

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee.

C.O. No. 238 of 2019

Newton Sk. & anr.
Vs.
Aamir Sk. & ors
(Through Video Conference)

For the petitioners: Mr. Partha Pratim Roy

For the opposite parties: Mr. Prosenjit Mukherjee
Ms. Poulami Dutta

Heard on: 28.01.2022

Judgment on: 03.02.2022

Ajoy Kumar Mukherjee, J.

1. Feeling aggrieved and being dissatisfied with the order dated 3rd October 2018 passed by learned Civil Judge (Sr. Division), 2nd Court Rampurhat, Birbhum in Title Suit No. 81/2013, present revisional application has been

preferred under Article 227 of the constitution of India inter alia on the following grounds :

- i)** The Learned Court below has failed to exercise its jurisdiction in not allowing the petitioners application for vacating ex-parte order against them.
- ii)** The Learned court below has exceeded its jurisdiction in *suo moto* directing the petitioners to be treated as the plaintiffs
- iii)** The learned Court below ought to have considered that the petitioners are entitled to file written statement, which is necessary for the conclusive adjudication of the rights of the parties to the suit and for such purpose the order for ex-parte proceeding against the petitioners, are required to be vacated in view of the fact that they have their respective shares in the suit properties.
- iv)** The learned Court ought not to have held that it is better to transpose the petitioners as plaintiff in absence of any application in this regard.

2. The case has a curious background. Present petitioners namely Newton Sk and Tomson Sk and one Safjar Sk, previously filed Title Suit No. 201/2001 before the 2nd Munsif Court, Rampurhat against present defendant No.2, Rejjak Sk and his 3 sons namely Sahjahan Sk, Basar Sk, Barjahan Sk, who are defendants No. 12,13 and 14 of present Title Suit No.81/2013. In the said Suit present Petitioners Newton Sk and Tomson Sk as plaintiffs had contended that the suit Property originally belonged to Erfan Sk, Insan Sk in eight anas share each. Said Erfan Sk died leaving behind his son Halim Sk and daughter

Munsera Bibi who inherited eight anas share of Erfan Sk in the present suit property, as well as suit property of that suit, jointly. Subsequently said Halim Sk and Munsera Bibi transferred their eight anas share in favour of plaintiff of that suit, namely Newton Sk, Tomson Sk and Sabjar Sk, by a registered deed dated 29.09.1999 and since purchase the aforesaid plaintiffs are possessing eight anas share in the suit property. It was revealed that the heirs of Insan Sk, had sold 01½ satak of land in favour of defendants. It also appeared that the defendants No.1 to 4, that means Sahajahan Sk, Basar Sk, Barjahan Sk and Rejjak Sk have manufactured a fraudulent deed which was allegedly executed on 20.07.1999 and was registered on 08.11.1999 in respect of suit property and they are falsely claiming that they have become owner of eight anas share of Halim Sk and Munsera Bibi. Accordingly present petitioners as plaintiff of that Title Suit 201/2001 had filed the said suit for a declaration that said deed which was allegedly executed on 20.07.1999 and was registered on 08.11.1999, as fraudulent deed and also prayed for preliminary decree for partition in respect of eight anas share in the suit property along with injunction and other reliefs. In the said suit said defendant No 1 to 4 namely Sahajahan Sk, Basar Sk and Barjahan Sk and Rejjak Sk filed written statement contending that admittedly suit property originally belong to Insan Sk and Erfan Sk, in eight anas share each and their names were duly recorded in R.S. Record of Rights (RSROR). Subsequently Insan Sk died leaving behind his wife Noseran Bibi and 5 daughters who inherited the same. After that by way of family settlement Noseran Bibi got entire eight anas share left by Insan

Sk. Noseran Bibi while was in absolute possession in the same, executed and registered a Hebanama deed on 22.05.1990 in favour of her eldest daughter Jahannegar Bibi who became the owner of said entire eight anas share in the suit property. On the other hand Erfan Sk died leaving behind Halim Sk and Munsera Bibi, who jointly inherited eight anas share, left by Erfan Sk. While said Munsera Bibi, Halim Sk and Jahannegar Bibi were in possession of the suit property, they transferred 04 satak of land in favour of the said defendant No. 1 to 4 namely Sahjahan Sk, Basar Sk, Barjahan Sk and Rejjak Sk. Defendants subsequently raised construction therein and are possessing the same. Said deed in favour of said defendants was executed on 23.07.1999 and was registered on 08.11.1999. Said defendants believe that the plaintiffs of that suit i.e. the petitioners, herein by way of false personification, have manufactured the deed dated 29.09.1999 and had filed aforesaid Title Suit No. 201/2001 before the 2nd Munsif court at Rampurhat. Infact Munsera Bibi and Halim Sk had never executed any deed in favour of plaintiffs on 29.09.1999. Subsequently said suit was dismissed for default vide order No. 33, dated 06.09.2006.

3. Suppressing the said fact, father of present petitioners namely Jelahas Sk filed present Title Suit No 81/2013, with an inconsistent pleading before the Learned Civil Judge (Sr.Division), 2nd Court, Rampurhat. Interestingly Jelahas Sk primarily filed this suit against one Amir Sk and aforesaid Rejjak Sk but subsequently on the basis of answer to the interrogatories, he has impleaded his 3 sons that is present petitioners namely Newton Sk and

Tomson Sk and Mafjar Sk as defendants No. 3, 4 and 5 and three sons of Rejjak Sk namely Sahjahan Sk, Barjahan Sk and Basar Sk as defendant No 13,14 and 15 along with other defendants. In the present Title Suit No. 81/2013 said Jelahus Sk that is the father of the present petitioners contended that suit property originally belong to Insan Sk and Erfan Sk in eight anas share each. Erfan Sk subsequently died leaving behind Abdul Halim and Munsera Bibi, who inherited Erfan's eight anas share each. Munsera Bibi subsequently transferred her share in favour of her brother Abdul Halim who became the absolute owner of the property, left by Erfan Sk and his name was duly recorded in the L.R. Record of Rights (LRROR). Subsequently Abdul Halim transferred said 02 ½ Satak of land in favour of plaintiff that is Jelahus Sk by registered deed dated 07.04.1999. Accordingly plaintiff's name also published in the LRROR. He admitted that defendant No. 2 Rejjak Sk has constructed a mud built house along with '*chala*' in a portion of the joint property. In fact suit property jointly possessed by plaintiff Jelahus Sk in respect of his 02 ½ satak along with the defendants. Defendants are trying to encroach plaintiffs land by making construction and for which plaintiff raised objection and requested for making amicable partition of the suit property but the defendants have refused to do the same and hence the suit for passing preliminary decree in respect of plaintiff's 02 ½ satak share in the suit property. Though in the plaint it had been stated by the plaintiff that the execution of deed in favour of the defendants dated 20.07.1999 which was allegedly registered on 08.11.1999, is a manufactured story but in the prayer portion of the present suit he has not

prayed for cancellation of said deed. Defendant 1 and 2 i.e. Amir Sk and Rejjak Sk filed written statement in the present suit and it appears from the written statement, that they have taken almost the same defence in the present suit, that they had taken in the earlier suit i.e. Title Suit No 201/2001.

4. The interesting fact to be noted herein is that in Title Suit No. 201/2001 son of Jelahus Sk namely Newton Sk and Tomson Sk, Safjar Sk claimed that Abdul Halim and Munsera Bibi transferred their eight anas share in the suit property in their favour (and not in favour of their father Jelahus Sk) by a registered deed which was executed and registered on 29.09.1999 but conversely the father of aforesaid plaintiffs of Title Suit No. 201/2001, claimed in present Title Suit No. 81/2013, that by a deed dated 07.04.1999 Abdul Halim, who became absolute owner of 02 ½ satak of land, transferred his said share in the suit property in favour of plaintiff Jelahus Sk and by that deed dated 07.04.1999, plaintiff that is Jelahus Sk became the owner of 02 ½ satak of land and he clearly asserted that defendants have falsely claimed that they have acquired title in respect of suit property by dint of any deed which was allegedly executed on 20.07.1999 and was registered on 08.11.1999.

5. In the said suit one Ajim Ali deposed as PW1 and he has stated that Abdul Halim has transferred his .02½ decimal share in favour of plaintiff through the deed which was executed on 07.04.1999. Badal Sk son of Jelahus Sk deposed as PW2 and contended that Abdul Halim, being the owner

transferred .02 ½ decimal of land in favour of Jelahus Sk which was executed on 07.04.1999 and he further contended that original plaintiff Jelahus Sk died leaving behind plaintiffs and defendant No. 3 to 5 and they became owner and possessor of the suit property to the extent of 02 ½ satak. He further stated that except defendant No 3 to 5 that means petitioners herein and Mafjar Sk, no other person have any right, title, interest in the suit property.

6. In the present suit defendant No 1 and 2 have brought aforesaid Jahannegar Bibi, wife of late Halim Sk, as defence witness, and she has stated that she along with her husband late Halim Sk and his sister Munsera Bibi transferred .04 decimal of the suit property by dint of a deed executed on 20.07.1999 and was registered on 08.11.1999 in favour of defendant No. 2, 12, 13 and 14. Son of Rejjak Sk namely Basar Sk, who is defendant herein also deposed and contended that Halim Sk and Munsera Bibi and Jahannegar Bibi transferred their .04 decimal of land to defendant No. 2 and his three sons, who are defendant No. 12,13 and 14.

7. From the aforesaid evidence it is clear that the defence of the principle defendant i.e. Rejjak Sk, remains the same, but the version of the other side changed in view of the fact that according to earlier Title Suit No. 201/2001 present petitioners became the owner of the suit property by registered deed dated 29.09.1999 but in the present suit their father Jelahus Sk claimed that he became the owner of the suit property by a registered deed dated

07.04.1999. Now according to the defendants both the deeds dated 29.09.1999 in favour of the petitioners herein and deed dated 07.04.1999 in favour of the petitioner's father Jelahus Sk are forged deeds and on the contrary plaintiffs contention is that the defendants' deed which was allegedly executed on 23.07.1999 and was registered on 08.11.1999 is a forged one.

8. Be it also mentioned that after closure of evidence by both the parties the present petitioners namely Newton Sk, Tomson Sk, have come up with two petitions one for taken off the suit from the peremptory board and the other for vacating the order of ex-parte hearing against said Newton Sk and Tomson Sk, who are the sons of original plaintiffs Jelahus Sk and are impleaded as defendant No 3 and 4 in the present case. It is also interesting to note that their father Jelahus Sk has placed the present petitioners in the category of defendants and it is again interesting to note that after the death of Jelahus Sk, his son Newton Sk and Tomson Sk and Mafjar Sk remained in the category of defendant and they were not substituted in place of original plaintiff Jelahus Sk who was their father. As the said defendants No. 3 and 4 Newton Sk and Tomson Sk did not file written statement, the said suit was posted for ex-parte hearing against them. By filing the aforesaid petitions the petitioners herein had prayed for vacating the order of ex-parte hearing against them and also for giving them an opportunity to contest by filing their written statement .

9. Learned Trial Court after hearing, was pleased to observe by the impugned order, that after the demise of Jelahus Sk, his one son namely Badal Sk, one daughter Rashida Bibi and wife Hazira Bibi were substituted as plaintiffs, but the other three sons of Jelahus Sk namely present petitioners and Mafjar Sk remains in the defendant category out of which defendants No. 3 and 4 that is present petitioners wanted to contest the suit by filing written statement. He further observed that their case is almost similar with that of the present plaintiffs and further more they are legal heirs of Jelahus Sk and as such he rejected the prayer for vacating order of ex-parte hearing and instead transposed said defendants No 3 and 4, i.e. petitioners herein, as plaintiffs in the suit.

10. In view of the aforesaid pleading in present suit and also evidence adduced in the present suit, it is clear that the real dispute raised for determination by the Trial Court is, whether principle defendants namely defendant No. 2,12,13, and 14 have acquired title in the suit property by dint of deed allegedly executed on 20.07.1999 and was registered on 08.11.1999 or the original plaintiff Jelahus Sk acquired title by way of deed which was allegedly executed on 07.04.1999 and was registered on 02.12.1999. Accordingly, as per the present case if the deed dated 07.04.1999 which was allegedly executed on 02.12.1999 stands, then all the legal heirs including the present petitioners have stepped into the shoes of deceased Jelahus Sk and their cannot have any conflicting interest in between present petitioners who are defendant No. 3 and 4 with that of present substituted plaintiffs as both

are heirs of deceased Jelahus Sk. On the contrary if the said deed in favour of Jelahus Sk is proved to be, not genuine before the Trial Court, then neither the substituted plaintiffs, nor the present petitioners who are heirs of Jelahus Sk, will have any case in this suit.

11. Needles to say that order 1 Rule 10(2) which deals with the transposition of the parties from one category to other, clearly begins with the words “ The Court may at any stage of the proceedings, either upon or without the application of either party.....”, which implies that the court can also on its own initiative, transpose a party from the category of defendants to the category of plaintiffs for the purpose of complete adjudication of the questions involved. The argument advanced by the Learned Counsel for the petitioners that the court cannot *suo moto* transpose the defendants as plaintiff, in the absence of any prayer, does not find any leg to stand. Only in cases where plaintiff and defendants having conflicting case, such transposition cannot be made unless plaintiff withdraws from suit. A person can very well be added as co-plaintiff when he adopts plaintiffs case. Here, existing plaintiffs have also not objected the transposition order passed by the Learned Trial Court. Moreover, existing plaintiffs have no adverse interest with that of the defendants No. 3 and 4 i.e. petitioners herein and the said petitioners have also not filed any written statement with a specific pleading that the suit is liable to be dismissed and as such I find nothing to interfere with the impugned order passed by the Learned Trial Court, for reasons stated above.

12. The petitioners herein i.e. defendant No. 2 and 3 argued that if the opportunity of filing written statement and to contest the suit, be not given to them, their interest will be prejudiced. I find no substance in the aforesaid contention. Firstly because in view of the aforesaid discussion it is apparent that the petitioners have no conflicting interest with the others heirs of Late Jelahus Sk, who are the present plaintiffs and secondly the present petitioners as plaintiffs in Title Suit No. 201/2001 have already disclosed their case against the self-same defendants in respect of the self same property. Though the said Title Suit 201/2001 was dismissed but the averments made by the petitioners therein shall remain and accordingly they cannot have any new inconsistent defence for which they can get the opportunity to file written statement or to contest against other legal heirs of Late Jelahus Sk.

13. C.O. No. 238/2019 is dismissed.

There will be no order as to costs .

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)