

S/L 1  
03.02.2021  
Court. No. 19  
GB

C.O. 122 of 2021

Sri Soumen Chowdhury & Ors.  
Vs.  
Sri Sushil Kumar Sharma & Ors.

(Through Video Conference)

*Mr. Ajit Kumar Chaubey,*  
*Mr. Noorul Islam.*

*...for the Petitioners.*

*Mr. Pinank Mitra.*

*...for the Opposite Parties.*

Supplementary affidavit filed in Court today be kept with the record.

This revisional application has been filed challenging an order dated January 22, 2020, passed in Title Appeal No.10 of 2016 by the learned Additional District Judge, 5<sup>th</sup> court at Howrah. The said appeal arises out of the judgment and decree passed in Title Suit No.8455 of 2014, by the learned Civil Judge (Junior Division), 2<sup>nd</sup> Court at Howrah.

The learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Howrah dismissed the suit filed by the plaintiffs/petitioners by coming to specific findings that the topography of the existing holding no.22, Ram Dhan Das Lane as reflected in the survey map of Mouza Shibpur was classified as a pond, that the Exhibits-1, 2, Exhibits A, F and G were proof of the fact that the holding no.22, Ram Dhan Das Lane was a pond. Exhibit-H, that is the Commissioner's report also

corroborated the fact that the said premises was a pond. No objection to the Commissioner's report was filed by the petitioners, and the plaintiffs failed to show that there was a plot of land measuring about 2 cottahs 9 chitaks and 20 sq. ft on the eastern side of the holding no.22, Ram Dhan Das Lane.

The evidence of P.W.1 was also disbelieved in view of the contradictions therein. On the one hand P.W.1 stated that the structures were built after filing of the suit on the other hand, the P.W.1 also stated that the structures existed prior to 1983. The Court came to a specific finding that there was nothing on record to show that the holding no.22, Ram Dhan Das Lane was converted to Bastoo land and the petitioners had been enjoying the said land by constructing a temporary R T-shed structure. The defendants on the other hand produced the partition deed entered into between the predecessor of the defendants and the co-sharers of holding no.15/1/4/1, Gopal Lal Choudhary Lane. The father of the plaintiffs was a witness to such partition deed. The partition deed mentioned about an existing pathway, which was corroborated by the survey map and the record of rights. The plaintiffs' property was situated on the western side of the passage. Exhibit-A proved that on the northern side of the holding of the property of the defendants there was a 6 ft. wide passage and the said passage had become an 8 ft. passage, abutting the plaintiffs' side of the suit property. The learned court below also relied upon of the deed of

conveyance of the petitioners, which stated that on the eastern side of the holding no.22, Ram Dhan Das Lane there was an existence of common drain. The court also found that the defendants had a right over the common pathway, even if, the same had shifted towards the property of the plaintiffs by 2 ft. Having discussed all the issues, the suit was dismissed.

The petitioners preferred a title appeal. In the title appeal the petitioners filed an application for amendment of the plaint. The learned lower appellate court rejected the application on the ground that the plaintiffs had failed to prove that during the pendency of the appeal the pond had been filled up and was being encroached by construction of 40 ft. long road. The learned lower appellate court also held that the plaintiffs could not show anything to establish subsequent encroachment upon the suit property and construction of a road during the pendency of the appeal.

The learned court came to a finding that the plaintiffs also could not show any evidence or documents that the pond had been converted into a Bastu land which was mutated in the land records as also the records of the Howrah Municipal Corporation. Thus, the amendment application was rejected at the subsequent event as pleaded by the plaintiffs in the said application did not occur during the pendency of the appeal. The application for amendment was rejected. The suit was one for declaration of title and a decree for permanent injunction restraining the defendants

from objecting and/or interfering with the plaintiffs construction of a part-boundary wall on the eastern side of the suit property.

The suit was dismissed on the grounds that the plaintiffs had failed to show that the suit property had been converted from a pond to a Bastu land and that the defendants were encroaching into the said 2/9<sup>th</sup> share of the plaintiffs over premises no. 22, Ram Dhan Das Lane. The right and title of the defendants to use the passage along side the suit property was upheld. Subsequently, in the appeal the plaintiffs wanted to introduce a pleading and a prayer in terms of the schedule.

*“SCHEDULE*

*I. After paragraph 13 of the plaint the following new paragraphs with the following averments may be incorporated:-*

*13A. That during pendency of the instant appeal on 25.02.2018 the defendants for the purpose of widening the passage situated to the adjoining eastern side of the suit Holding No.22, Ramdhan Das Lane, P.S. Shibpur, District Howrah encroached a substantial portion of the suit Holding No.22, Ramdhan Das Lane from its eastern side measuring about 40 ft. in length from North to South on the Western side and 39 ft. in length from North to South on the Eastern side and 5ft. 6 inches in width from east to west on the Northern side abutting Ramdhan Das Lane and 4 ft. 1 inch in width from east to west on the Southern side, thin in all measuring 300 sq. ft., more fully described in*

*the Schedule-“B” to the plaint and shown in the plan annexed to the plaint by “red border line” and converted the same in a concrete passage and have been plying vehicles through the said passage for the purpose of egress and ingress to and from their property situated at Holding No.15/1/4/1, Gopal Lal Chowdhury Lane, P.S. Shibpur, District Howrah in a highly illegal and arbitrary manner and repeated requests on the part of the plaintiffs to restore the said passage to its former position did not yield any fruit.*

*13B. That finding no other alternative the plaintiffs rushed before the local Shibpur Police Station in order to lodge a complaint to that effect but the police personnel disclosed their inability to take any action against the defendants on the plea that the dispute is civil in nature and a case is still pending before the Learned Court and ultimately advised the plaintiffs to take recourse to law.*

*II In paragraph 14 of the plaint after the date “05.09.2010” and before the words “and on” the dates “25.02.2018” may be incorporated.*

*III In prayer portion of the plaint after sub-paragraph 16 (c-1) a new sub-paragraph as “(c-2)” with the following averments may be incorporated:-*

*“(c-2) for a further decree mandatory injunction inter alia directing the defendants to restore the passage situated to the adjoining eastern side of the suit Holding No.22, Ramdhan Das Lane, P.S. Shibpur, District Howrah to its former position at their own costs within a stipulated period, failing*

*which the plaintiffs may be permitted to do the same at their own costs to be realized from the defendants.”*

*IV. In the Schedule of the plaint in the heading “SCHEDULE PROPERTY” the word “PROPERTY” may be substituted by the letter “A”.*

*V. After the proposed Schedule “A” of the plaint a new Schedule as Schedule “B” with the following averments may be incorporated.*

**SCHEDULE-“B”**

*ALL THAT piece and parcel of land 40 ft. in length from North to South on the Western side and 39 ft. in length from North to South on the Eastern side and 5ft. 6 inches in width from east to west on the Northern side abutting Ramdhan Das Lane and 4 ft. 1 inch in width from east to west on the Southern side, thus in all measuring about 300 Sq.ft. as shown in the plan annexed to the plaint by “Red border line” forming part of the plaint.”*

The learned lower appellate court came to a finding that the plaintiffs failed to produce any document in support of the proposed amendment and the proposed amendment sought would introduce a new cause of action at the stage of appeal, the learned lower appellate court also dismissed the application observed that the High Court had directed the lower appellate court to hear out the application for amendment after making an investigation as to whether the facts sought to be incorporated by the proposed amendment actually occurred subsequent to filing of the appeal or not.

As the learned lower appellate court did not find any support in the contention of the petitioners, the learned lower appellate court came to a finding that the said events sought to be incorporated did not occur subsequent to the filing of the appeal. Thus, the application for amendment was rejected. The learned court below exercised its discretion in accordance with law and I do not find any material irregularity in the order impugned.

The revisional application is dismissed.

There will be, however, no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.

**(Shampa Sarkar, J.)**