

**Civil Side**  
**Summary**  
**Sub Topic - 1**

**Production of Additional Evidence in Appellate Court -**

**( Order 41 Rule 27 ) ;**

01. As a general rule, the Appellate Court should not admit additional evidence for the purpose of the disposal of an appeal, and the parties are not entitled to produce additional evidence, whether oral or documentary in the appellate court. The Code, however under this rule empowers an appellate court to take additional evidence subject to certain conditions. The power is discretionary and must be exercised on sound judicial principles and in the interest of justice. Additional evidence does not mean evidence over and above the evidence led by the party in the lower court. The basic principles for the admission of the additional evidence are;

(1) (i) The party seeking the admission of additional evidence should be able to establish that such additional evidence could not have been adduced at the first instance with the best efforts;

(ii) The party affected by the admission of additional evidence should have an opportunity to rebut it;

(iii) The additional evidence must be relevant for the determination of the issue.

02. For entertaining an application for the production of additional evidence in an appeal, any one or more of the following conditions have to be fulfilled.

(i) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(ii) The party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed; or

(iii) The appellate court required any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

**Substantial cause, what is ;**

Substantial ' cause' must be analogous to or of same category as mentioned in clause (a)(b) and (c) of O.41 Rule 27(1).

When the parties agree at the appellate stage that additional evidence should be taken that element can be taken as

constituting substantial cause for fresh evidence under O.41 Rule 27(1)(d). The fact that, if the opinion of the expert be taken and found in favour of the appellant it would dispel the disbelief of the trial court in the defence evidence cannot be regarded as 'substantial cause', nor can the non implementation of the order for expert opinion by the plaintiff in the court below be held to be substantial cause. Further, the fact that there is convincing and conclusive evidence to prove the matter in dispute may be a ground for review but certainly not for leading additional evidence under O.41 R 27 especially when the party who wants it has had ample opportunity and did not avail of the same in the belief that the evidence he proposed to lead would be sufficient.

That evidence already adduced is unsatisfactory and insufficient is also not a substantial cause. Nor the mere fact that the litigant was not aware of the documentary evidence at the time of trial is substantial cause. Negligence of pleader in not tendering evidence at proper stage is also not substantial cause.

There is no sufficient cause to admit additional evidence when a point is sufficiently covered by an issue and the parties had every opportunity of producing evidence on it.

**Recording of reason necessary;**

Where a further appeal lies from the decision of the appellate Court such recording of reasons is necessary and useful also to the Court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the Court below. The omission to record the reason must, therefore, be treated as a serious defect. It is extremely desirable that when the Court exercises its power under R.27 it should make a direct reference to the rule, giving its reasons in such a form that there is no room for doubt that the Court has realised the exceptional nature of the powers that it is exercising.

**Case Law;**

In the case of **Mahavir Singh and others -Vs- Naresh Chandra and another, reported in AIR 2001** Supreme Court ,134 the Hon'ble Supreme court held that" Section 107 CPC enables an appellate Court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order XLI ,Rule 27 C.P.C.. The Court is not, however, bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of

right, to the admission of such evidence and the matter is entirely in the discretion of the Court, which is, of course, to be exercised judiciously and sparingly. Order XLI, Rule 27, CPC envisages certain circumstances when additional evidence can be adduced.

**Partition-Sell of Joint family property by Karta for legal necessity/benefit of estate ;**

**Who is Karta ?**

The manager of the joint family is called the Karta. The senior most male member of a joint Hindu family is considered as the karta of the family provided he is otherwise fit to act as such that he is not suffering from any physical or mental deficiency. He is not an agent or trustee of the family but as the head of the family he is the custodian or guardian of the property and affairs of the family and of the interest of the family.

**Alienation** ; The Karta or manager can alienate the coparcenary property by sale or mortgage for legal necessity or benefit of the estate or otherwise. The karta is not required to obtain the consent of the other coparceners for alienation and if the alienation is for legal necessity, it will bind the other coparceners. Any alienation made subsequent to the relinquishment of the office will not bind the other

coparceners. But an alienation by the manager for no family purpose or necessity and made without the assent of the others is void and a subsequent ratification by the other members cannot validate it.

When a junior member is allowed to deal with family properties as if he was the manager, any alienation by him for family necessity is binding on all the members of the family, including the real manager. Where the joint family property is alienated by the karta but legal necessity is not proved, still the sale is binding on the undivided share of the karta. The only reasonable limitation that can be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The situation is to be assessed on the same basis of the facts of the situation. However an alienation made for a grossly inadequate amount even if for a legal necessity cannot be held to be valid. But if legal necessity is proved, mere inadequacy of consideration is no ground for setting aside the sale by the manager.

It cannot be however said to be beneficial to a Hindu joint family for the manager to purchase property for which the family is unable to pay and when the family is unable to pay, it is certainly not

for the benefit of the family that a liability should be cast upon the joint family ancestral property. Alienation by the managing member of the family cannot be said to be for legal necessity, if the legal remedy to recover the debt has become time barred.

**What is legal necessity ;**

The following have been held to be family necessities within the meaning of

- (a) payment of Government revenue and of debts which are payable out of the family property;
- (b) maintenance of coparceners and of the members of their families;
- (c) marriage expenses of male coparceners, and of the daughters of coparceners;
- (d) performance of the necessary funeral or family ceremonies;
- (e) costs of necessary litigation in recovering or preserving the estate;
- (f) costs of defending the head of the joint family, or any other member against a serious criminal charge;
- (g) payment of debts incurred for family business or other necessary purpose. In the case of a manager other than a father, it is not enough to show merely that the debt is a pre-existing debt.

**Benefit of the estate ;**

The terms necessity and benefit of the estate have been used side by side and the Courts are not agreed as to the meaning to

be given to the expression benefit to the estate. It is obvious that anything which is the necessity to the estate must be of benefit to it. But the term benefit would seem to import something positive done to enlarge or improve the estate, not merely negative act such as the discharge of debts or the averting of disaster. As to what is meant by the expression for the benefit of the estate there has been a conflict of judicial opinion. According to one view, unless the transaction is of a defensive character in the sense that it is calculated to protect the estate from threatened danger or destruction, it is not for the benefit of the estate. According to the other view, it is competent to the Karta to alienate ancestral property when the transaction is for the positive benefit of the family and is such as a prudent owner would carry out with the knowledge available to him at the time. In other words, according to the later view, the only reasonable limitation which can be placed on the Karta is that he must act with prudence and prudence implies caution.

(i) Hon'ble Apex Court in the case of "Subodhkumar V/s Bhagwant Namdeorao Mehetre" (AIR 2007 SC 1324) has observed that ;

A Karta undoubtedly has powers to alienate for value the



joint family property, either for legal necessity or for the benefit of the estate. He can do so with the consent of all coparceners. When the alienation is for legal necessity, the Karta alienate an interest which is larger than his undivided interest. When, however, such alienation is imprudent , it is not binding upon a non consenting coparcener to the extent of such coparcener's share.

### **Sub Topic-2**

**Condonation of delay under Section 5 of Limitation Act. Time specified to file suit for relief of declaration under Article 58, For possession based on previous possession under Article 64, and For possession based on title under Article 65 of Limitation Act;**

01.           The Indian Limitation Act, 1963 ( Act 36 of 1963 ) is an Act prescribing the period within which suits asking for various reliefs can be brought. Section 5 of it is an enabling provision to assist the litigants who failed to do an act within the prescribed time period as originally fixed under the various enactments. For example a litigant who failed to file an Appeal before the superior courts within the permissible time period as originally fixed then he can file it after the expiry of the prescribed time period provided he has to shown "sufficient cause" for non-filing the Appeal within the time

period. Likewise while running a case either before the subordinates courts or any superior courts; the litigants has to file necessary applications under various enactments for smooth running of the case, but such an application has not been filed in-time then he can file it latter on provided he has to show "sufficient cause" for late filing of the same.

02. In Collector, Land Acquisition Anantnag V/s Ms. Katiji and others, A.I.R. 1987 SC 1353, Hon'ble Supreme Court observed in paragraph No.3 that - The legislature has conferred the power to condone delay by enacting Section 5 of The Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub serves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy . And such a liberal approach is adopted on principle as it is realized that :-

- 1] Ordinarily a litigant does not stand to benefit by lodging an appeal late;
- 2] Refusing to condone delay can result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that cause would be decided on merits after hearing the parties.
- 3] " Even days delay must be explained " does not mean that a pedantic approach should be made. Why not every hours delay, every seconds delay ? The doctrine must be applied in a rational common sense pragmatic manner.
- 4] When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the order side cannot claim to have vested right in injustice being done because of a non deliberate delay.
- 5] There is no presumption that delay is occasioned deliberately, or on account culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay in fact he runs a serious risk.
- 6] It must be grasped that judiciary is respected not on

account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so ".

03. Section 5 of The Indian Limitation Act, 1963 is applicable only to the situation where the suit or appeal is already filed and pending for disposal. Suppose the Suit or Appeal is not filed within the stipulated time-period, then this provision is not applicable to get an extension of time period for filing the same.

04. Likewise for the enforcement of the Decrees, Orders passed by the Court of law the litigants has to file an Execution Petition before the Executing Court by exercising the provisions as enshrined under the Chapter Execution in Part II ( Sections 36 to 74) with the aid of Order XXI of the First Schedule of Code of Civil Procedure, 1908 ( 5 of 1908). For filing such an Execution Petition Section of the Indian Limitation Act, 1963 is strictly not applicable because the Execution Petition should be filed within the time period as originally fixed under the Enactments failing which the litigants/Decree Holder in the eyes of law had exhausted his lawful remedies as such he cannot thereafter enforcing his rights as enshrined under the Decrees, Orders etc, passed by the Courts in his favour.

05. Article 58 of Indian Limitation Act, will apply to a suit which is a suit for declaration simpliciter. This Article covers all declarations, other than those, mentioned in Article 57. It is a residuary Article for declarations. It provides that to obtain any declaration, the limitation is three years from the date of when the right to sue first accrues.

06. In India, the Limitation Act, 1963 is the legislation that governs the period within which suits are to be filed, with relevant provisions for delay, condonation thereof etc. If it is not filed within prescribed period of limitation, then the remedy is lost. The principle ' limitation extinguishes the remedy, but only the right to claim it in a Court of law extinguished. An exception to this general rule is the law of prescriptive rights, whereby the right itself is destroyed. Section 27 of the Indian Limitation Act, 1963 proclaims. " Section 27: Extinguishment of Right to Property at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished ".

**Article 64 & Article 65 of Limitation Act :-**

07. Article 65 relates to suits for possession based on title

while Article 64 deals with suits based on possession and not on title. In the case of Article 64, the onus lies on the plaintiffs to prove his possession within 12 years, while in the case of Article 65 it is for the defendant to prove when his possession became adverse. In a suit governed by Article 64 the nature of possession is not material but under Article 65 the possession to be a material is adverse possession of the defendant.

08. In **Ramaiah V/s Narayana Reddy, ( 2004 AIR SCW 4695)**, it is pointed out by the Hon'ble Supreme Court that the Article 64 is restricted to suits for possession on dispossession or discontinuance of possession, whereas Article 65 is the residuary Article and applies on suits for possession not otherwise provided for, that the suits based on the plaintiffs title in which there is no allegation of prior possession and subsequent dispossession alone can fall within Article 65 and that the question whether Article 64 or Article 65 applies to a particular suit has to be decided by the pleadings and the plaintiff cannot invoke Article 65 on suppressing material facts.

Under Article 64 limitation commences from the date of dispossession whereas under Article 65 it commences from the date

when the possession of the defendant became adverse.

09. The explanation (a) to Article 65 indicates a suit by a remainder man, a revisioner ( other than a landlord) or a devisee for possession of the property will attract Article 65. An estate in remainder is that expectant portion or ulterior estate, on the creation of a particular estate, is at the same time conveyed away, by the owner to another who is to enjoy it immediately after the determination of such particular estate. A remainder does not like reversion, arise any operation of law, but is always created by act of parties.

10. Explanation (b) to the Article 65 covers the suits for possession of immovable property by a Hindu or a Muslim entitled to possession to such property on the death of Hindu or Muslim female. The word 'Hindu' for the purpose of this Explanation means not only a person who is ethnological a Hindu but also a person who has the legal status of Hindu and is governed in the matter of inheritance by the Hindu Law. **In Dhanurjaya V/s Sukra ( AIR 1987 Ori. 205)**, the Hon'ble Supreme Court has held that a person born to a Hindu father and Christian mother if brought up as a Hindu is also a Hindu. In order to attract the Explanation ( B) to Article 65, the following

conditions are required :

- (i) The deceased should have been a Hindu or Muslim female with a limited estate;
- (ii) the deceased as well as the plaintiff should both of them be Hindus or Muslims;
- (iii) the suit by the plaintiff should be for possession;
- (iv) the property should be immovable;
- (v) the right to possession should arise on the death of the female limited owner; and
- (vi) the person who is in possession of such immovable property should be a stranger.

11. The Explanation (b) to Article 65 applies only to suits by revisioner's in respect of the property of which they are entitled to recovery of possession and which was in possession of the defendant on the date of death of the female.

Explanation (c) to Article 65 provides that where the judgment debtor was out of possession at the time of the sale in execution of a decree, in any suit for possession by the purchaser he shall be deemed to be the representative of the judgment debtor.

12. The effect of Explanation (c) is that the time which has run against the judgment debtor with a cause of action will be added on to the time which runs against the auction purchaser to reckon total period of limitation under Article 65. So the entire period



which has run against the judgment debtor and the auction purchaser will have to be reckoned for computing the period of limitation.

13. In a suit falling under Article 65 plaintiff must establish his title to the property; he need not prove that he was in possession within 12 years. If he fails to prove his title the suit fails, and the question of adverse possession does not arise in such a case.

**In Annasaheb V/s Balwant ( AIR 1995 SC 895)**, it has been held that under Article 65, the burden is on the defendants to prove affirmatively that he is in possession in hostile assertion i.e. a possession which is expressly or impliedly in denial of the title of the true owner.

**Conclusion** ; The Limitation Act, 1963, prescribed limitation with a view to see that a litigant does not drag on the litigation. The law on limitation keeps a check on filing of cases and prescribes time period within which it should be filed and the person can get the remedy conveniently. The law of condonation of delay keeps the principle of natural justice alive and also states the fact that each and every individual may not be able to approach the Court due some problem. Thus, Section 5 gives an opportunity to a litigant to file applications beyond the prescribed period of limitation provided; he

is able to establish that he was prevented by sufficient cause from approaching the Court within the said period.

### **Sub Topic -3**

#### **Criteria for grant of amendment to the pleadings;**

Pleadings means plaint or written statement as per Order VI Rule 1 of the C.P.C. Pleadings are statement in writing stating what contentions will be at the trial of the party. It is an essential requirement of pleading that material fact and necessary particulars must be stated in the pleadings. But many a time the party may find it necessary to amend his pleadings before or during the trial of the case. Rule 17 of Order VI provide the provision of amendment of the pleadings. An amendment can be by way of altering something, modifying something, deleting something.

Power to allow the amendment is wide and can be exercised at any stage of the proceedings. The amendment has to confine to the question in controversy between the parties. Order VI, Rule 17 can not be utilized by the parties to go beyond the very dispute raised by the parties. Thus, unless there is lis between the parties the amendment can not be allowed.

The purpose and object of Order VI Rule 17 of the Code

is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases which the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations. It enables the Court to effectively adjudicate upon the real controversy in the suit. The aforesaid rule has been laid down in the Case of “**Ramesh Kumar Agrawal Vs Rajmala Exports Pvt. Ltd. (2012) 5, SCC 337**”.

The courts should try the merits of the case, that come before them and should subsequently allow. All amendments that may be necessary or determining the real question in controversy before the parties provided, it does not cause injustice or prejudice to the other side. Order VI Rule 17 consists of two parts: whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments, which are necessary for the purpose of determining the real question in controversy before

the parties. The real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed, if it is not the amendment will be refused.

**Leave to amend when given ;**

As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. Technicalities of law should not be permitted to hamper the Court in the administration of justice between the parties. Generally the amendments are allowed in the pleadings, to avoid uncalled or multiplicity of litigation. Further amendment in general should not be refused in a mechanical and casual manner. When the law confers discretion upon an Authority, it is expected that the discretion will be exercised in a judicious manner. The Court can take notice of subsequent event and can grant appropriate relief in the interest of justice.

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 question in controversy between the parties. Therefore, the main points to be considered before a parties allowed to amend his pleadings are: firstly, whether the amendment is necessary for the determination of the real question in controversy, and secondly, can the amendment be allowed without injustice to the other side.

The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment should not be allowed even though the court may think that the party seeking the amendment will not be able to prove the amended plea. This is the basis test which govern the court's unchartered powers of amendment of pleading.

The second condition is also equally important according to which no amendment will be allowed which will cause injustice to the opposite party. It is settled law that the amendment can be allowed if it can be made without injustice to the other side. But it is also cardinal rule that “there is no injustice if the other side can be

compensated by costs.”

**Leave to Amend when Refused ;**

It follows from what has been stated above that leave to amend should be refused .- (1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is -

- (i) merely technical, or
- (ii) useless and of no substance.

(2) Where the plaintiff's suit would be wholly displaced by the proposed amendment.

(3) Where the effect of the amendment would be to take away from the defendant, a legal right which has accrued to him by lapse of time.

(4) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings.

(5) Where the application for amendment is not in good faith.

Generally in following cases leave to amend will be refused by the court :

1] Leave to amend will be refused where the amendment is

not necessary for the purpose of determining the real question in controversy between the parties. As discussed above the “ real controversy ” test is the basic test and it is the primary duty of the court to decide whether such amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. Therefore, if the amendment is not necessary or is merely technical or useless or without any substance, it will be refused.

2] Leave to amend will be refused if it introduces a totally different, new and inconsistent case or changes the fundamental character of the suit or defence.

3] Leave to amend will be refused where the effect of the proposed amendment is to take away from the other side a legal right accrued in his favour.

4] Leave to amend will be refused where the application for amendment is not made in good faith. As a general rule, leave to amend ought not to be granted if the applicant has acted mala fide. Want of bona fides may be inferred from the circumstances of the case. When there is no substantial ground for the case proposed to be set up by the amendment, or the object is to defeat or delay the

plaintiffs claim, or merely to re-agitate the same question and lead further evidence, the amendment was not granted as not being bona fide.

**Subsequent events ;**

As general rule, every litigation must be determined on the basis of facts existed on the date of filing of the suit. A court may, however, take into account subsequent events in order to shorten litigation or to preserve, protect and safeguard right of both the parties and to sub-serve the ends of justice. For that purpose, a court may allow amendment in pleadings of the parties.

**Merits not to be considered ;**

While considering whether an application for amendment should or should not be allowed, the court should not go into correctness or falsity of the case in the amendment. “ The merits of the amendment sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment.”

In the case of “ **Revajeetu Builders & Developres V/s Narayanswamy & sons and others reported in (2009) 10 SCC 84** ”, Hon'ble Supreme Court laid down, factors to be taken into consideration while allowing or rejecting the application for



amendment.

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

**Conclusion;**

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties.

With this, summary is concluded.

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