

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**CM (M) No. 111/2022
CM No. 3501/2022**

Reserved On: 15th of December, 2023
Pronounced On: 29th of December, 2023.

Haja @ Hajira Bano, Age: 47 Years

D/O Abdul Ahad Ahangar
R/O Nowgam, Chanapora,
Srinagar.

... Petitioner

Through: -

Mr H. Suhail Ishtiaq, Advocate.

V/S

1. Gh. Mohammad Ahangar

S/O Abdul Ahad Ahangar
R/O Nowgam, Tehsil Chanapora, Srinagar

(Dead) Through his LRs:

All Residents of Nowgam, Srinagar.

- I. Yasmeena W/O Late Gh. Mohammad Ahangar
- II. Adil Ahmad Ahangar S/O Gh. Mohammad Ahangar
- III. Nusrat D/O Gh. Mohammad Ahangar
- IV. Ulfat D/O Gh. Mohammad Ahangar

2. Tariq Ahmad Sheikh S/O Haji Ab. Aziz Sheikh

R/O Nowgam, Tehsil Chanapora, Srinagar

... Contesting Respondents

3. Rehti W/O Habibullah Bhat R/O Nowgam, Srinagar
4. Raja W/O Mohammad Akbar Tantray R/o Medur, Tral
5. Mahtab W/O Bashir Ahmad Ahangar R/O Hyderpora, Srinagar
6. Wazira W/O Mushtaq Ahmad Najar R/O Nagam, Chadoora
7. Bashir Ahmad Ahangar
8. Mohammad Shafi
9. Abdul Majeed
10. Aijaz Ahmad
- 7 to 10 Sons of Abdul Gafar Ahangar
Residents of Khanda, Chadoora.

11. Naseema W/O Gh. Mohammad Najar R/O Pulwama.

... Proforma Respondents

Through: -

Mr Aqib Khan, Advocate.

CORAM:**HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE****(JUDGMENT)**

01. Through the medium of this Petition, initially registered as OWP No. 1293/2018 and later treated as Petition under Article 227 of the Constitution of India and, accordingly, re-diarized as CM (M) No. 111/2022 vide Order dated 6th of May, 2022, the Petitioner has challenged the Order dated 4th of June, 2018 passed by the Court of learned Sub Judge, Chadoora, whereby in a Suit titled '**Haja Alias Hajira Bano v. Gh. Mohammad Ahangar & Ors.**', an application moved in terms of Order VI Rule 17 of the Code of Civil Procedure read with Order I Rule 10 (4) of the Code of Civil Procedure (CPC) for grant of leave to amend the Suit was rejected, holding that the Plaintiff through the medium of that application wanted to make such changes which shall change the nature of the Suit and also that the reason seeking amendment was within the knowledge of the Plaintiff at the time of the filing of the Suit, as such, the application is barred in terms of Order II Rule 2 of the Code of Civil Procedure (CPC).

02. The Petitioner had filed a Civil Suit for declaration, partition, separate possession and injunction before the Court below, asserting therein that the father of the Plaintiff and Defendant Nos. 1 to 4, namely, Abdul Ahad Ahangar died in the year 2010, leaving behind the parties to the Suit as his legal heirs, as such, the estate left behind by him vested and devolved upon the parties to the Suit in terms of the Shariat Act; that the father of the Plaintiff and Defendant Nos. 1 to 4 and grandfather of Defendant Nos. 5 to 10 was the owner, possessor and title holder of land measuring 07 Kanals and 05 Marlas comprising of Survey Nos. 389, 390 and 421 of village Gund, Checkpora, Tehsil Baghat-i-Kanipora, District Budgam and land measuring 03 Kanals and 08 Marlas comprising of Survey Nos. 1092, 1180 and 1003, along with residential house thereon situate at village Nowgam, Tehsil Chanapora, District Srinagar; that the parties to the Suit were claimed to be the only legal heirs left by the deceased estate holder, Abdul Ahad Ahanger and that after his death, the parties to the Suit became co-

sharers, co-owners and co-possessors of the Suit property and are entitled to get their respective shares in terms of law of succession, as envisaged under the Shariat Act, the parties being Muslim by faith and religion and being governed by the Shariat Act in the matter of inheritance, etc.; that the estate mentioned above, situated at Nowgam, was still in the name of the deceased Ahad Ahangar, however, it was alleged that the Defendant No.1, by greasing the palms of the revenue officials, had got the Mutation attested in his name with respect to property situated at Village Gund, Checkpora illegally, in violation of the provisions of Shariat Act and of other rules and norms, standing orders devised for attestation of mutation at the back of the Plaintiff and proforma Defendants, to the exclusion of the rest of the legal heirs of the deceased Abdul Ahad Ahangar, i.e., the Plaintiff and proforma Defendants and that mutation had already been assailed before the competent forum, whose operation was ordered to be kept in abeyance; that the property is joint un-partitioned and undivided amongst the Plaintiff and the Defendants and, despite several requests by the Plaintiff and the Defendants to partition the Suit property, the contesting Defendant, who is on spot holding possession of over 90% of the Suit property, delayed the same on one pretext or the other and, lastly, refused to partition the Suit property, making it public that the Plaintiff had no right, interest or claim over the Suit property and that he would not give even an inch of that to the Plaintiff, whereas the Plaintiff, being the joint owner, co-sharer and possessor of the Suit property, has every right to seek partition of the Suit property by metes and bounds and to get separate possession of her due share after partition and that none of the Defendants can sell or alienate the Suit land even after partition to any stranger without prior notice to the Plaintiff, as she has right of prior purchase.

03. The Suit was entertained by the Court below, and pursuant to notice, the Defendant No.1 filed Written Statement on 14th of September, 2015. The Defendant No.1, who is the contesting Defendant, controverted the assertions made by the Plaintiff in her Suit, asserting therein that the estate left behind by the father of the Plaintiff and the Defendant Nos. 1 to 4

be devolved unto his lone son, namely, Ghulam Mohammad Ahangar, in terms of the customary law; that the Plaintiff had taken her share out of the share of her father and Defendant Nos. 1 to 4, which has also been mutated in her favour and which is already in her possession and that she has been enjoying the same without any interference from the Defendants; it was admitted that the father of the Plaintiff and Defendant Nos. 1 to 4 was owner in possession of Suit property and that the Defendant No.1 had already sold the land measuring 03 Kanals and 13 Marlas viz. 01 Kanal and 16 Marlas of Survey No. 421, 01 Kanal and 17 Marlas of Survey No. 390 Min situated at village Gund Checkpora, Tehsil Baghati Kanipora to one Tariq Ahmad Sheikh S/O Haji Abdul Aziz Sheikh R/O Nowgam and that land measuring 01 Kanal and 12 Marlas under Survey No. 1180 and land measuring 01 Kanal under Survey No. 1003, along with residential house, are in exclusive possession of Defendant No.1, recorded as 'Aabadi Deh' kind of land in the revenue extracts and, therefore, cannot be subjected to partition; it was further asserted that the Plaintiff and Defendant Nos. 1 to 4, who happen to be daughter and sons of Late Ahad Ahanger, had given due share of the Defendant Nos. 2 to 4 and Plaintiff to them before his death and Plaintiff is enjoying the ownership and possession of the same without any interference; that there is nothing unpartitioned between the parties to the Suit out of the estate left behind by the deceased father of the Plaintiff and Defendant Nos. 1 to 4; that the Plaintiff does not have any right or interest over the Suit property and was not entitled to get anything out of the estate left behind by the father of the Plaintiff and Defendant Nos. 1 to 4, as same stands mutated in favour of Defendant No.1 to the exclusion of the Plaintiff and Defendant Nos. 2 to 4.

04. The Plaintiff, after filing of the Written Statement by Defendant No.1, moved an application for impleading the said Tariq Ahmad Sheikh as a party Defendant in the Suit, which was allowed by the learned trial Court vide Order dated 25th of March, 2017. Thereafter, on 6th of July, 2017, the Plaintiff moved an application in terms of Order VI Rule 17 of the Code of Civil Procedure read with Order I Rule 10 (4) of the Code

of Civil Procedure for grant of leave to amend the Suit, asserting therein that since the newly impleaded Defendant-Tariq Ahmad Sheikh had executed a sale deed with the Defendant No.1 regarding some portion of the land out of the Suit property against the provisions of law and against the interests of the Plaintiff, which necessitates the amendment in the Plaint, as the Plaintiff was aggrieved of the said sale deed, as such, it was prayed, through the medium of making necessary changes by adding Para 7 (A) in the Plaint and, accordingly, affect the change in the relief clause of the Suit.

05. It was also pleaded that the Plaintiff, while filing the instant Suit, had inadvertently incorporated 19 Marlas of land out of Survey No. 389 as Suit land at Para 3 of the Plaint, when the same is in possession and ownership of one Ab. Gaffar, as such, the applicant abandoned her claim *vis-à-vis* the aforesaid 19 Marlas of land; that the land out of Survey No. 421 had also been shown inadvertently 01 Kanal and 14 Marlas as against 01 Kanal and 16 Marlas and in Para 3 of the Plaint, it had been inadvertently recorded *Purni* type (*Aabadi Deh*) land 01 Kanal in Survey No. 1003, along with residential house thereto, which in fact is *Purni* type (*Aabadi Deh*) 01 Kanal in Survey No. 1003, as the residential house thereto was demolished by the Defendant No.1 and used for construction of his new residential house and in this background, the applicant, through the medium of amendment, intended to make necessary changes in Para 3 of the Plaint and, accordingly, in the relief clause as well.

06. It was pleaded that the proposed amendment was required for avoidance of multiplicity of litigation between the parties, as such, it was prayed to allow the Plaintiff to amend the Plaint.

07. This application was resisted by the Defendants/ Non-Applicants 1, 2 and 4 on the grounds that the application filed by the Applicant was hit by the law of limitation; that the Plaintiff was having knowledge of the same before the institution of the Suit and that she had the knowledge of execution of the sale deed of some portion of the land by Defendant No.1, as with regard to the same she had filed a criminal

complaint before the Court at Chadoora, which was dismissed with costs. It was also opposed for the reason that by granting leave to file amended Plaint, the trial of the case will be relegated to August, 2015 and the distance it had crossed in more than 30 hearings will go back to infinity at the inconvenience of the Defendants/ Non-Applicants; that the proposed amendment with regard to sale of the land to Tariq Ahmad Sheikh was based on a new cause of action which had accrued to the Plaintiff subsequent to the filing of the Written Statement by the Defendant No.1, as such, the application merits dismissal, as the new cause of action cannot be pleaded in an earlier Suit and the amendment sought was not permissible in the eyes of law, being based on new cause of action, absolutely independent and separate of earlier cause of action. The Defendants/ Non-Applicant Nos. 3, 5 to 10, however, submitted that they have no objection in case the application for grant of leave to amend the Suit is allowed.

08. Learned Counsel for the Petitioner argued that the Petitioner had filed the Suit in August, 2015, whereas the Written Statement was filed by the contesting Respondent in September, 2015 and that, on a challenge to the mutation, the Deputy Commissioner, Budgam vide Order dated 11th of September, 2015 had set aside the order of mutation and thereafter application for impleadment was made on 5th of October, 2015, which was allowed on 25th of March, 2015, thereafter, amendment application was moved on 6th of July, 2017 as per the mandate of Order VI Rule 17 of the Code of Civil Procedure, which provides that for determination of real questions, the pleadings are to be made before the Court. He has further argued that when the application for amendment was filed, at that stage, only one of the Defendants had filed the Written Statement and no further proceedings had taken place. The learned Counsel has also argued that the Petitioner's basic Suit was with regard to partition of the property to which one part was sold by way of a sale deed by one of the co-sharers, as such, by seeking amendment with regard to incorporation of the sale deed and to challenge the same, the nature of the Suit cannot be said to be changed. He also argued that since there was no period of limitation provided for

amendment of the pleadings and the learned trial Court, while rejecting the application by applying the provisions of Order II Rule 2, has committed an error, inasmuch as, this provision was with regard to some subsequent Suit and not with regard to amendments in a Suit already pending. It was finally prayed that the Petition be allowed and the impugned Order be set aside, directing the trial Court to take on record the amended plaint.

09. The learned Counsel for the Respondents, on the other hand, argued that the sale deed sought to be challenged by way of amendment in the Suit was not challenged initially, though it was not a subsequent development after filing of the Suit. He further argued that the Plaintiff, without seeking amendment with regard to the sale deed, had impleaded the vendor-Tariq Ahmad Sheikh earlier and then moved an application for amendment, meaning thereby that the nature of the Suit for partition would be changed in case the amendment is allowed which was not permissible in terms of Order II Rule 2 of the Code of Civil Procedure. It is further argued that by way of seeking amendment, the Plaintiff wanted to bring a new cause of action and relief, whereby the nature of the Suit shall altogether be changed. It was, accordingly, prayed that the Petition be dismissed and the Order impugned be upheld.

10. The learned trial Court, while rejecting the application moved by the Plaintiff seeking amendment in the Plaint, observed that the Applicant was already having the knowledge of the execution of the sale deed before the institution of the Suit and that the Plaintiff had woken up from a deep slumber after two years. It was further observed that while filing the Suit, the whole of the claim, which the Plaintiff is entitled to make in respect of the cause of action, is to be made and if the Plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished as per the provisions of the Order II Rule 2 of the Code of Civil Procedure (CPC). It was further observed by the trial Court that with the proposed amendment, the Plaintiff intended to set up altogether a new case and, if she

is allowed to amend the Plaint, it will cause an irreparable prejudice to the Non-Applicants, which cannot be compensated by way of damages.

11. Heard learned Counsel for the parties, perused the record and considered the matter.

12. Order II Rule 2 of the Code of Civil Procedure, being relevant in view of the nature of dispute raised in this Petition, reads as under:

“Suit to include the whole claim: (1) Every Suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the Suit within the jurisdiction of any Court.

(2) **Relinquishment of part of claim:** Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) **Omission to sue for one of several reliefs:** A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: For the purposes of this rule, an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

13. In the present case, the principal argument of the learned Counsel appearing on behalf of the Respondent is that the amendment application has been rightly rejected by the Court below applying the principle of Order II Rule 2 of the Code of Civil Procedure. The expressions “omits to sue” and “intentionally relinquish any portion of his claim” give an indication as to the intention of the Legislature in framing the said Rule. The term “sue” can mean both the filing of the Suit and prosecuting the Suit to its culmination, depending on the context of the provision. In this case, the Legislature thought it fit to debar a Plaintiff from suing afterwards for any relief which he/ she has omitted, without the leave of the Court or from suing in respect of any portion of his claim which he intentionally relinquishes.

14. Having regard to the mandate of Order II Rule 2 of the Code of Civil Procedure which, as noticed hereinabove, provides that every Suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action, I am of the view that if the two Suits and the relief claimed therein are based on the same cause of action, then the subsequent Suit will become barred under Order II Rule 2 of the Code of Civil Procedure, however, I do not find any merit in the contention raised on behalf of the Respondent herein that the amendment application was rightly rejected by applying the bar contained under Order II Rule 2 of the Code, which cannot be applied to an amendment which is sought on an existing Suit.

15. The Hon'ble Apex Court, in a case titled '**Life Insurance Corporation of India v. Sanjeev Builders Private Limited & Anr.**', reported as **2022 AIR (SC) 4256**, has considered this aspect of the matter and has, in Paragraph No.70, laid down the following law:

“70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negated.

(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; &

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; and

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 hyper-technical 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)".

16. Given the above legal position enunciated by the Hon'ble Apex Court on the subject, the learned Trial Court, thus, seems to have misdirected itself while rejecting the application moved by the Petitioner/Plaintiff for seeking amendment of the Plaint, under the notion that no such amendment is permissible in terms of Order II Rule 2 of the Code of Civil Procedure. Where the amendment is sought before commencement of the trial, which is the position in the present case as well, 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 by amendment, as such, where the amendment does not result in any irreparable prejudice to the opposite party or divests the opposite party of an advantage which it had secured as a result of 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 issue in controversy between the parties, the amendment is to be allowed. The Petitioner, as Plaintiff before the Court below, had sought amendment with regard to mentioning of a sale deed with regard to a portion of the Suit property and, therefore, it was necessary for the Trial Court, for effective adjudication of the controversy between the parties, to allow the amendment sought by the Petitioner/ Plaintiff.

17. Having regard to the aforesaid discussion and observations made hereinabove, the impugned Order dated 4th of June, 2018 passed by the Trial Court is **set aside** and the application moved by the Petitioner/Plaintiff before the Court below for amendment of the Plaint is **allowed**. The learned Trial Court is directed to take on record the Amended Plaint for further proceedings in the case as per law.

18. Petition is, thus, **disposed** of on the above terms, along with any connected CM therewith.

CM (M) No. 111/2022
CM No. 3501/2022

19. Record of the Court below be sent down, along with a copy of this Judgment, for information and compliance.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR

December 29th, 2023

"TAHIR"

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| i. | Whether the Judgment is speaking? | Yes. |
| ii. | Whether the Judgment is reporting? | Yes. |

