WHEN CAN THE COURT ALLOW AMENDMENT IN THE PLEADING

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INTRODUCTION

The Code of Civil Procedure, 1908 prescribes the provisions through which the amendments to pleadings can be introduced during the trial process. Since the bygone era, the belief of almost all the legal systems was that the courts must have unrestricted and unguided power to amend the pleadings so as to further the cause of justice without causing an iota of injustice to the adversary party. Rule 17 of Order VI provides for the powers to the courts in India to allow the amendments. Adding to this, the Privy Council, the Supreme Court and other Courts in India have been implementing this practice since the ages. In 1990s, a lot of concerns were raised as to the extent of usage of this facility in almost all the cases litigated till then. Various reports found that no stone has been unturned not to utilize this provision and hence there is a need for a re-look[1].

By the Code of Civil Procedure (Amendment) Act, 1999, this provision relating to amendment of pleadings was deleted. Justice Malimath Committee recommended that the rule 17 of this order be deleted to avoid delay and to ensure speedy disposal of cases[2]. This amendment act received the assent of the President but was not brought into force. Due to a lot of uproar in the Country and opposition from lawyers, the government reconsidered the question and revived the rule by the next amendment act in 2002 with a proviso. However, it was reintroduced by the Code of Civil Procedure (Amendment) Act, 2002, but with a proviso and was brought into effect from July 1, 2002.

What are pleadings?

Order VI deals with pleadings in general. Rule 1 of that Order defines pleadings as a plaint or written statement. Plaint is used to notify the opposite party of the case that is filed against him or her. Framing of pleadings is the most fundamental and must be dealt with a lot of caution. The reason is that, once the pleadings are framed, no one has the power to amend them expect for the judge on his discretion. In the absence of the pleadings, if any evidence is produced by the parties, that cannot be considered. It is a settled law that no party must be allowed to venture beyond the pleadings. There is a lot of litigation in this area as to the scope and extent of the liberty to amend the pleadings. In the Common law, the pleading

[1] http://lawcommissionofindia.nic.in/reports/report222.pdf.
[2]http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf.

practice was a mechanical and rigid exercise such that misspellings of minor details were not allowed[3]. The object and purpose of the pleadings is to make the opposite party acquaint with the case he has to face in the due course of time. The whole object of the pleadings is to bring parties to the definite issues, reduce costs and to ensure the speedy delivery of justice. This also results in the conduct of the fair and flawless trial and the pleadings must contain all the essential material facts so that the adversary party is not taken away by surprise. The parties are normally expected to confine to the pleadings. One of the most important objects of allowing the amendment to pleadings is to prevent multiplicity of suits. If the amendment is sought seeking an ancillary relief is not allowed, then the party might have a remedy to raise the same in the subsequent case. The amendments relating to constructive *res judicata* must not be allowed by the courts.

AMENDMENT OF THE PLEADING

Amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of proceedings. It is in the interest of justice that a suit shall be decided on all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit. There can be a situation where there is change of circumstances in the course of pendency of a proceeding and if a matter in issue arises upon such change of circumstance, then amendment becomes necessary. Amendment of pleadings is provided under Order VI Rule 17 of the Code of Civil Procedure, 1908, which reads as under: According to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose conditions i.e. in the form of cost or any other condition. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit. A proviso has been added to this provision through the CPC (Amendment) Act, 1999, which intends to limit the powers of the court's discretion of amendment of pleadings. It says that no application for the amendment shall be allowed by the court after the commencement of the trial, unless the court is of the opinion that notwithstanding the parties' due diligence, they could not have raised the matter before the commencement of the trial. At the same time, the *Proviso* to Order VI Rule 17 puts a mandate upon the Court not to allow such amendment after the trail has begun (i.e. if issues have been settled), if its finds that the party could have raised the pleadings by due diligence at an earlier point of time.

[3] Holdsworth, the History Of The English Law 305 (1923).

However, the *Proviso* need not be given a very rigid effect in all cases as the same is subject to the discretion of the Court. The main object of the legislation is to enable the Court to allow amendment at any stage. The purpose of the *Proviso* cannot do away with the intent of the legislation. Thus, if an application for amendment of pleadings has been filed after trial has begun, the Court will normally be tilted against the applicant, if it could be raised by due diligence at any earlier stage of proceedings. But in proper cases if the point to be amended is very essential to the suit, the Court may, in the interest of justice and equity, allow the amendment on such conditions as the Court deems fit and proper in the facts and circumstances of the particular case. It was held by the Hon'ble Supreme Court in ***Salem Advocate Case***[4], that by the 2002 Amendment, which added the *Proviso to Order VI Rule 17*, the burden of proof has been shifted upon the applicant who makes the application for amendment after the trail has commenced, to prove that despite due diligence he could not have raised the issue before the commencement of trail. This is for the purpose of preventing frivolous application to delay the proceedings.

INTERPRETATION OF THE RULE

Rule 16 of the same Order provides for the striking out of the pleadings. This was also subjected to the amendment in the year 1976. It provides that the Court may at any stage of the proceedings order to amend or remove any part of the pleading which is unnecessary, scandalous, frivolous or vexatious etc. The Court may also modify at any stage any matter that delays the fair trial or abuses the process of the court. The rules of interpretation to be followed in interpreting this provision are very simple. The provision can be divided into two parts. The first part is discretionary ("may") and gives wide and unfettered discretion to decide on case-to case basis whenever it appears to be just. The court may or may not allow the amendment to the proceeding for determining the real questions of controversy. The approach of the Court should be liberal and not hypothetical.[5] Hence, the amendment to proceedings is not a right; rather it is in the discretion of the court. The second part is mandatory and orders the court to accept all the applications necessary for the purpose of determining the real issue between the parties if it finds that the parties could not have raised the issue in spite of the due diligence before the commencement of the trial. However, such discretion must be exercised by applying the judicial mind according to the well-established principles.

[4] AIR 2005 SC 3353
[5] Narayana Pillai vs. Parameshwaran Pillai, AIR 2000 SC 614.

GUIDELINES FOR THE AMENDMENT OF THE PLEADING

- Cause of action in a suit cannot be altered by amendment of pleadings. The cause of action will not be allowed to be substituted in totality and the reason being that the cause of action is the very basis of a suit. If a new/distinct cause of action is there, the parties are always free to go to the Court with such cause of action in an independent suit. But there can be cases where the cause of action has got further aggravated by any further violation or some continuing cause of action which can be joined in the present suit due to subsequent change of circumstances. In such cases, the Court in its discretion is free to allow the amendment as that would not be a case of substitution of cause of action.
- The Amendment of pleadings shall be allowed to bring or to clarify all matter in issue before the Court. The matter in issue is essential for the determination of the suit and therefore amendment can be made. Similarly, relief also can be amended. In such cases, if the amendment is not allowed, the bar of res *judicata* or as the case may be, the bar of Order II Rule 2 of the Code of Civil Procedure, 1908 may apply. Therefore, the Court should try to bring a balance between the injustice that might be caused to the applicant in case of refusal to grant relief and at the same time, in case of allowing the application, the requirement of injustice caused to the other party in the present suit.
- If a right has already accrued in pleadings to the opposite party, then the Court shall normally be reluctant to allow the Amendment of pleadings. However, in such cases, if the loss that will be caused to the other party can be adequately compensated for by cost then amendment shall be allowed. [6]
- When the court hears the application for Amendment of pleadings it does not go into the merits of the case. While considering the prayer for amendment of the pleadings, the Court cannot go into the issue of merits vis-à-vis maintainability of the suit, but can consider only whether the amendment is necessary to determine the real controversy between the parties.[7]
- If there is an undue delay in the filing of the application for amendment, without there being sufficient cause shown to condone the delay, then the Court may normally not allow the amendment.
- Change of law: The law can be a change of substantive law either prospective or retrospective. If it is a prospective change then it normally not effect cause of action and matter in issue in the pending suit and therefore, amendment is not needed. Whereas it is

[6] J. Samuel and Ors. Vs. Gattu Mahesh and Ors.: 2012 (1)SCALE 330
[7] Andhra Bank Vs. ABN Amro Bank N.V. & Ors.: AIR 2007 SC 2511

> a retrospective change, amendment might be needed and shall be allowed. If it is a change of procedural law then normally pleadings will not be allowed to be amended but the court shall itself take note of the change of procedural law.[8]

Further, Order VI rule 18 of the Code of Civil Procedure, 1908 casts a duty on the party to carry out the amendment, if allowed by the Court, within the time limited for the said purpose by the order and if no time is thereby stated, then within 14 days from the date of the order. In case the party fails to carry out amendment within the said period, he shall not be permitted to carry out the amendment after the expiration of time limited, unless the time is further extended by the Court.[9]

Leave to Amend when Granted

The general rule is that the leave to amend will be granted so as to enable the real question on issue between the parties to be raised in the pleadings, where the amendment does not cause any injury to the opposite party[10]. Now let us look at the approach of the judiciary in solving this issue. This job helps us in tracing the evolution of the law relating to the amendment of proceedings. Generally, the courts grant the leave to amend the proceedings if such allowance enables the court to decide the real matter in controversy. Provided that, it does not cause injustice to the other party. In Suraj Prakash vs. Raj Rani[11], the Supreme Court held that liberal principles should guide the court in the exercise of discretion in allowing amendment. It said that the multiplicity of proceedings should be avoided and the amendments which might change the character of the case must not be allowed. It also added a caveat that the subject matter of the suit must not be changed by that.

Though the courts were granted unfettered discretion to decide whether to grant the amendment or not, but it is subjected to misuse. The classic rule is, the wider the discretion, the greater the misuse. This power of the courts must be exercised properly, reasonably and non-arbitrarily.

Interpreting at any Stage of Proceedings

Under Order 6, Rule 17, the courts were given power to amend the proceedings "at any stage of the proceedings" which simply means that the amendment applications are not governed

[8] Omprakash Gupta Vs. Ranbir B. Goyal: AIR 2002 SC 665
[9] Delhi Development Authority Vs. S.S. Aggarwal and Ors.: AIR 2011 SC 3265
[10] Tildersay vs. Harper, (1878) 10 Ch D 393.
[11] AIR 1981 SC 485.

by the law of limitations Narayana Pillai vs. Parameswaran Pillai [12]. The object of inserting such clause is to serve the ends of justice by determining the exact controversy between the parties. The court may accept the application of amendment before, during or after the trial, after the decree, in first appeal or in the second appeal or in the revision or in the High Court or in the Supreme Court. That list even extends to the execution proceedings. The court must keep in mind that complete justice must be done to the parties. Therefore, delay in making the application is not fatal. But, if there is a gross delay and latches on the part of the amendment, and if the court feels that permitting such amendment causes serious prejudice to the other party, which however cannot be compensated in terms of costs, then the courts may not allow such an amendment. The Supreme Court in Gauri Shankar vs, Hindustan Trust [13]lt held that "not raiding the plea for the span of eight years, a great prejudice was caused to the appellant". The proviso adduced to the provision by way of amendment in 2002 merely limits the power of the court and does not allow the court to allow amendment after the commencement of the trial unless it comes to the conclusion that in spite of due diligence, that matter could not be raised by the party before the commencement of the trial.

Amendments to Written Statements

The principles that apply to amendments of pleadings also apply to the written statements. [14]The Supreme Court in *Usha Balasahed Swami vs. Kiran Appaso Swami* [15]explained the law relating to the applicability of law relating to amendment of pleadings to the amendments of written statements. It said that the prayer relating to the amendment to the plaint and that of written statements stand on different levels. The general principle is that amendments should not be allowed which substitute a cause of action in the nature of the claim. The Supreme Court said that there is no counterpart in the principles relating to the amendment of the written statement. Hence, the Court said that addition or substitution of written statement would not be objectionable whereas adding or subtracting the cause of actions by the plaint may be objectionable. Hence the Apex Court in this case held that the courts should be more liberal in allowing the applications for the amendment of the written statements that in the case of plaints as question of prejudice would be more in the former case.

[12] AIR 2000 SC 614.
[13] AIR 1972 SC 2091.
[14] Gautam Swarop vs Leela S Jetley, AIR 2009 SC (supp) 363.
[15] AIR 2007 SC 1663.

EFFECT OF 2002 AMENDMENT

On the recommendation of the law commission, the CPC was amended in 2002, limiting the power of courts in granting the amendments after the commencement of the trial. With the intention of shortening the litigation and for the speedy disposal of the cases, order 17 was omitted by the 1999 amendment. The legislators felt that this rule was in the statute book since ages and there is no single case where this rule was not used. The provision was restored back in 2002 in view of the protests, agitations and strikes all over the country, but with a caveat in the form of the proviso. The new proviso provides that no application for amendment must be processed by the court after the commencement of the trial, unless the courts come to the conclusion that in spite of the due-diligence of the parties, they could not have raised before the commencement. But, the issue of deciding whether the parties in spite of due diligence could have raised the prayer or not depends on the facts and circumstances of the each case. This amendment is trying to limit the powers of the court to some extent, nonetheless, the courts have unfettered powers in the cases of the unforeseen situations. This provision has been already subjected to the judicial scrutiny by the courts in India. In *Sampath Kumar vs. Ayyakannu* [16], the plaintiff filed a suit against the defendant for prohibitory injunction. But, before the commencement of the trial, he was dispossessed of the property and after eleven years, he moved an application seeking amendment of the plaint claiming possession. The defendant claimed that this would change the nature of the suit and that he had the perfect title by adverse possession and this particular claim is barred by law of limitation. The trial court and the high court rejected the application of the plaint but the Supreme Court allowed it saying that: "We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit." In another interesting case *Nagappa vs. Gurdayal Singh*[17], the facts are that plaintiff suffered injuries in an accident and filed an insurance claim of one lakh. But, in the Apex Court he enhanced his claimed to five lakh. The Supreme Court granted him relief stating that when there is sufficient evidence on record justifying the enhanced compensation for medical treatment, the same should be granted. In this type of cases, the court said that there is no question of introducing a new or inconsistent cause of action. Hence, the courts, in case they want to do justice to the parties, do not consider themselves to be restricted by any legislation.

[16] 2002 Supp (2) SCR 397.
[17] AIR 2003 SC 674.

CONCLUSION

The law of amendment of pleadings is settled by the Supreme Court. The Courts started with the rule of law that there must not be any restriction on the powers of the courts be it law of limitation or after the commencement of the proceeding, for securing the ends of justice and to minimize the harm caused to the opposite party. The Courts have been very active in this area developing the law time and again to suit to the various time frames. However, the legislators themselves thought that discretion should be granted to the courts whether to allow the amendment or not to decide the matter in issue. The courts themselves since 1908 have started crystallizing the law through guidelines which must be followed while allowing the amendments. They have laid down the principles in which the leave to amendment should be granted and the cases in which it should not be. However, the Supreme Court has been cautious and vigilant in carefully designing the guidelines to be followed by the lower courts. Gradually, as a lot of discretion is vested on the courts, there is a possibility of misuse. There was a Law Commission Report stating that this provision of the amendment was used on a large scale and hence it needs to be restricted. In 1999, efforts were made to eliminate this provision but could not be brought into force. Due to a lot of protests from the legal practitioners, this was restored back in the 2002 CPC Amendment. But, now a small caveat was adduced to the proviso with a view to limit the unrestrained power of the courts in allowing or refusing the amendments. This was that the court shall allow the amendments to the pleadings only if it feels that the parties could not have raised before in spite of their due diligence. By the literal reading of the provision, it appears that that the power of the Courts is restricted. But, a simple glance at the judgments pronounced since 2002 discussed in the above sections shows that the Courts continued to exercise the unbridled power even after the amendment for securing the ends of justice. This is bold judicial activism that has reached great heights and did not erode the faith entrusted by the citizens in the judiciary. In view of the aforesaid, it can be concluded that the amendment of pleadings cannot be claimed by the party as a matter of right nor can be denied by the Court arbitrarily. However, the discretion to be exercised by the Court is guided by the principles mentioned hereinabove and depends on the facts and circumstances of each case. Thus, rational behind the provision of Order VI Rule 17 of the Code of Civil Procedure, 1908 can be summarized as "***Court shall allow application of amendment if granting of an amendment really sub serves ultimate cause of justice and avoids further litigation***".