

**Civil Revision****Present : The Hon'ble Mr. Justice Prasenjit Mandal****Judgement On: October 5, 2010****C.O. No. 188 of 2009****Chittaranjan Jana.****Versus****Pankaj Nayek & Ors.****Point:**

AMENDMENT OF PLAINT By the amendment, the plaintiff wanted to take away the admission that the principal defendants were the owners of the suit property- The plaintiff wanted to incorporate different new, inconsistent and destructive pleas- Whether it will substitute one distinct cause of action for another and will cause change of the character of the suit-Code of Civil Procedure,1908, O 6 R 17

**Facts:**

A Memorandum of Understanding dated October 7, 1999 for development of the suit property, as described in the schedule of the plaint, was executed between the plaintiff/Petitioner and the principal defendants/opposite party nos.1 & 2 herein. Thereafter, on November 7, 1994 an irrevocable power of attorney was executed between the plaintiff/petitioner and the opposite party nos.1 & 2 for the purpose of construction of the building, inducting tenants therein and also for construction of commercial cum shopping complex, utilizing vacant land, etc. It was registered. The opposite party nos.1 & 2 took money from the petitioners for that purpose. When the construction was almost finished and the shops were going to be transferred in favour of the intending purchasers after execution of the deeds, all of a sudden, the opposite party nos. 1 & 2 had

sent a letter to the petitioners revoking the power of attorney. The plaintiff replied to that letter. The opposite party nos.1 & 2 asked the petitioner for accounts of the expenditure. Thereafter, the plaintiff filed the suit for the reliefs stated above. In that suit, the defendants appeared. Subsequently, the plaintiff filed an application for amendment of the plaint for inclusion of certain paragraphs in the plaint including the prayer for amendment of the prayer portion of the plaint. That application for amendment was rejected by the impugned order. Being aggrieved, this application has been preferred by the petitioner.

**Held:**

By the proposed amendment, the plaintiff has wanted to take away the admission that the principal defendants were the owners of the suit property. Therefore, the plaintiff has wanted to incorporate destructive pleas in the plaint by way of amendment. This is also clearly barred in view of the decision of 2002 AI HC 3766. **Para-15**

When the plaintiff has wanted to introduce a totally different new and inconsistent pleadings, if the proposed amendment is allowed, it will substitute one distinct cause of action for another and it will certainly cause change of the character of the suit. **Para-16**

**Cases Cited:**

**Sampath Kumar Vs. Ayyakannu -----AIR 2002 SC 3369**

**Om Prakash Gupta Vs. Ranbir B. Goyal -----AIR 2002 SC 665, Sk. Abul Kalam Vs. Umapada Maity -----2007 (4) CHN 962**

**Hiralal Vs. Kalyan Mal -----AIR 1998 SC 618**

**Vipin Bhimani & Anr. Vs. Sunanda Das & Anr. -----2006 (2) CHN 396**

**For the petitioner: Mr. Arabinda Chatterjee,  
Ms. Kakali Dutta.**

**For the opposite parties: Mr. Gopal Ghosh,  
Mr. Om Narayan Rai.**

**The Court:** This application is at the instance of the plaintiff and is directed against the order no.55 dated December 19, 2008 passed by the learned Civil Judge (Senior Division), First Court, Contai in Title Suit No.202 of 1999 thereby rejecting an application under Order 6 Rule 17 of the C.P.C. for amendment of the plaint.

2. The plaintiff filed the said title suit praying for declaration of the following reliefs:

- a. *for declaration that the plaintiff has lien over the property described in the schedule below until and unless the accounts are complete;*
- b. *for a decree directing the principal defendants to execute and register appropriate deed of transfer in respect of the suit properties in favour of the plaintiff by accepting the balance contract money of Rs.8,50,640/-, in default the plaintiff may be permitted to get it done through the process of court;*
- c. *for possession of the suit property;*
- d. *for attachment before judgment;*
- e. *for permanent injunction restraining the principal defendants so that they may not make any transfer in respect of any portion of the suit*

*property and may not take any money from any person in connection thereof;*

- f. for temporary injunction in terms of prayer (e);*
- g. for a decree of accounts and appointment of Accounts commissioner ;*
- h. for interest on the decretal amount from 7.11.94 till realization at commercial rate;*
- i. for costs; and for other legal and equitable reliefs.”*

3. According to the plaint case, a Memorandum of Understanding dated October 7, 1999 for development of the suit property, as described in the schedule of the plaint, was executed between the plaintiff and the principal defendants/opposite party nos.1 & 2 herein. Thereafter, on November 7, 1994 an irrevocable power of attorney was executed between the plaintiff/petitioner and the opposite party nos.1 & 2 for the purpose of construction of the building, inducting tenants therein and also for construction of commercial cum shopping complex, utilizing vacant land, etc. It was registered. The opposite party nos.1 & 2 took money from the petitioners for that purpose. When the construction was almost finished and the shops were going to be transferred in favour of the intending purchasers after execution of the deeds, all of a sudden, the opposite party nos. 1 & 2 had sent a letter to the petitioners revoking the power of attorney. The plaintiff replied to that letter. The opposite party nos.1 & 2 asked the petitioner for accounts of the expenditure. Thereafter, the plaintiff filed the suit for the reliefs stated above.

4. In that suit, the defendants appeared. They are contesting the suit by filing a written statement. Subsequently, the plaintiff filed an application for amendment of the plaint for inclusion of certain paragraphs in the plaint including the prayer for amendment of the prayer portion of the plaint.

That application for amendment was rejected by the impugned order. Being aggrieved, this application has been preferred by the plaintiff.

5. Mr. Chatterjee, learned Advocate appearing on behalf of the petitioner, submits that the developer filed the suit for specific performance of contract. Amendment of the plaint can well be allowed at any stage, even in the second appeal. The petitioner sought for amendment of the plaint to include certain facts for determination of the real controversy of the suit; otherwise the evidence on such matters could not be given. In support of his submission Mr. Chatterjee has referred to the decision reported in (2002) 6 SCC 665, AIR 2002 SC 3369 and 2007 (4) SCHN 962. Thus, Mr. Chatterjee has contended that in view of such decisions, the learned Trial Judge should have allowed the application for amendment of the plaint. So, impugned order should be set aside and the prayer for amendment of the plaint should be granted.

6. On the other hand, Mr. Ghosh, learned Advocate appearing on behalf of the opposite party nos.1 & 2, submits that the suit is not maintainable. By the proposed amendment, the plaintiff has wanted to withdraw the admission made in the plaint. It is not at all a subsequent event and so the learned Trial Judge was justified in rejecting the prayer for amendment of the plaint. Thus, he supports the judgment. Mr. Ghosh has also referred to the decision reported in 2006 (2) CHN page 396 in support of his contention.

7. Thus, the point that emerges for decision in this application is whether the impugned order should be sustained.

8. Upon hearing the learned Advocate for the parties and on perusal of the materials on record, I find that the plaintiff is the developer in respect of the suit property, as described in the schedule of the plaint. A Memorandum of Understanding dated October 7, 1994 was executed between the plaintiff and the principal defendants. Such Memorandum of Understanding is nothing but an agreement for specific performance of contract. On perusal of the plaint, specifically the relief sought for in the plaint, it would reveal that the plaintiff has virtually admitted the right, title and interest of the principal opposite parties in the suit property and on that basis he proceeded for development works on the suit property of the opposite party nos.1 & 2 on October 7, 1994 and when the plaintiff tendered that power of attorney to the concerned registrar for registration, it was registered; but the collector assessed the valuation of the suit property as if the power of attorney was a sale deed. In the meantime, the petitioner took the development works on the suit property as per specific performance of contract and certain payment was made to the opposite party nos.1 & 2. The plaintiff originally prayed for declaration that he has lien over the suit property. He also prayed for a decree directing the principal defendants to execute and register appropriate deed of transfer in respect of the suit property in favour of the plaintiff by accepting the balance contract money of Rs.8,50,640/-. Therefore, from the body of the plaint as well as the prayer portion as indicated above, it is clear that the developer has admitted that the principal defendants had right, title and interest over the suit property. The principal defendants executed an irrevocable power of attorney in favour of the plaintiff on November 7, 1994. The plaintiff got possession of the suit property for the purpose of development works. But, when the plaintiff experienced various problems for carrying out the development works, dispute between the parties cropped up and the principal defendants revoked the power of attorney on January 28, 1998.

9. By the proposed amendment, the plaintiff has wanted to incorporate that on the basis of execution of the irrevocable power of attorney by the principal defendants in favour of the plaintiff, the latter has acquired right, title and interest over the suit property and so they have prayed for a decree of declaration of the plaintiff's right, title and interest and possession over the suit property, permanent injunction for restraining the principal defendants from creating any disturbance for peaceful possession of the plaintiff over the suit property. In the alternative for a decree of compensation / damages, etc.

10. Thus, by the proposed amendment, I find that the plaintiff has wanted to incorporate the clauses as if he has become the owner of the suit property by dint of the irrevocable power of attorney executed by the defendants in his favour. I have stated earlier that as per prayer of the plaint, the plaintiff admitted the right, title and interest of the defendant with regard to the suit property. But, by the proposed amendment, he has wanted to incorporate certain paragraphs including the prayer of the plaint as if he is the owner of the suit property. Therefore, I find that such subsequent prayer for amendment of the plaint is nothing but mutually destructive to his earlier contention made in the original plaint. This is totally contradictory and this amounts to nothing but denial of the admission made by the plaintiff earlier in his plaint.

11. So far as the decision of Sampath Kumar Vs. Ayyakannu reported in AIR 2002 SC 3369 filed by Mr. Chatterjee, I find that in that case the prayer for amendment was allowed as subsequent event. Previously, the suit was for permanent injunction. Subsequently, when the plaintiff was dispossessed, amendment was sought for declaring title and recovery of possession. So, that application for amendment of plaint was allowed. In the instant case, the proposed amendment

cannot be said to be on subsequent event after filing of the suit. Therefore, I hold that this decision is not applicable in the instant case.

12. As regards the decision of Om Prakash Gupta Vs. Ranbir B. Goyal reported in AIR 2002 SC 665, the amendment of the plaint was allowed for taking note of the subsequent events. The Hon'ble Apex Court has held that the Court can take judicial notice of subsequent events. The parties should be allowed to modify or mould the course of litigation or relief so as to bring it in conformity with the law. The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found; without the amendment of the pleadings, the court would not be entitled to modify or alter the relief. So, the amendment was allowed. But with due respect to Mr. Chatterjee, I am of the view that the facts as stated in the instant case cannot be considered as of subsequent event.

13. As regards the decision of Sk. Abul Kalam Vs. Umapada Maity reported in 2007 (4) CHN 962, I find that the suit was filed for declaration and injunction. After conclusion of evidence, when the suit was fixed for hearing argument, the plaintiff filed an application for amendment of the plaint for incorporating further reliefs by way of recovery of possession and for declaration that the main deeds of conveyance are not binding upon the wakf estate with a further declaration that the 'A' schedule property belongs to wakf estate being wakf of Liluah. So, the amendment was allowed. The Hon'ble Justice Jyotirmoy Bhattacharyya has observed by quoting the decision of Hiralal Vs. Kalyan Mal reported in AIR 1998 SC 618 that admission made by either party in their pleadings cannot be allowed to be withdrawn by way of amendment but an explanation or clarification of the same is not impermissible. But, in the proposed amendment, the plaintiff has not wanted to



incorporate the facts of the plaint case as an explanation or clarification of the matter already stated. But he has wanted to incorporate certain facts which appear to be nothing but mutually destructive contention raised earlier in the original plaint. Therefore, the decision of Sk. Abul Kalam (supra) is not applicable in the instant case.

14. On the other hand, Mr. Ghosh has referred to the decision of Vipin Bhimani & Anr. Vs. Sunanda Das & Anr. reported in 2006 (2) CHN 396 whereby it has been observed by an Hon'ble Division Bench of this Court that when an irrevocable power of attorney is given to a developer for giving effect to the development of an agreement and for no other reason and such power of attorney is revoked, the suit for specific performance of agreement at the instance of the developer is barred. However, if the developer had expended money, he is entitled to damages if the power of attorney is revoked without just reason. The Division Bench has also observed that the concept of irrevocable power of attorney is unknown to jurisprudence unless the power is coupled with interest. In the instant case, since an agreement for specific performance of contract in the name of Memorandum of Understanding was executed and the plaintiff proceeded on the basis of such an agreement for sale, I am of the view that the decision of Vipin Bhimani & Anr. (supra) would be applicable here and for that reason when the principal defendants had cancelled the power of attorney, the plaintiff is entitled to get relief for damages/compensation he had suffered for cancellation of the power of attorney.

15. By the proposed amendment, the plaintiff has wanted to take away the admission that the principal defendants were the owners of the suit property. Therefore, the plaintiff has wanted to

incorporate destructive pleas in the plaint by way of amendment. This is also clearly barred in view of the decision of 2002 AI HC 3766.

16. When the plaintiff has wanted to introduce a totally different new and inconsistent pleadings, if the proposed amendment is allowed, it will substitute one distinct cause of action for another and it will certainly cause change of the character of the suit.

17. Since the plaintiff has wanted to incorporate paragraphs the effect of which is the change of the nature and character of the rights claims by the plaintiff, the proposed amendment, if allowed, would cause the change of the nature and character of the suit.

18. In that view of the matter, I am of the view that the learned Trial Judge was justified in rejecting the application for amendment of the plaint. Therefore, this application has no substance at all. There is nothing to interfere with the impugned order. Accordingly, this application is dismissed.

19. The above observations are made for the disposal of this application and the learned Trial Judge shall not be swayed away by such observations. He shall dispose of the suit on the basis of evidence as available.

20. Considering the circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

**(Prasenjit Mandal, J.)**