1909.

ISMALJI YUSUFALLI v. RAGHUNATH LACHIRAM.

It was assumed by the lower Court that the agreement was an agreement to sublet certain salt-pans, which was prohibited by the license which Yusufalli obtained, and we must take it that that is so. In the lower Court it was contended otherwise, but now it has been sought to establish that the plaintiff acted on behalf of defendant No. 1 *and not on his own account.* That, however, is a question of fact. It was not made good in the lower Court and we cannot go into it here. The question, therefore, is whether the object of the agreement is forbidden by law within the meaning of section 25 of the Contract Act. It seems to me that it is, for the object was to enable the plaintiff to manufacture salt without a license, and the law says that no salt shall be manufactured otherwise than by the authority of a license granted by the Collector.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Beaman.

1909. *July* 2.

KISANDAS RUPCHAND AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* RACHAPPA VITHOBA SHILWANT AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings —Defence of the bar of limitation—Practice as to amendment of plaint.

The plaintiffs alleging that in pursuance of a partnership agreement they delivered Rs. 4,001 worth of cloth to defendants, sued for an order for the dissolution of the partnership and accounts. The Subordinate Judge found that the plaintiffs did deliver Rs. 4,001 worth of cloth to the defendants as alleged; but he came to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal came on for hearing this plea was abandoned; the plaintiffs admitted that the facts stated in their plaint did not constitute a partnership and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. At this date the claim for the money was barred by limitation.

* Second Appeal No. 23 of 1908.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

The lower appellate Court being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their Pleader, allowed the amendment to be made and ultimately allowed the plaintiffs' claim. The defendants in appeal to the High Court contended that the amendment was wrongly allowed.

Held, that the amendment was rightly allowed. The defence of limitation was a defence to which the defendants were never fairly entitled, and the allowance of the amendment only withdrew from them an advantage which they ought never to have received.

Per BATCHELOR, *J.*:—Under the Civil Procedure Code, 1908, O. VI, *r.* 17, all amendments ought to be allowed, at any stage of the proceedings, 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. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not?

SECOND appeal from the decision of Vaman M. Bodas, First Class Subordinate Judge, A. P., at Sholapur, reversing the decree passed by Naginlal Venilal Desai, Subordinate Judge at Karmala.

Rachappa and another sued for dissolution of partnership and accounts.

On the 30th April 1897, the plaintiffs agreed with the defendants to start a partnership named "Yeshwant Kisandas" from the 26th October 1897. The agreement provided that the defendants were to be solely responsible for the firm and the plaintiffs had to supply a capital of Rs. 4,001 to defendants and to receive Rs. 351 a year in lieu of interest and profits. This arrangement was to last for five years, that is, till the 1st of November 1902. The defendants had then to return Rs. 3,001 in cloth and cash, and the remaining Rs. 1,001 were to be returned on the 8th November 1904.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

The defendants having failed to carry out their obligations under the above agreement, the plaintiffs filed this suit for dissolution and accounts of the partnership on the 28th March 1905.

The defendants in their written statement denied the agreement and contended that even if the agreement had been executed, plaintiffs were only to get under its terms a fixed sum and hence there was no need to ask for dissolution and accounts.

The Subordinate Judge found that there was an agreement between the parties to start business in the name of Yeshwant Kishandas, but the agreement did not amount to partnership in the legal sense of the term. He also found that plaintiffs had delivered Rs. 4,001 worth of cloth to defendants as agreed. The plaintiffs' suit was therefore dismissed.

The plaintiffs appealed contending that partnership was established and that he was entitled to maintain his suit.

When, however, the appeal came on for hearing, the appellants' pleader admitted that the facts stated in the plaint did not constitute a partnership between the parties, and said that the only relief which the plaintiffs were legally entitled to obtain was a decree for Rs. 4,001 advanced by them with interest. He applied to amend the plaint accordingly.

The learned Judge of the appeal Court allowed the amendment on the 7th October 1907, on the following grounds:—

"The proposed amendment does not necessitate a change in the nature of the suit, or addition of anything to facts stated in the plaint as constituting the cause of action, but the mere addition of an alternative relief only. This relief, there seems no doubt, could very well have been claimed in the plaint as originally framed. The application and affidavit make it clear that plaintiffs wished to sue for their money only, and had no desire to evade payment of proper stamp duty, but that they were induced to sue for the dissolution of a supposed partnership and accounts by the ill-advice of their Vakils. I therefore decide to allow the plaint to be amended in the manner proposed more especially as limitation is likely to come in the plaintiffs' way if they now bring a fresh suit on the cause of action stated by them in the plaint."

The appeal was then heard on its merits: and the decree passed by the lower Court was revised and the plaintiff's claim as amended was allowed.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

The defendants appealed to the High Court.

H. C. Coyaji (with *J. R. Gharpure*) for the appellant:—We submit the lower appellate Court ought not to have allowed the amendment, because it would deprive us of our right to plead limitation as a bar to the plaintiffs' suit as now changed. See *Weldon* v. *Neal*(1); *Mallikarjuna* v. *Pullayya*(2); *Alagappa Chetti* v. *Vellian Chetti*(3) and *Damodar Madhowji* v. *Purmanandas Jeewandas*(4).

There was no *bonâ fide* mistake in the form of the suit in which it was originally brought. But it was so brought, first to avoid payment of full Court-fees and, secondly, to avoid the bar of limitation, for the cause of action accrued on the 26th October 1897.

The objection as to the form of the suit was first taken in our written statement. Still the plaintiff elected to carry on the suit as originally framed in the first Court and it was at a very late stage in the lower appellate Court that he applied for amendment. The amendment should, therefore, have been refused; see *Narayana* v. *Shankunni*(5).

Further the amendment should not have been allowed, because (1) it changes the character of the suit: see *Mallikarjuna* v. *Pullayya*(2) and *Weldon* v. *Neal*(1); and (2) it changes jurisdiction: see *Bai Shri Majirajba* v. *Maganlal Bhaishankar*(6); *Hari Sadashiv* v. *Shaik Ajmudin*(7); at any event, we should have been allowed to adduce fresh evidence: see *Hari Sadashiv* v. *Shaik Ajmudin*(7).

Setalvad (with *G. K. Dandekar*) for the respondents:—It is discretionary with the Court to allow an amendment of the plaint: that discretion is limited by the rule that the amendment should not convert a suit of one character into a suit of another and inconsistent character: see section 53 of the Civil Procedure Code (Act XIV of 1882), and *Balkrishna* v. *Gangabai*(8).

(1) (1887) 19 Q. B. D. 394.
(2) (1892) 16 Mad. 319.
(3) (1894) 18 Mad. 33 at pp. 37, 38.
(4) (1883) 7 Bom. 155 at p. 160.
(5) (1891) 15 Mad. 255 at pp. 257, 258.
(6) (1894) 19 Bom. 303.
(7) (1886) 11 Bom. 235.
(8) (1896) P. J. 617.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

Upon facts, the amendment was properly allowed in this case. The plaint as originally framed clearly set forth the agreement and based the cause of action upon it. The purpose of the suit was the enforcement of the terms of the agreement. And this purpose has been quite kept in view by the amendment which involves no change of venue.

BATCHELOR, J.:—On 28th March 1905 the suit out of which this appeal arises was instituted, the plaintiffs claiming an order for the dissolution of an alleged partnership and accounts. It was stated in the plaint that, in pursuance of the partnership agreement, the plaintiffs had brought in Rs. 4,001, as capital which was repayable, as to Rs. 3,001, on 1st November 1902, and as to the remaining Rs. 1,000, on 8th November 1904.

The substantial defences were that the alleged partnership was never agreed to or undertaken, and that the plaintiffs never contributed Rs. 4,001 or any other sum as capital.

The Court of first instance raised several issues, and dismissed the suit on the grounds that no partnership was created and that the suit as framed would not lie. The learned Subordinate Judge found as a fact that the plaintiffs did deliver to the defendants Rs. 4,001 worth of cloth; "but," he says, "that is no reason why plaintiff should get relief in this suit. He made an experiment about his being a partner probably to avoid the payment of larger Court-fees, as is suggested by the defendant in his written statement; he has failed to prove his case as brought, and did not ask to amend it, and I have no alternative but to dismiss it with all costs." From this determination the plaintiffs appealed, grounding their appeal on the contention that the partnership had been created and that the suit was in order. But this contention was abandoned when the appeal came on for hearing, and the plaintiffs, then represented by a new pleader, admitted that the facts stated in their plaint did not constitute a partnership, and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. The learned Subordinate Judge of the lower appellate Court, being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their pleader, allowed the amend-

ment to be made and ultimately decreed the plaintiffs' claim for the Rs. 4,001 and a portion of the interest. His judgment allowing the amendment is dated 7th October 1907 and at this date the claim for the Rs. 4,001, or at least for the greater part of it, was barred by the law of limitation.

From this decision the defendants have preferred the present appeal, and the only question involved is whether the lower Court's order allowing the amendment of the plaint should be disturbed. For the appellants it is urged that the amendment should have been refused because the effect of allowing it was to deprive the defendants of their defence of limitation, the debt, as I have said, being barred at the date of the amendment. But in order to pronounce upon the validity of this contention, it is, I think, necessary to examine a little more closely the particular facts of this case in the light of the accepted principles which govern the admissibility of amendments.

As to the principles I think there is no room for doubt: they are contained in O. VI, *r.* 17 of the Code, which is substantially identical with O. XXVIII, *r.* 1 of the English Rules of the Supreme Court. From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, 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. Upon the record before us there can be no doubt that this second condition is satisfied here, nor was this point challenged for the appellants. It remains to consider whether the allowance of the amendment worked injustice to the defendants. Upon this question *Weldon* v. *Neal*[1] was cited for the appellants. Reference may also be made to *Tildesley* v. *Harper*[2]; *Clarapede & Co.* v. *Commercial Union Association*[3], and *Steward* v. *North Metropolitan Tramways Co.*[4]; but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendments should be refused

(1) (1887) 19 Q. B. D. 394.
(2) (1878) 10 Ch. D. 393 at p. 396.
(3) (1883) 32 W. R. 263.
(4) (1885) 16 Q. B. D. 178: C. A. p. 556.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not? And this becomes clearer if the cases are examined. For the reason already given I shall notice only two. In *Weldon* v. *Neal*[1] the original action was simply for slander, and the plaintiff was non-suited. Later she sought to amend her claim by setting up, in addition to the claim for slander, fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by limitation though not barred at the date of the writ. Here, then, the amendment sought to set up fresh claims, claims which had never been heard of until they had become barred; yet even in so strong a case as this Lord Esher M. R. in refusing leave to amend, intimated that the decision might have been the other way if there had existed special circumstances to justify it. *Steward* v. *North Metropolitan Tramways Co.*[2] seems to me to proceed on the same principle: there the defendants sought to amend their written statement, as we should call it in India, by pleading that the liability for the plaintiff's injuries rested, not with them, but with a third party, the vestry, against whom the plaintiff's right of action was by that time barred. Leave was refused because the application was too late: no such plea had even been brought to the plaintiff's notice until his action against the vestry was barred, and Lord Esher observes that "If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants, and then have given

(1) (1887) 19 Q. B. D. 394. (2) (1885) 16 Q. B. D. 178: C. A. p. 556.

notice of action and brought an action against the vestry." Lindley, L. J., uses language to the same effect. The principle is the same as in *Weldon's* case; leave is refused because the plea sought to be added is not heard of until rights have accrued under the law of limitation.

If this is a right view of the cases, they have, in my opinion, no bearing on the present facts; or, rather, they bear against the appeal. In order that these decisions should serve the appellants' turn it would be requisite that the allowance of the amendment should prejudice them by barring the defence of limitation otherwise fairly open to them; but how can that be said of a claim which, before the bar of limitation had arisen, had been regularly pleaded to by them, had been formally put in issue, and had been decided against them after consideration of all the evidence which they had offered in defence? If at the time of the amendment the appellants had any show of argument based on the law of limitation, that seems to me to have been occasioned less by the incompleteness of the plaint than by the excessive technicality of the trying Court. In other words the defence of limitation was a defence to which the appellants were never fairly entitled, and the allowance of the amendment only withdraws from them an advantage which they ought never to have received.

If that is so, the cases quoted do not assist the appellants in the particular facts of this appeal, but rather tend the other way. Falling back, then, upon the words of the Rule, I cannot follow the argument that there would be any injustice to the appellants in allowing the amendment, for the only effect of it is to enforce their liability for a debt which was claimed, disputed, and found to be due long before the defence of limitation was available. It is true that, though the Subordinate Judge found the sum to be due, he refused to decree it, because, in his opinion, the suit was wrongly framed and the plaintiffs had not then asked to amend; but I cannot regard this circumstance as of sufficient weight to displace the other considerations to which I have referred. In my opinion the Subordinate Judge would have exercised a sounder discretion if he had awarded the sum found due, notwithstanding the inexpertness of the pleadings,

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

and sufficient warranty for that procedure might have been found in the principal plaintiff's own statement, which, as cited by the Subordinate Judge himself, was as follows: "I had nothing whatever to do with the dealings of the shop. All I was to have was Rs. 351 yearly in lieu of goodwill and interest on my Rs. 4,001. . . . If my Rs. 4,001 are returned, and if I am paid Rs. 351 as agreed, I have no dispute." It is difficult to imagine how the plaintiff could have more clearly professed that, whatever may have been the attitude of his obstinately unskilful pleader, he for his part had no concern with the alleged partnership, but was suing simply to recover his debt. I think, therefore, that the Subordinate Judge would have been well advised if he had paid more attention to the substance of the suit before him, and taken command of it himself rather than handed over the conduct of the suit to a manifestly inexpert pleader; had he taken this view of his duty as presiding Judge, the slight technical difficulty which stood in his way would have been easily removed. Be that as it may, it was open to the lower appellate Court to allow the amendment; and that has been done in England whether leave to amend was asked for in the Court below or not, and even where the Court below offered leave to amend, and the offer was declined: See *Ecklin* v. *Little* [1]. In this context it is important to observe that the lower appellate Court which is the ultimate Court of fact, did not adopt the Subordinate Judge's view as to the plaintiffs' desire to sue cheaply at whatever risk; on the contrary it found "it clear that the plaintiffs wished to sue for their money only, and had no desire to evade payment of proper stamp duty, but they were induced to sue for the dissolution of a supposed partnership and accounts by the ill-advice of their Vakils." I do not use this finding as essential to my decision, though it is at least arguable that facts of this sort would suffice to constitute the "peculiar circumstances" which Lord Esher excepted in his judgment in *Weldon* v. *Neal* [2]; for, in my opinion, the Court below in allowing the amendment was perfectly right in the strictest view of the principles and practice of the Courts. In

(1) (1890) 6 T. L. R. 366.

(2) (1887) 19 Q. B. D. 394.

my opinion not only was there no injustice to the defendants in allowing the amendment, but there would have been injustice to the plaintiffs in refusing it.

I must add that the case appears to me to afford an instance of that undue technicality, that excessive attention to form and deficient attention to "the real questions in controversy between the parties," which occasionally besets our Subordinate Courts, and hampers the success of their work in a country where competent legal advice is not always readily obtainable. I do not for a moment suggest that forms should be disregarded, and I admit that no hard and fast line can be drawn for all cases, but it does seem to me that the importance of forms is sometimes set in very incorrect perspective so that on occasions the trial of a suit is apt to wear too much the appearance of a game of skill in points of procedure and too little the appearance of a resolute attempt by the presiding Judge to come at justice on "the real questions in controversy between the parties." There must of course be no over-reaching or surprise of one party by the other and it is very important that parties should be kept to their pleadings, and not allowed to alter their case according to their shifting interest in Courts of appeal; but this is pre-eminently a reason why the trying Court should spare no pains to ascertain precisely the real character of the dispute and of the case made by each party. Nothing, I think, is more calculated to imperil the justice of a case than negligence or carelessness in these essential preliminaries, as nothing conduces more to a right decision than to have these points firmly determined at the outset.

Subject to these and similar considerations, the mofussil Courts would, I think, do well to bear in mind that the rules of procedure have no other aim than to facilitate the task of doing justice. On this subject the following words of Lord Penzance in *Kendall* v. *Hamilton* [1], should have perennial interest for Subordinate Judges trying original suits: "Procedure," said his Lordship, "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of

(1) (1879) 4 App. Cas. 504 at p. 525.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve." Directions not less emphatic and of even closer application to the subject under notice were conveyed by the Judicial Committee in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1), where their Lordships lay down "that it is of the utmost importance to the right administration of justice in these Courts," that is, the Courts in India, "that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute." It seems to me that in this case, as occasionally in other cases, these imperative directions have been somewhat lost sight of; and I have thought it well again to call attention to their importance.

I am of opinion that this appeal fails and should be dismissed with costs.

BEAMAN, J.—I will state shortly what I conceive to be the true principle which has governed English Judges in exercising the discretion reposed in them by the Orders and Rules of the Supreme Court corresponding with our O. VI, *r.* 17.

The question was recently fully and ably argued before me on the Original Side of this Court, and examined and answered, to the best of my ability in an exhaustive critical judgment. See *Nandlal Thakersey* v. *The Bank of Bombay*(2).

After carefully reconsidering the whole question for the purposes of this case I have found no sufficient reason for departing from or modifying any part of the conclusions I then reached.

(1) (1856) 6 Moo. I. A. 393 at pp. 410-411. (2) (1909) 11 Bom. L. R. 926.

A careful analysis of the leading English cases seem to me to yield this result. Amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs. That is a rule of practice, or as one of the great English Judges prefers to call it, a rule of conduct, not of positive law. And while usually adhering to it, the English Courts have been careful to distinguish its essential character, from a rule of positive law, which must be obeyed in all cases. Thus it has been observed that notwithstanding the salutariness and general correctness of the rule, it is always open to exception where the circumstances of a particular case are very peculiar.

In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed. I prefer to state the principle, and the tests by which its application can be ascertained, in the simplest and widest terms. Because the dicta of the most eminent judges in some of the leading cases appear to me to refer to the particular facts, and when wrested from their appropriate context, and sought to be used as universal propositions, rather to obscure the true principle. Thus I question whether the introduction of such a factor as the claim being a fresh claim can logically be made to express the principle in its completeness, as applicable to all cases. Great prominence was given to this factor, in *Weldon* v. *Neal* [1], as was natural in the facts of that case. But I cannot escape the feeling that in a sense, every amendment which Courts are asked to allow, must

(1) (1887) 19 Q. B. D. 94.

1909.

KISANDAS RUPCHAND v. RACHAPPA VITHOBA.

introduce a "fresh," that is to say a changed, or different, if not an additional claim or defence. Put at the lowest, every such amendment seems to me to bring forward an old claim in a new form. If this were not so, it would not be necessary to amend at all. If then the "freshness" of the claim introduced by the amendment is to be sought as a determinant of the Courts' discretion, in granting or refusing it, and not the disadvantage or injury it inflicts on the other party, I should feel a real difficulty in reconciling the practice with the principle. For the practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs. The words of O. VI, *r.* 17 are very wide. They authorize Courts to allow amendments whenever, in the opinion of the Judges, it is just that this should be done. So that we are thrown back on some consistent criterion of justice, in the average circumstances of such applications. And in order to systematize the practice and not allow too much latitude to individual Judges' notions of justice, the English Rule appears to me to have been founded on the broad principle, tested by the two simple uniform tests, I have stated.

If I am so far correct, it would follow that *primâ facie* this case is within the rule. But I agree with my learned brother that its circumstances are so peculiar that it may properly be excepted. I therefore concur in the decree which he has proposed.

Appeal dismissed.

R. R.