

hear the appeal and the Commissioner is entitled to hear it.

We, therefore, return the reference stating that the learned Commissioner has power to hear the appeal.

*Reference returned.*

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## MISCELLANEOUS CIVIL

*Before Mr. Justice Ziaul Hasan, Acting Chief Judge and  
Mr. Justice J. R. W. Bennett*

NAZIR HASAN KHAN (APPELLANT) v. GANGA DIN  
(RESPONDENT)\*

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*United Provinces Encumbered Estates Act (XXI of 1934), section 9—Civil Procedure Code (Act V of 1908), order VI, rule 17—Written statement of Creditor filed under section 9 Encumbered Estates Act—Amendment of written statement sought by adding new claims—Application for amendment made long after expiry of time allowed under section 9 for filing of claims—Amendment if can be allowed under order VI, rule 17—Limitation Act (IX of 1908), section 5—Counsel's mistaken advice, whether a ground for extension of time under section 5, Limitation Act.*

Order VI, rule 17, Civil Procedure Code, does not enable a party to alter the nature of his suit by the substitution or the addition of a claim founded on a different cause of action.

When long after the expiry of the time allowed under section 9 of the United Provinces Encumbered Estates Act for filing a written statement a creditor made an application for the amendment of his written statement, by adding a claim on the basis of four additional mortgage deeds, *held*, that as there would be a material change in the claim made in the written statement, the applicants cannot rely on order VI, rule 17 to bring his additional claims within time.

The mistaken advice of counsel is not sufficient to justify extension of time under section 5 of the Limitation Act unless the advice was given in good faith, that is with due care and attention. *Amrit Lal and others v. Phool Chand and others* (1) referred to.

\*Miscellaneous Appeal No. 75 of 1937, against the order of Pandit Brij Kishan Topa, Special Judge, of 1st grade, Bara Banki, dated the 31st August, 1937.

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Mr. B. K. Dhaon, for the appellant.

Messrs. Mohd. Ayub and Moti Lal Tilhari, for the Respondent.

ZIAUL HASAN, A. C. J. and BENNETT, J.:—This is an appeal under section 45 of the Encumbered Estates Act against the order dated the 31st August, 1937, passed by the Special Judge, first grade, Bara Banki, on an application for amendment of a written statement filed under section 10 of that Act. This application was made by Ganga Din, the respondent in this appeal. The applicant under section 4 in the case was the appellant Nazir Hasan Khan.

It appears that another application under the Encumbered Estates Act had been made by one Krishna Behari alias Manna Babu, and that the respondent Ganga Din had filed a written statement in that case also, which was before a Special Judge of the second grade. His written statement in this latter case was filed on the 27th March, 1936, while in the case of Nazir Hasan Khan it was filed on the 23rd April, 1936. In both cases he made claims against the applicants on the basis of certain mortgages.

In the case of Nazir Hasan Khan Ganga Din referred in his written statement to a number of mortgages, but made claims in respect of some of them only. In the case of Krishna Bihari Ganga Din made claims in respect of seven mortgage-deeds.

Ganga Din's claim in Krishna Bihari's application was decided by compromise in respect of three out of the seven mortgage-deeds. In respect of the remaining four his claim was dismissed on the 1st March, 1937. On the 5th August, 1937, Ganga Din made an application before the Special Judge of the first grade, who was dealing with Nazir Hasan Khan's application, asking that his written statement in that case might be amended by the addition thereto of claims based on the four mortgage-deeds in respect of which his claims had been rejected

by the Special Judge of the second grade. Nazir Hasan Khan objected to the amendment prayed, but Ganga Din's application was allowed by the Special Judge of the first grade on the 31st August, 1937, in the order against which the present appeal has been preferred.

Neither the record of the proceedings before the Special Judge of the second grade nor any copy of the judgment of that Special Judge in which he rejected Ganga Din's claims in respect of the four mortgage-deeds referred to, has been placed before us. It would appear from the order of the Special Judge of the first grade appealed against that the compromise by which the claim on the other three mortgage-deeds was settled did not cover in any way the four deeds now under consideration. The record of the Special Judge, 2nd grade, was, before the Special Judge, first grade, and in his order he has observed as follows:

"It does not clearly appear as to how the claim for these four deeds was left out in that court (the meaning of this apparently being that the reasons for rejecting the claim on these deeds are not clearly given). They are no doubt mentioned in the original written statement filed in the Court of the Special Judge, second grade, but subsequently it appears that no claim with reference to them was pressed. I come to this conclusion by reading the order of the Special Judge, second grade, dated 1st March, 1937, in which he decrees claim no. 53/2 relating to three mortgage-deeds other than those which are in dispute here. As regards these four deeds the learned Special Judge remarks in his judgment that the applicant of that case, namely Krishna Bihari, was not liable to pay the debts due under these four deeds."

As regard the merits of the application made by Ganga Din for amendment of his written statement in the Court of the Special Judge, first grade, the Special Judge remarked as follows:

"The difficulty is about the application of order VI, rule 17, Civil Procedure Code, and section 9(3), Encumbered Estates Act, and sections 5 and 14 of the Limitation Act. The provisions of section 9(3) of the Encumbered

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Estates Act are mandatory, but I think that they do not preclude the applicability of the Civil Procedure Code or the Limitation Act. I quite feel that under the garb of this amendment the creditor is putting new claims which he is precluded from doing under section 9(3) of the Encumbered Estates Act, but having regard to the broad principles of equity and the exceptional circumstances of this case and to the fact that litigation about these deeds was going on in the lower Court, I allow the application for amendment subject to the payment of Rs.25 as costs to the other side."

It is not, in our opinion necessary to consider at length why Krishna Bihari was at first thought to be liable on these mortgages. It is sufficient to say that according to the application for amendment made by Ganga Din on the 5th August, 1937, Krishna Behari had purchased a portion of the mortgaged property in execution of a decree against Nazir Hasan Khan.

Section 9 of the Encumbered Estates Act provides that claims shall be presented within three months from the date of the publication of the notice referred to in this section, and that the Special Judge may receive the written statement if presented within a further period of two months on his being satisfied by the claimant that he had sufficient cause for not presenting it within the period of three months. Since notice was published in Nazir Hasan Khan's case under section 9 on the 8th February, 1936, it is clear that the additional claims made by Ganga Din on the 5th August, 1937, were made long after the period of limitation had expired. It has, however, been contended on his behalf that he was entitled to amend his original written statement which had been made within time on the 23rd April, 1936, having regard to the provisions of order VI, rule 17 of the Civil Procedure Code. This rule empowers a court at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. It has, however, been held by all or nearly all High Courts that this rule would not enable a party to alter the nature of his suit by the

substitution or the addition of a claim founded on a different cause of action. We have been referred on this point to a large number of rulings, but we will mention only a few of them. In *Kokamal Madhoram v. Gulab-singh Gurudatsingh* (1), the Bombay High Court held that a plaintiff cannot by amendment be allowed to substitute one plaint for another. In *Addanki Lakshmanacharyulu v. Madduri Venkataramanuja Charyulu* (2), the Madras High Court observed that—

“It is a cardinal maxim of the law of amendment not only that you should not amend so as to change the cause of action but you should not amend in such a way as will take away a valid defence under the law of limitation.”

In *Balkaran Upadhya and others v. Gaya Din Kalwar and others* (3) the Allahabad High Court held that a court had no power to allow amendment of the plaint by introducing a new cause of action after the period of limitation in respect of such cause of action had expired.

Finally in *Ma Shwe Mya v. Maung Mo Hanaung* (4), their Lordships of the Privy Council observed,—

“All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit.”

Learned counsel for the respondent has argued that actually there was no change in the nature of the suit. The mortgage-deeds had been referred to in the respondent's original written statement. It is admitted, however, that no claim was made on them and it is also admitted that the omission to make any claim on them was due to the fact that a claim was being made on them before the Special Judge of the second grade. There can be no doubt whatever therefore that there was a

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(1) (1925) A.I.R., Bom., 248.

(2) (1926) A.I.R., Madras, 827.

(3) (1914) I.L.R., 36 All., 370.

(4) (1922) A.I.R., P.C., 249.

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material change in the claim made in the written statement, since further substantial amounts were claimed on the basis of no less than four additional mortgage-deeds. The respondent cannot therefore rely on order VI, rule 17 to bring his additional claims within time.

Reference was made by the Special Judge, first grade in his order to sections 5 and 14 of the Limitation Act. Section 14 has not been referred to by counsel, and we have no doubt that it cannot apply, since the person against whom the claims were made was different in each case. As regards section 5 the respondent would lay the blame on his counsel for advising him wrongly but it has been held in various cases that the mistaken advise of counsel is not sufficient to justify extension of time under section 5 unless the advice was given in good faith, that is with due care and attention. We have been referred on this point to the case of *Amrit Lal and others v. Phool Chand and others* (1). It has not been contended that the respondent or his counsel was justified in believing that he was entitled to sue on these deeds against Krishna Bihari, and it would seem from what the lower court observed in its order that it was realised during the proceedings in that court that the claim in respect of these deeds could not be pressed.

Even if it were held that the respondent had some justification for making the claim on Krishna Bihari's application, it can hardly be doubted that he and his counsel were negligent in not preferring it in the court of the Special Judge, first grade, earlier. Actually they allowed a period of more than five months to elapse after the claim had been rejected by the Special Judge, second grade, and the only explanation which has been offered for this delay is that they were considering whether an appeal should be preferred against the order of the Special Judge, second grade. In view of the observations of the lower court with regard to the proceedings in the court of the Special Judge, second grade, we are

(1) (1938) A.I.R., Lahore, 81.

doubtful whether this explanation is true, and in any case we do not consider that it would justify such a long delay.

The lower court admitted that the respondent was putting in new claims which he was precluded from doing under section 9 of the Encumbered Estates Act, and we do not consider in the circumstances that the reasons given for allowing the amendment are sufficient.

We accordingly allow this appeal, set aside the order passed by the Special Judge of the first grade and disallow the application made by the respondent for the amendment of his written statement. The appellant will recover his costs in this appeal from the respondent.

The appellant applied to this court twice for an order of stay of proceedings in the court of the Special Judge, first grade, but this application was not allowed, it being considered that he would not be prejudiced if these proceedings were allowed to continue. The effect of the order now passed on this appeal will be that the decree awarded by the Special Judge against the appellant will be modified in so far as it is based on the deeds with which this judgment is concerned, the amount being reduced accordingly together with the costs allowed.

*Appeal allowed.*

## REVISIONAL CIVIL

*Before Mr. Justice A. H. de B. Hamilton and Mr. Justice  
J. R. W. Bennett*

BABU GANESHI LAL (DECREE-HOLDER-APPLICANT) v.  
CHATTAR PAL SINGH AND OTHERS (JUDGMENT-  
DEBTORS-OPPOSITE-PARTIES)\*

*United Provinces Encumbered Estates Act (XXV of 1934), section 7—United Provinces Agriculturists' Relief Act (XXVII of 1934), section 3(4)—Section 7 of the Encumbered Estates Act whether over-rides section 3(4) of the Agriculturists' Relief Act.*

Section 7 of the Encumbered Estates Act overrides section 3(4) of the Agriculturists' Relief Act.

\*Section 115 Application No. 19 of 1938, for revision of the order of Pandit Girja Shankar Misra, Additional Civil Judge of Unao, dated the 23rd November, 1937.

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