

14.9.2022
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Ct. no. 652
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C.O. 1215 of 2021

Sri Joynarayan Shaw and ors.

Vs.

Sri Raj Kumar Shaw

Mr. Ayan Banerjee
Ms. Debjani Sengupta ...for the petitioners

Mr. Dhananjoy Banerjee
Ms. Oindrila Ghosh
Ms. Ankita Maji ...for the opposite party

Being aggrieved and dissatisfied with the order no. 27 dated 28.5.2021 passed by learned Additional District Judge, Chandannagar, Hooghly in title appeal no. 21 of 2016, the present application under Section 227 of the Constitution of India has been preferred.

The petitioner contended that the opposite party instituted a suit for recovery of khas possession, damage and injunction against the petitioners which was registered as title suit no. 97 of 2011, before the learned Civil Judge, Junior Division, 1st Court, at Chandannagar. In the said suit the plaintiff/opposite party herein claimed himself to be absolute owner in respect of 'kha' schedule property by dint of a deed of gift dated 21.2.1989 executed by one Sundari kanu and their right already declared in T.S. 22 of 1994 and T.S. 275/1995. The opposite party herein as plaintiff alleged

that the petitioners herein had forcibly illegally trespassed upon the southern part of the suit property described as ka-1 property to the plaint and in spite of several request, the petitioners refused to vacate the suit property and as such the opposite party herein had instituted the aforesaid suit. The petitioners herein as defendants contested the said suit by filing written statement. In the written statement it was averred by the petitioners herein that the suit property was erroneously recorded in the name of Sundari Kanu and that she had no right title or interest in the suit property and as such the deed of gift executed by Sundari Kanu in favour of opposite party is invalid. Additionally they have pleaded that the petitioner and their predecessors are in possession of the suit property for more than 90 years and therefore they have acquired title in the suit property alternatively by way of adverse possession.

By judgment and decree dated 31st July, 2015, the learned Civil Judge, Junior Division, 1st Court, Chandannagar decreed the suit in favour of the plaintiff/opposite party. Being dissatisfied with the judgment and decree, petitioner herein preferred title appeal no. 21 of 2016 challenging the judgment and decree dated 31st July, 2015, before the court of learned Additional District Judge, Chandannagar, Hooghly where it is pending for adjudication.

During the course of hearing of the said appeal, the petitioners contended that it is now brought to their knowledge, that the previous lawyer of the petitioners has misguided them and the vital documents were not brought on record and as the petitioners being illiterate and was ignorant about the state of affairs, could not take appropriate steps during pendency of the suit.

Now the petitioner's contention is that the suit property was indeed previously owned and possessed by Sundari Kanu and her name was rightly recorded in RS record of rights and on 9th June, 1979, by virtue of registered sale deed being no 784 of 1979, Sundari Kanu transferred the entire suit property comprising of RS dag no 101, under khatian no. 43, in favour of Saraswati Kanu being the predecessor in interest of the petitioner no. 2. Thereafter, the petitioner obtained certified copy of the above-mentioned deed on 18th March, 2020 and it is clear therefrom that Saraswati Kanu was the owner of the entire property by virtue of sale deed and upon her demise the property devolved upon her legal heirs. The bona fide omission of the pivotal fact in the written statement has deprived the petitioners of a fair opportunity to prove their ownership and caused irreparable loss and injury to the petitioner/defendants. Accordingly, the petitioner herein filed an application under Order 6 Rule 17 of the Code of Civil Procedure in the aforesaid pending appeal before the additional

District Judge, Chandannagar praying for giving them permission to amend the written statement to bring them that pivotal fact on record which is very much crucial. The petitioner has also filed an application under Order 41 Rule 27 of the Code for marking the said certified copy of the sale deed as exhibit by way of additional evidence but unless the said fact of transfer by original owner Sundari Kanu in favour of the Saraswati Kanu is brought on record by way of amendment, the appellants/defendants are not in a position to adduce the additional evidence to prove the certified copy of the said deed.

Mr. Banerjee , learned counsel appearing for the petitioners submits that such amendment is very much essential to adjudicate the real dispute involved in the matter and thus, it goes to the very root of the case. Learned trial judge erred in exercising the jurisdiction vested upon him by not allowing the petitioner to carry out the necessary amendment to incorporate the factum of exercise of a prior title which is necessary and interlinked with the defence of the defendant and he was erred in holding that if the proposed amendment if allowed, it would amount to withdrawal of admission and such defence may be inconsistent. Learned trial court further failed to appreciate that the defence of adverse possession may be inconsistent with a defence of absolute ownership but they are not mutually

destructive and as such there is no bar in allowing the amendment to incorporate alternative case by the appellant. Learned court below also failed to appreciate that the implication of the sale deed is very much relevant for determination of the ownership of the parties and existence of such instrument is not a new defence being created by the petitioners but an act of bringing the fact to this case. Trial court also failed to appreciate that sale deed was not within the knowledge of the petitioner and in any case, the discovery of such document being a subsequent event, the amendment should have been allowed because it is settled position of law that bona fide omission of necessary amendment ought to be brought on record if it is required to determine the real question in controversy and if allowed it will no way displace the case of the plaintiff. In this context, he relied upon case laws reported in **(2006) 6 SCC 498**, **(1998) 1 SCC 278** and **(1976) 4 SCC 328** in support of his contention that even an inconsistent plea can be allowed if it is required to determine the real controversy between the parties.

Learned counsel for the opposite party Mr. Dhananjay Banerjee submits that proposed amendment if allowed it would amount to withdrawal of admission which was made by the defendants in their written statement. In this context, he has pointed out the averment made by the petitioners/defendants in their

written statement in para-7 wherein the petitioner plaintiff has categorically stated that the Sundari Kanu was not an absolute owner of the suit property and she had no right to execute or register the deed of gift in favour of the plaintiff. Moreover, in para-8 the petitioner defendant has contended that one Bharti Kundu (Saha) got settlement of 5 kattas of land and he constructed straw shaded rooms and started living therein and “Patta” and “kabulati” were granted. Furthermore in para-9 they have also contended that the name of Sundari Shaw has been erroneously recorded in the record of rights and she has not acquired any right title and interest in the suit property .

Now by way of amendment they want to incorporate the completely inconsistent new case which discloses that the Sundari Kanu was absolute owner of the suit property and her name was correctly recorded in the record of rights and said Sundari Kanu sold the suit property by registered sale deed being 784 of 1979 in favour of Saraswati Kanu at a considerable price of Rs. 3,000/- and put her in possession of the same and said Saraswati Kanu is residing there along with her family members till date. He contended that said amendment cannot be allowed at the appellate stage and in this context, he has relied upon the case laws reported in **AIR 2008 SCW 4113** and **AIR 2009 SC 2544** and also **AIR 1998 SC 618** in support of his contention that the

admission made in the written statement cannot be allowed to be withdrawn specially when the defendant has taken the plea in the written statement that Sundari Kanu was not the owner of the suit property and her name was erroneously recorded in the record of rights.

He further submits that the defendants/petitioners earlier filed suits being no. 22 of 1994 and 275 of 1995 for declaration of their title which were dismissed by judgment and decree passed in those suits, against which the defendant/petitioners preferred appeal, which is still pending for disposal.

In view of the judgment reported in **M/s. Revajeetu Builders and Developers vs. M/s. Narayanaswamy and Sons and ors.** reported in **(2009) 10 SCC 84** the apex court had laid down the factors to be taken into consideration while dealing with the applications for amendment after critically analysing both the Indian cases and English cases. The factors may be reproduced below:

“67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought 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.”*

In view of the aforesaid observation made by the apex court let us see whether the proposed amendment can be allowed or not.

In response to the question as to whether the amendment sought for is imperative for proper and effective adjudication of the case, answer is “yes” simply because the issue in controversy is whether plaintiff became owner by way of deed of gift executed by Sundari Kanu in the year 1989 or defendants predecessor become owner by way of registered purchase deed in the year 1979. Unless the amendment is incorporated the real question in controversy as to who is the owner of the suit property cannot be adjudicated.

Now whether the application for amendment is bona fide or mala fide, learned counsel appearing on behalf of the plaintiff/opposite party has not brought anything in the record to show that the proposed amendment is not *bona fide* or *mala fide*. Moreover from the conduct of the defendants/ petitioners, it appears that the application for amendment was made *bona fide* because if it was known to the petitioners that their predecessor has become owner of the property by way of sale deed in the year 1979, they must not have initially taken the defence in the written statement that they

have acquired title in the suit property by way of adverse possession. As regards the next point that is whether the amendment would cause such prejudice to the other side which cannot be compensated adequately in terms of money, does not arise in the present context because the proposed amendment is required to determine the real controversy between the parties and as such causing prejudice to the other side which cannot be compensated adequately in terms of money does not arise. On the contrary refusal of proposed amendment may lead to multiplicity of proceedings because the trial court has already held on the basis of plaintiff's deed that the plaintiff is the owner of the property. Now defendants alleged earlier deed if not brought on record in this suit or appeal by way of amendment, obviously it would lead to multiplicity of proceedings.

Now as regards the point as to whether the proposed amendment would fundamentally change the nature and character of the case, the answer still is "no", because proposed amendment if allowed suit will remain suit for determination of title in the suit property that is whether the plaintiff is the owner of the suit property or defendant has become owner of the suit property prior to the plaintiff. The question of barring the proposed amendment by way of limitation does not arise in the present case.

Considering the aforesaid factors, which are necessary to be taken into consideration while disposing of the application for amendment, it appears to me that though defendant by way of amendment wants to incorporate inconsistent plea namely initial plea that Sundari Kanu was not owner and her name was wrongly recorded to a plea that Sundari Kanu was real owner and her name was correctly recorded, but such inconsistent plea is required to be allowed for the adjudication of the real controversy between the parties as stated above.

Having considered the aforesaid facts, the impugned order no. 26 dated 28.5.2021 is hereby set aside. Prayer for amendment of the written statement as sought for by the defendants/petitioners is allowed. The defendant is directed to amend the written statement as per schedule of the amendment petition and to file amended written statement before the court below within a period of four weeks from the date of the communication of the order.

Accordingly, C.O. 1215 of 2021 is disposed of.

Urgent Photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)