.

(xi) 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 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. (See ***Vijay Gupta v. Gagninder Kr. Gandhi & Ors.,*** *2022 SCC OnLine Del 1897)"*

37. Thus, the Plaintiffs and Defendant are entitled to amend the plaint, written statement or file an additional written statement. It is, however, subject to an exception that by the proposed amendment, an opposite party should not be subject to injustice and that any admission made in favour of the other party is not but wrong. All amendments of the pleadings should be allowed liberally which are necessary for determination of the real controversies in the suit provided that the proposed amendment does not alter or substitute a new cause of action on the basis of which the original *lis* was raised or defence taken.

38. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings.

39. In the case on hand, the first suit filed in the Small Causes Court was on the premise that the Defendant as a tenant was in arrears of rent and had unlawfully

inducted sub-tenants in the tenanted premises. Thus, the Plaintiffs put forward a case, as if, there was a landlord tenant relationship between the parties. The said suit came to be dismissed for non-prosecution. Later in point of time, the present suit came to be filed in the Civil Court with the prayer that the Plaintiffs be permitted to redeem the mortgage and take back the possession of the suit property.

40. It appears that the present suit in which the courts below permitted the Plaintiffs to amend the plaint is based on the stance taken by the Defendant in his written statement filed in the first suit i.e., the Small Cause Case No. 3 of 2007, which came to be dismissed for non-prosecution. However, it appears that the Plaintiffs have not given up their case that the Defendant is a tenant in the suit property and has inducted sub-tenants. It is also the case of the Plaintiffs that the Defendant is in arrears of rent. Thus, the stance of the Plaintiffs in the present suit is two-fold. First, as regards the tenant-landlord relationship and secondly, the case of redemption of mortgage.

41. The pleadings are so poor and pathetic that as a result, this Court found it extremely difficult to understand what the Plaintiffs intend to say by way of the amendment. With lot of effort, ultimately what we have been able to understand is that the father of the Appellant Defendant, namely, late Gulab Chand was the mortgagee of the suit property. The father of the Plaintiffs, namely, late Harihar Prasad was the mortgagor and he executed a mortgage deed dated 12.02.1957 in favour of the father of the Appellant Defendant for a sum of Rs. 700/-. The grandfather of the Appellant Defendant, namely, late Laxman Prasad remained in occupation of the suit property as a tenant from the year 1953 at the rate of Rs. 23 monthly rent and later the father of the Appellant Defendant occupied the suit property, as a tenant till the year 2005 i.e., the year of his demise. Thereafter, the Appellant Defendant became the tenant of the suit property. What is sought to be conveyed by the Appellant Defendant is that the grandfather and father of the Plaintiffs were tenants in the suit property and a mortgage deed was also drawn and executed in the year 1957 with respect to the same property. It is also the case of the Plaintiffs that the Appellant Defendant has inducted sub-tenants in the suit property.

42. A three-Judge Bench of this Court in the case of ***Firm Sriniwas Ram Kumar v. Mahabir Prasad and Others*** reported in AIR 1951 SC 177, has held that a party is

entitled to take alternative pleas in support of its case. Where alternative pleas arose to some extent from the admitted position of the defendant, such plea is not impermissible merely because it is inconsistent with the other plea. It held that a plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent sets of allegations claiming relief therein in the alternative. It further observed that although, a Court should not grant relief to a plaintiff in a case in which there is no foundation in a pleading on which the other side was not called upon or had opportunity to meet yet when the alternative case which, the plaintiff could have made was not only admitted by defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.

43. The view that a plaintiff is entitled to plead even inconsistent pleas while seeking alternative reliefs was reiterated by this Court in ***G. Nagamma and Another v. Siromanamma and Another*** reported in (1996) 2 SCC 25. In that case, a suit for specific performance of an agreement of re-conveyance was filed by the appellants. Later, an application for amendment of the plaint was sought stating that the transactions of execution of sale deed and obtaining a document for re-conveyance came to be a single transaction, i.e., it was a mortgage by conditional sale. So, alternatively plaintiff sought relief to redeem the mortgage. The trial court and the High Court rejected the same on the ground that the suit was filed for specific performance and that the amendment would change the nature of the suit as well as the cause of action. But this Court reversed the said decision and held that since the plaintiff therein was seeking alternative reliefs, he is entitled to plead even inconsistent pleas and that the amendment of the plaint would neither change the cause of action nor would affect the relief.

44. In ***Praful Manohar Rele v. Krishnabai Narayan Ghosalkar and Others*** reported in (2014) 11 SCC 316, this Court followed the decision in ***Firm Sriniwas Ram Kumar*** (supra) and reiterated the principle that alternative and inconsistent pleas can be taken by a plaintiff. In that case, the plaintiff therein had alleged that the defendant

therein and his legal representatives were occupying the suit premises as gratuitous licensees and upon termination of such licence, the plaintiff was entitled to a decree for possession. The trial court found that defendants were tenants and not licensees as alleged by the plaintiff. The 1st Appellate Court recorded a finding to the contrary, held that the defendants were let into the suit property by plaintiff on humanitarian grounds and as gratuitous licensees and the license was validly terminated by plaintiff. It thus, negatived the defence of the defendants that they were tenants. In the plaint itself, the plaintiff therein had taken an alternative plea that he was entitled to vacant possession of the premises on the ground of *bona fide* personal need, nuisance, annoyance and damage allegedly caused to the premises and to the adjoining garden land belonging to him by the defendants. This Court held that the alternative plea of plaintiff and the defence set up by defendants was no different from each other. The Court held that it was open to the plaintiff not only to take a plea of license but also to alternatively plead tenancy in support of his plea for relief of recovery of possession. The Court held that defendants therein had specifically admitted that the property belongs to plaintiff and that they were in occupation thereof as tenants, and an issue was also framed whether defendants were in occupation as license or as tenants, and defendants had full opportunity to prove their respective cases. So, the defendants cannot be said to have been taken by surprise by the alternative case pleaded by plaintiff nor could any injustice would result to them from the alternative plea being allowed and tried by the Court. It observed that even if the alternative plea had not been allowed to be raised in the suit filed by appellant, he would have been certainly entitled to raise that plea and seek eviction in a separate suit filed on the very same grounds.

45. In ***Revajeetu Builders*** (supra), cited by the learned counsel for the Appellant, a two-Judge Bench of this Court had an occasion to deal with Order 6 Rule 17 C.P.C. In that case, the judgment of this Court in ***Usha Balashaheb Swami and Others v. Kiran Appaso Swami and Others*** reported in (2007) 5 SCC 602, was followed. It referred to the judgment in ***M/s. Ganesh Trading Co. v. Moji Ram*** reported in (1978) 2 SCC 91, wherein at para 50, this Court observed that if a plaintiff seeks to alter the cause of action itself and introduces it indirectly through amendment of his pleadings, an entirely

new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it, if it amounts to depriving the party, against which a suit is pending, of any right which may have accrued in its favour due to lapse of time.

46. In our considered opinion, the aforesaid observations also do not come to the aid of the Appellant herein, inasmuch as, even in the judgment in ***Ganesh Trading Co.*** (supra), it had not referred to the three-Judge Bench judgment of this Court in ***Firm Sriniwas Ram Kumar*** (supra).

47. In the event, if the pleas sought to be introduced by plaintiff by way of an amendment is also the plea, which the defendant has set up in his written statement and such a plea of the plaintiff is an alternative plea, even though it is inconsistent with the original plea, since there is no prejudice caused to the defendant, the Court is not precluded from allowing the amendment.

48. At this stage, we may refer to rely upon the decision of this Court in the case of ***State of Madhya Pradesh v. Union of India and Another*** reported in (2011) 12 SCC 268. We quote the relevant observations as contained in para 8 of the judgment: -

> *"8. The purpose and object of Order 6 Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule, particularly in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."*
>
> *(Emphasis supplied)*

49. The Appellant Defendant has also put forward an argument as regards the applicability of Order IX Rule 9 of the CPC to make good his submission that the amendment should not be permitted as the present suit by itself is not maintainable as the earlier suit filed in the Small Causes Court came to be dismissed for non-prosecution under the provisions of Order IX Rule 8 of the CPC.

50. We could have at this stage closed the matter saying that if it is the case of the Appellant Defendant that the present suit is not maintainable in view of Order IX Rule 9 of the CPC, then it shall be open for him to raise such a plea before the trial court by filing an application under Order VII Rule 11 for rejection of plaint. However, we are of the view that as an important question of procedural law has been raised, we take this opportunity of explaining in this appeal itself as to why the plea of Order IX Rule 9 of the CPC should fail.

51. Order IX Rule 9 reads thus:

> "***9. Decree against plaintiff by default bars fresh suit.-(1)*** *Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing the fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to cost or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*
>
> ***(2)*** *No order shall be made under this rule unless notice of the application has been served on the opposite party."*

52. Order IX Rule 9 bars fresh suit in respect of the same cause of action in case the earlier suit was dismissed as indicated in Order IX Rule 8 of the CPC. The term "same cause of action" assumes significance in as much as the bar under Order IX Rule 8 of the CPC applies to a later suit only in respect of the very same cause of action. In case the cause of action in the later suit was altogether different, which has nothing to do with the cause of action in the earlier suit, the statutory bar has no application to such later suits. It was only with a view to curb the tendency of filing multiple suits, on the basis of the very same cause of action, successively even after the dismissal of the earlier suit that such a provision has been introduced. It was not the intention of the Legislature to bar the subsequent suits between the parties and the same was evident by the qualifying words, "same cause of action". Therefore, everything depends upon the cause of action and in case the subsequent cause of action arose from a totally different bunch of facts, such suit cannot be axed by taking shelter to the provision of Order IX Rule 9 of CPC.

53. This Court in ***The Gaya Municipality v. Ram Prasad Bhatt and Anr.*** in Civil Appeal No. 29 of 1965 decided on 8th September, 1967, explained the scope of Order IX Rule 9 of the CPC thus:

> *"In our view, the present suit is not barred by O. IX r. 9, C.P.C. The principles for determining whether the causes of action in two suits are different or not were laid down by the Privy Council in Mohammad Khalil Khan v. Mahbub Ali Khan A.I.R. (1949) P.C. 78 and referred to with approval by this Court in Suraj Rattan Thirani v. Azamabad Tea Company A.I.R. (1965) S.C. 295. The only question is whether applying these principles the High Court was right in holding that the cause of action was different in the present suit from that in the 1941 suit. It seems to us that if the two plaints are analysed closely it would appear that in the first suit the cause of complaint was a threat by the defendant municipality to interfere with the alleged rights of the plaintiff by constructing stalls immediately to the south of his house. At that time no stalls had been constructed and the alleged rights of the plaintiff had not been actually infringed. During the course of the suit the construction of the stalls was commenced, and the same was completed, at some appreciable distance from the house of the plaintiff, after the suit was dismissed for default. Further the complaint in the 1941 suit was that the right to use the footpath just south of the municipal drain was being infringed which footpath was alleged to have been used by pedestrians and customers of the shop of the plaintiff; there was no allegation that his right to access to Halliday Road was being threatened or infringed. In the present suit what is substantially alleged is that the plaintiff had a right to access to the house from all sides of the said plot No. 11459 in question abutting and lying in front of the plaintiff's house. It will also be noticed that the present plaint alleges a permanent deprivation of plaintiff's alleged right of access to Halliday Road. The constructions are of a permanent nature, and, in our view, a fresh cause of action arose when the stalls were constructed in 1942."*

54. What is a cause of action is now settled beyond any doubt. The classic definition of that expression is that of Lord Justice Brett in ***Jay Cook v. Henry S. Gill*** reported in (1873) LR 8 CP 107 as under:

> *"'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, — every fact which the defendant would have a right to traverse."*

55. Lord Justice Fry put it in the negative by saying, "*Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause*

of action." This definition is the basis of all subsequent decisions containing an interpretation of the expression 'cause of action.' It was accepted in ***Deep Narain Singh* v. *Minnie Dietert and anr.*** reported in ILR (1904) 31 Cal 274 at p. 282 and by the Privy Council in ***Mohammad Khalil Khan and others* v. *Mahbub Ali Mian and others*** reported in AIR 1949 PC 78 at p. 86, para 61 point No. 2.

56. The aforesaid cases also make it clear that the cause of action in a suit has no reference to the defence taken in the suit, nor is it related to the evidence by which that cause of action is established. In ***Mohammad Khalil Khan*** (supra) to which, we have referred above, this point is made in the judgment of the Privy Council in para 61, point No. (5), as follows:—

> *"The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers … to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."*

57. Cause of action should also be distinguished from 'remedy' which is the means or method whereby the cause of action or corresponding obligation is effectuated and by which a wrong is redressed and relief obtained. The one precedes and gives rise to the other, but they are separate and distinct from each other and are governed by different rules and principles. The cause of action is the obligation from which springs the "action", defined as the right to enforce an obligation, A cause of action arises when that which ought to have been done is not done or that which ought not to have been done is done. The essential elements of a cause of action are thus the existence of a legal right in the plaintiff with a corresponding legal duty in the defendant, and a violation or breach of that 'right or duty' with consequential injury or damage to the plaintiff for which he may maintain an action for appropriate relief or reliefs. The right to maintain an action depends upon the existence of a cause of action which Involves a combination of a right on the part of the plaintiff and the violation of such right by the defendant. The duty on the part of the defendant may arise from a contract or may be imposed by positive law independent of contract, it may arise of *contractus or ex delicto*. A cause of action arises from the invasion of the plaintiff's right by violation of some duty Imposed upon the defendant in favour of the plaintiff either by voluntary contract or by positive

law. (See: ***Sardar Balbir Singh v. Atma Ram Srivastava*** reported in AIR 1977 ALL 211 (FB))

58. Secondly, the cause of action must be distinguished from the evidence upon which, that cause of action is proved and though the one has no relation to the other, still the nature of the cause of action may be indicated by the nature of the evidence by which it is supported. This again is made clear in ***Mohammad Khalil Khan*** (supra) para. 61 at P. 86 in points Nos. 3 and 4, which are put as follows:—

> *"(3) If the evidence to support the two claims is different, then the causes of action are also different. …*
>
> *(4) The cause of action in the two suits may be considered to be the same if in substance they are identical. …"*

59. The decision of the Privy Council in ***Mohammad Khalil Khan*** (supra) was taken notice of by this Court in the case of ***Suraj Rattan Thirani and Others v. Azamabad Tea Co. Ltd. and Others*** reported in AIR 1965 SC 295. This Court, while explaining the true purport of Order IX Rule 9 of the CPC observed in paras 29 & 30 resply as under:-

> *"**28.** A cause of action is a bundle of facts on the basis of which relief is claimed. If in addition to the facts alleged in the first suit, further facts are alleged and relief sought on their basis also, and he explained the additional facts to be the allegations about possession and dispossession in October 1934, then the position in law was that the entire complexion of the suit is changed with the result that the words of Order 9 Rule 9 "in respect of the same cause of action" are not satisfied and the plaintiff is entitled to reagitate the entire cause of action in the second suit. In support of this submission, learned counsel invited our attention to certain observation in a few decision to which we do not consider it necessary to refer as we do not see any substance in the argument.*
>
> ***29.** We consider that the test adopted by the Judicial Committee for determining the identity of the causes of action in two suits in Mohammed Khalil Khan v. Mahbub Ali Mian [75 IA 121] is sound and expresses correctly the proper interpretation of the provision. In that case Sir Madhavan Nair, after an exhaustive discussion of the meaning of the expression "same cause of action" which occurs in a similar context in para (1) of Order 2 Rule 2 of the Civil Procedure Code observed:*

> *"In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is/are the causes of action in the two suits in substance — not technically — identical?""*

60. Thus, we may sum it up saying that Order IX Rule 9 of the CPC provides that when the suit is wholly or partially dismissed under Rule 8 (dismissed for default) the Plaintiffs shall be precluded from bringing in a fresh suit, in respect of the same cause of action. The present suit i.e., Suit No. 154 of 2009 filed in the Court of Civil Judge (J.D.) Eastern, District Ballia is not filed on the same cause of action. In the present suit, the case of the Plaintiffs as put up in the alternative is that the Defendant is in possession of the suit property as a mortgagee and they are ready to redeem the mortgage by making the necessary payment of the mortgaged amount and take back the possession. Whether the relief prayed for is time barred or not is for the trial court to decide on the basis of the evidence that the parties may lead. As observed by the Privy Council in ***Mohammad Khalil Khan*** (supra) if the evidence to support the two claims is different than the causes of action are also different. Hence, the contention raised on the basis of the provisions of Order IX Rule 9 of the CPC has no merits.

61. The matter may also be looked at from a different angle. Let us assume for the moment that in the first suit also the plaintiffs had prayed for a relief, seeking redemption of mortgage as prayed for in the present suit. Even in such circumstances, whether with both the reliefs identical in the two suits and the cause of action also the same, the provisions of Order IX Rule 9 of the CPC would operate as a bar for the maintainability of the present suit. The right to redeem, is a right conferred upon the mortgagor by an enactment, of which he can only be deprived by means and in manner indicated for that purpose and strictly complied with. In ***Shridhar Sadba Powar* v. *Ganu Mahadu Kavade and others*** reported in ILR (1928) 52 Bom 111, a suit for redemption was filed but was dismissed under Order IX, Rule 8, of the CPC. The mortgagor brought a second suit for redemption and it was contended that it was barred under Order IX Rule 9 of the CPC. Marten, C.J. and Crump, J. rejected this plea. The learned judges relied on the previous decisions of the Bombay High Court including ***Ramachandra Kolaji Patil v. Hanmantha*** reported in ILR (1920) 44 Bom

939, and pointed out that the decision of the Privy Council in ***Thakur Shankar Baksh v. Dya Shankar and Others*** reported in (1887) LR 15 IA 66, was not against the view taken by them, as it was decided on a different state of law. In ***Vithal Rajaram Sutar and another v. Ramchandra Pandu Jadhav and others*** reported in AIR 1948 Bom 226, a Full Bench of the Bombay High Court held that the general terms of Order XXII Rule 9 of the CPC, which provided that where a suit abated or was dismissed under the Order, no fresh suit shall be brought on the same cause of action, cannot override the specific terms of Section 60 of the TP Act. It was pointed out that the CPC dealt with the procedure relating to all suits. There was a special law which dealt with the rights of mortgagors and mortgagees and that substantive law was to be found in the Transfer of Property Act. That substantive law provided only two ways in which the right of redemption can be extinguished and they were: (i) by act of the parties, or (ii) by decree of the court. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in ***Bhaiya Raghunath Singh and others v. Musammat Hansraj Kunwar and others*** reported in (1933-34) 61 IA 362, the right of redemption can be extinguished as provided in Section 60 of the Transfer of Property Act and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore barred.

62. It follows, therefore, that if the right of redemption is not extinguished, the provision like Order IX Rule 9 of the CPC will not debar the mortgagor from filing a second suit because as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one.

63. In the result, this appeal fails and is hereby dismissed.

64. The interim order passed by this Court dated 3.01.2019 staying the further proceedings of Suit No. 154 of 2009 pending in the Court of Civil Judge (J.D.) Eastern, District Ballia is hereby vacated.

65. The trial court shall now proceed to take up the Suit No. 154 of 2009 for hearing and dispose of the same at the earliest preferably within a period of six months from today. It is clarified that it shall be open for both the sides to raise all legal contentions available to them in law.

66. It is further clarified that we have not expressed any opinion in regard to the merits of the civil suit. The civil suit shall be decided strictly on the basis of the evidence that may be led by the parties in accordance with law.

67. We have confined our adjudication in the present appeal only on the limited question whether the Plaintiffs should be permitted to amend the plaint and secondly, whether the provisions of Order IX Rule 9 of the CPC are applicable to the case on hand.

68. There shall be no order as to costs.

69. Pending application(s) if any stand disposed of.

.....J.
(SUDHANSHU DHULIA)

.....J.
(J.B. PARDIWALA)

NEW DELHI;
MARCH 14, 2023.