(20) In this view of the matter, it is not necessary to decide the other two contentions raised by the learned counsel for the appellants.

(21) The result is that this appeal succeeds, the decision of the learned District Judge is reversed and that of the trial Court restored. In the circumstances of this case, however, I leave the parties to bear their own costs in this Court as well.

N. K. S.

REVISIONAL CIVIL

Before Harbans Singh, Chief Justice.

GURMUKH SINGH,—*Petitioner.*

versus.

DALIP SINGH, ETC.,—*Respondents.*

C. R. No. 1170 of 1970.

January 29, 1971.

Code of Civil Procedure (Act V of 1908)—Section 115 and Order 6 Rule 17—Punjab Pre-emption Act (I of 1913)—Section 15—Suit for pre-emption of land on ground of relationship with the vendor—After the expiry of limitation for the suit, plaintiff seeking amendment of the plaint to introduce new ground of pre-emption of being co-sharer in the land—Such amendment—Whether to be allowed—Order allowing amendment of plaint to introduce new ground of pre-emption after the period of limitation for the suit—Such order—Whether revisable by the High Court under section 115.

Held, that where a plaintiff files a suit for pre-emption of land on the basis of his relationship with the vendor, and then after the expiry of the period of limitation for the suit seeks amendment of the plaint to introduce a new ground of pre-emption of being a co-sharer in the land sold, such an amendment cannot be allowed. There is no connection between the ground originally taken and the ground that is sought to be added. It is also not an attempt to explain the ground already taken. Originally the claim is on the basis of relationship alone and it cannot be doubted that, if that relationship is not proved, the suit of the plaintiffs is bound to fail, but, if the amendment is allowed, then, even if the plaintiff fails on the question of relationship, he can fall back upon the other ground of being cosharer which he is taking for the first time after the period of limitation has expired. Hence the amendment sought by the plaintiff to introduce the new ground of being cosharer after the period of limitation should not be allowed. (Para 13).

Held, that no doubt the question of allowing or refusing an amendment under Order 6 Rule 17 of the Code of Civil Procedure is a matter of discretion with the Court and, if that discretion has been judicially exercised, it cannot be said that there has been any lack of jurisdiction in the exercise of that discretion or that the jurisdiction has been exercised in an irregular or illegal manner and thus would not require interference under the revisional jurisdiction of the High Court. But if a new cause of action or a new ground for sustaining the suit for pre-emption has been allowed to be added and added at a time when a new suit brought on that basis would have been hopelessly barred by time it cannot be said to be an exercise of discretion in judicial manner, and therefore the Court must be taken to have acted beyond its jurisdiction. Hence such an order of allowing amendment is revisable by the High Court under section 115 of the Code. (Paras 7 & 9)

Petition under Section 115 C.P.C. of Act of 1908 for revision of the order of Shri P. C. Nariala, Additional Sub Judge II Class, Sirsa, District Hissar, dated 31st August, 1970 allowing the plaintiffs to amend the plaint on payment of costs of Rs. 30.

K. L. JAGGA, ADVOCATE, for the petitioner.

H. S. GUJRAL, ADVOCATE, for the respondents.

JUDGMENT.

HARBANS SINGH, C.J.—(1) This revision under section 115, Civil Procedure Code (hereinafter referred to as the Code), has arisen in the following circumstances:

(2) One Dalip Singh, brought a suit for possession by pre-emption of the property sold by the vendor Teja Singh. The superior right of pre-emption was claimed on the ground of relationship and it was claimed that the pre-emptor was brother's son of the vendor. During the pendency of the suit, Dalip Singh, plaintiff died. His legal representatives being the children applied for being brought on the record as such. This application was allowed and the legal representatives were directed to file the amended plaint, which was filed on 3rd July, 1970. It may be stated here that the suit was instituted on 26th June, 1968.

(3) On 22nd July, 1970, the legal representatives (hereinafter referred to as the plaintiffs) filed an application under Order VI, rule 17 of the Code seeking amendment of the plaint by addition of a new sub-para in paragraph 4 of the plaint to the following effect:—

"That Dalip Singh, father of the plaintiffs was a cosharer in the suit land and since he is dead and the present plaintiffs

have succeeded to his estate, so they are cosharers in the suit land. Accordingly, they have got superior right of pre-emption in suit land on this ground as well."

As already stated, in paragraph 4 of the plaint the ground for claiming superior right of pre-emption taken was that of relationship, being brother's son of the vendor.

(4) The application was resisted on behalf of the defendant, who is now petitioner before me, on the ground that by the amendment the plaintiffs were seeking to introduce a new ground for claiming a superior right of pre-emption and, therefore, amounted to a new cause of action being taken by them and that the same could not be allowed as a suit brought on the basis of that cause of action would be hopelessly barred by time on the date of the application for amendment.

(5) The learned Sub-Judge, however, accepted the arguments of the learned counsel for the plaintiffs, which, in the words of the learned Sub-Judge, were as follows:—

"The learned counsel for the plaintiffs has advanced the arugment that the case would have been different if the plaintiffs had failed to prove their relationship with the vendor or had left the plea of relationship and only relied upon the plea of cosharer for pre-emption of the sale. He has stated that because the plaintiffs are taking this additional plea of pre-emption without having given up the first ground of pre-emption, they are neither changing the ground of pre-emption nor making a different case but merely adding a new ground of pre-emption, the amendment be allowed."

The learned trial Court in the operative part of the judgment clearly recognised that a new ground of pre-emption was being added, but then allowed it in the interest of fair play and being just and proper. The observations made were as follows:—

"The present pre-emptors have stepped into the proceedings because of death of Dalip Singh, their father, and they have applied for amendment of the plaint to add new ground of pre-emption and it would be just and proper and in the interest of fair play to allow the amendment."

(6) It has been argued on behalf of the defendant-petitioner before me that the order of the Court below is altogether without jurisdiction, because the Court has no jurisdiction to allow a new cause of action or a new ground being added when the suit, if brought on the new cause of action, would be barred by limitation. The superior right of pre-emption was claimed originally on the ground of relationship and it cannot be denied that, if it is ultimately found that they have no superior right on this ground, the suit would fail. If no amendinent is allowed, the plaintiffs cannot claim to sustain their suit for superior right of pre-emption on any other ground given in section 15 of the Punjab Pre-emption Act, 1913 (hereinafter referred to as the Act) and one of such grounds is of being cosharer with the vendor. There can, therefore, be no manner of doubt that the amendment allowed introduces into the plaint ground which did not exist before and which has got absolutely no connection with the ground taken earlier.

(7) On behalf of the plaintiff-respondents their learned counsel vehemently argued that this Court acting under section 115 of the Code has no jurisdiction to interfere in any order of the trial Court refusing or allowing an amendment. No doubt the question of allowing or refusing an amendment is a matter of discretion with the Court and, if that discretion has been judicially exercised, it cannot be said that there has been any lack of jurisdiction in the exercise of that discretion or that the jurisdiction has been exercised in an irregular or illegal manner and thus would not require interference under the revisional jurisdiction of this Court. There can be no dispute with this proposition laid down by their Lordships of the Supreme Court over and over again.

(8) *Inter alia* reference in this respect is made by the learned counsel to *Radheyshyam and others* v. *Ram Autar and others* (1), and *M. K. Palaniappa Chettiar and another* v. *A. Pennuswami Pillai* (2).

(9) The question here is entirely different. If it had been a case where the amendment did not raise a new cause of action or, if it raised a new cause of action, the same was well within time and the Court, in the exercise of its jurisdiction, either allowed the amendment or refused to allow the amendment, this Court would not interfere. In the present case a new cause of action or a new ground for

(1) 1967 S.C.N. (No. 60) 51.
(2) 1970 (2) S.C. 290.

sustaining the suit for pre-emption has been allowed to be added and added at a time when a new suit brought on that basis would have been hopelessly barred by time and it cannot be said to be an exercise of discretion in a judicial manner and, therefore, the Court must be taken to have acted beyond its jurisdiction.

(10) This question directly arose before Mehar Singh, C.J., in *Shankar Singh* v. *Chanan Singh* (3). At page 458 of the report, the argument, about the jurisdiction of this Court under section 115 of the Code to interfere in an order allowing amendment, was discussed and I can do no better than to reproduce the pointed observations made by the learned Chief Justice as follows:—

> "The learned counsel for the plaintiff then points out that so far as rule 17 of Order 6 (of the Code) is concerned, it is a matter of discretion with the trial Court to allow or not to allow an amendment and if it has exercised discretion in this respect, this Court cannot interfere with that under section 115 of the Code of Civil Procedure. However, the discretion vested in a Court of law is always a judicial discretion and where it exercises discretion, as in this case, against the statute of limitation, it cannot be said to have exercised the discretion judicially. It has, therefore, outstepped its jurisdiction in this respect and hence the matter can be considered under section 115 of the Code of Civil Procedure."

(11) That was also a case of pre-emption. In the plaint, as originally filed, the superior right of pre-emption was claimed on the ground of "collateralship". When an objection was raised in the written statement, that mere collateralship does not give any superior right under section 15 of the Act, the mistake was realised and an amendment was sought by giving the exact reationship. The amendment was allowed by the trial Court, though it was after limitation, and this order was set aside by the learned Chief Justice. *Inter alia* it was observed at page 457 as under:—

> ".....collateral relationship is no ground of pre-emption in so far as the right of pre-emption in respect of agricultural land is concerned. ....., but it is pointed out on

(3) 1968 P.L.R. 455.

the side of the plaintiff that grounds Secondly and Thirdly in clause (a) of sub-section (1) of section 15 of Punjab Act I of 1913 give a right of pre-emption in respect of agricultural land to the brother or brother's son of the vendor, and to the father's brother or father's borther's son of the vendor, and the learned counsel for the plaintiff says that that relationship is the one which the plaintiff has *with Arjan Singh vendor* ..... The learned counsel stresses that the plaintiff has done no more than to explain the nature of his collateral relationship in his amendment application and that the ground on which he claimed preferential right of pre-emption on the basis of collateral relationship has been stated in the plaint itself."

(12) After referring to *Rulia Ram* v. *Ram Chander Das* (4), and *Chandgi Ram* v. *Rabi Dau* (5), the learned Chief Justice rejected the plea and observed as follows:—

"In this case all that Chanan Singh plaintiff did was to say that the vendors are his collaterals, but section 15 of Punjab Act I of 1913 in such relationship by itself does not give a right of pre-emption. A particular defined relationship does give a right of pre-emption and if on the ground of relationship such a right is claimed then obviously the particular relationship referred to as a ground in section 15 of Punjab Act I of 1913 has to be stated ..... If after the period of limitation such an attempt is made it cannot be permitted to defeat a right that has accrued to the vendee to defeat the pre-emptor's claim as not coming within the statutory provision upon which reliance is placed."

(13) The facts in the present case before me are even much stronger than those before the learned Chief Justice. Here there is no connection between the ground originally taken and the ground that is sought to be added. It is not an attempt to explain the ground already taken. Originally the claim was on the basis of relationship alone, and it cannot be doubted that, if that relationship is not proved, the suit of the plaintiffs is bound to fail, but, if the

(4) A.I.R. 1933 Lah. 774.
(5) A.I.R. 1952 Pb. 231.

amendment is allowed, then, even if the plaintiffs fail on the question of relationship, they can fall back upon the other ground of being cosharers which they are taking for the first time after the period of limitation has expired. The observations of the learned Chief Justice apply with far greater force to the facts of the present case. If a suit had been brought on the date of the amendment on the ground of coshareship, that would have been obviously barred by time.

(14) Reference on behalf of the respondents was made to a judgment of Gurdev Singh J. in *Banta Singh and others* v. *Mehar Singh and others* (6). There the superior right of pre-emption was claimed on the ground that the plaintiff was the brother of the vendor. On an objection being taken in the written statement, that the plaintiff was not his brother, the plaintiff sought amendment to correct the mistake and wanted to substitute for the words 'brother of the vendor' the words 'brother of the vendor's father'. The trial Court allowed the amendment and a revision being brought to this Court, Gurdev Singh J., held as under:—

> "..... both at the time the plaint was originally framed and when it was subsequently amended the plaintiff was basing his claim of pre-emption on his relationship with the vendors. Though originally the relationship stated by him brought his case under clause Secondly of section 15(1)(b), later as a result of the amendment it fell under clause Thirdly of section 15(1)(b) ....., the plaintiff in seeking amendment claimed that it was due to a typing or clerical mistake that the word 'father of' was left out in paragraph 3 of the plaint ....."

(15) This case has absolutely no bearing on the present case, because there is no suggestion that the amendment sought is for correction of any typing or clerical mistake and, in fact, the second ground has no connection with the first one, except that this is also one of the grounds under section 15 of the Act.

(16) Reference was also made to a judgment of the Supreme Court in *A. K. Gupta and Sons Ltd.* v. *Damodar Valley Corporation* (7). In that case there was a clause in a contract that if there was an increase

(6) 1970 P.L.R. 37.
(7) A.I.R. 1967 S.C. 96.

in the prevailing labour rate of more than 10 per cent, the contractor would be entitled to charge proportionate increased rates. The labour rate having increased to 20 per cent, he claimed an increase in his tendered rates to that extent. The matter was, consequently, taken to the Court. The suit filed was for a declaration that on a proper interpretation of the clause, he was entitled to an enhancement of 20 per cent over the tendered rates. The suit was decreed, but in appeal it was held not to be maintainable in view of section 42 of the Specific Relief Act. The appellant sought leave of the High Court to amend the plaint by adding an extra relief for a decree for the contract money or such other amount as was to be found due on proper account being taken. The amendment having been refused, the matter was taken in appeal to the Supreme Court under Article 133(1)(a) of the Constitution and it was held by majority as follows:—

> "..... the amendment ought to be allowed. The suit was on the contract seeking only the interpretation of the clause for a decision of rights of the parties under it and for no other purpose. The cause of action was the contract itself on which the suit was based. The amendment sought to introduce a claim based on the same cause of action, namely, the same contract and introduced no new case or facts."

(17) Their Lordships of the Supreme Court while taking this view laid great stress on the question that the claim was based on the *same cause of action*. In fact, they went on to observe in paragraphs (7) and (8) as follows:—

> "(7) ..... The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: *Weldon* v. *Neale,* (8) But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation.

(8) (1887) 19 Q.B.D. 394.

(8) The principal reasons that have led to the rule last mentioned are, first, ... and, secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended. ....."

(18) The question, therefore, boils down to this, whether the plea, that is now sought to be added, can be said "in substance to be already in the pleading" and the answer to this is in the negative. The ground of cosharership is conspicuous by its absence in the original pleading.

(19) In view of the clear authority of this Court and that of the Supreme Court, I have no doubt in my mind that the Court below had not exercised its discretion in a judicial manner and transgressed its jurisdiction in allowing a new ground, or claiming a superior right of pre-emption, being taken at a time when a suit based on that ground would have been barred by time.

(20) I, therefore, accept this revision, set aside the order of the Court below and dismiss the application seeking amendment of the plaint. The trial Court will proceed with the case on the basis of the unamended plaint with all possible expedition. The record of this case will be sent back to the Court concerned immediately. The counsel will direct the parties to appear in the Court below on 1st of March, 1971, for further proceedings. The costs of this petition will be borne by the respondents.

N. K. S.

APPELLATE CIVIL

Before Prem Chand Pandit, J.

KUNDAN SINGH,—*Appellant.*

versus.

ARJAN SINGH,—*Respondent.*

Regular Second Appeal No. 1057 of 1968.

January 29, 1971.

Punjab Pre-emption Act (I of 1913)—Section 15—Right of pre-emption—When waived—Sale by mother being pre-empted by son—Pre-emptor utilizing the sale money received by the vendor in purchasing some other land—Whether amounts to the waiver of the right of pre-emption.