

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1795 of 2016

**Badan Chandra Adak
Vs.
Sovan Banerjee**

For the Petitioner : Mr. Buddhadev Ghosal
Mr. Souri Ghosal

For the Opposite party : Ms. Susmita Chatterjee
: Ms. D.Ganguly
Mr. K. Bhattacharya

Heard on : 09.11.2022

Judgment on : 24.11.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order no. 35 dated 14.09.2015 passed by the Additional District Judge, at Uluberia, Howrah, in Title Appeal No. 165 of 2011, present revisional application has been preferred. By the impugned order learned court below was pleased to reject appellant's prayer for amendment made under order VI rule 17 of the code of the Civil Procedure.

2. Petitioner contended that Hiren Banerjee since deceased inducted the petitioner/defendant as a premises tenant in respect of the suit property. On

the basis of the impugned letter of surrender dated 22.06.1997 said Hiren Banerjee since deceased as plaintiff filed the instant suit for eviction under section 13(K) and (J) of the West Bengal Premises Tenancy Act, 1956 alleging surrender of tenancy. During the pendency of the suit Hiren Banerjee died intestate and according to the original plaintiff, since deceased, the defendant was monthly premises tenant of the suit premises at a rental of Rs. 200/- per month payable according to the English Calendar month. According to the deposition, adduced before the trial court the petitioner has surrendered his tenancy on 22.06.1997 and the defendant is no longer a tenant of the suit property since 01.01.1999 . Hiren Banerjee affirmed the affidavit of evidence on 08.06.2005. Petitioner contended that petitioner suffered the decree of eviction on 19.04.2011 against which Title Appeal No. 165 of 2011 was filed before the learned District Judge, Howrah which is now pending before learned Additional District Judge, Uluberia for disposal. Petitioner further contended that the original advocate of the petitioner herein died and it is under the advice of the newly appointed advocate, an application for amendment of the written statement was filed before the learned Appellate court and after contested hearing learned Appellate Court by the order impugned, rejected appellants prayer for amendment of the written statement, mainly on the grounds that it is a belated one and some facts are already on record.

3. Mr. Buddhadev Ghosal learned counsel appearing on behalf of the petitioner contended that learned court below has acted illegally and with material irregularity in passing the impugned order and he has failed to exercise the jurisdiction so vested to it by law. The learned court below has

acted with material irregularity in rejecting the prayer for amendment of written statement on the ground of delay. He further submits that under section 107 of the Code of Civil Procedure (CPC) the learned Appellate Court enjoys the same power with that of the power of the trial court in respect of disposal of the said petition. In fact delay is no ground for rejection if the proposed amendment is required for effective and conclusive adjudication of the dispute between the parties. Mr. Ghosal further submits that the proposed amendment is required for elucidation of fact and if it is incorporated the opposite party will have no cause to prejudice. In this connection Mr. Ghosal has relied upon the case laws reported in **(2012) 5 SCC 583, (2006) 6 SCC 498 (2001) 2 SCC 472, (2012) 5 SCC 337, AIR 1969 SC 1267** and contended that amendment petition cannot be refused on technical grounds. Mr. Ghosal further argued that even in ***Daji Raoji Patel's Case*** reported in **(2012) 5 SCC 583**, Apex Court refused to interfere, where amendment of pleadings allowed by First Appellate Court, 30 years after filing of suit and in ***Ragu Thilak D-Jon's Case*** reported in **(2001) 2 SCC 472**, Apex Court held, where it is arguable that relief sought by way of amendment would be based by law of limitation, amendment should still be allowed.

4. Mr. Gagnully learned counsel appearing on behalf of the opposite parties submits that the judgment cited by the learned counsel for the petitioner is not applicable as in those cases proposed amendments were required to adjudicate real question in controversy. Furthermore on perusal of earlier prayer for amendment made by the petitioner it is evident that the self same prayer was made before the trial court. Furthermore it is reflected from

judgment also that learned trial court has considered the contention that has been sought to be incorporated by way of amendment and ultimately passed the judgment after considering the said issue. Learned counsel for the opposite party in this context relied upon the case laws reported in **2010 SCC OnLine P & H 5528, (2020) 11 SCC 549.**

5. I have carefully perused materials in record and also considered submissions made by both the parties. On perusal of the written statement filed by the petitioner before the trial court it appears that plea taken by the petitioner in paragraph 13 of written statement is that the property mentioned in the plaint belonged to Haripada Bhattacharyaa who died leaving behind two sons namely the plaintiff and one Gora Bhattacharyaa and another daughter. About 25 years back the heirs of Haripada inducted defendant as monthly tenant at a rent of Rs. 125/- per month and as such the defendant being tenant under two sons and daughter of deceased Haripada, is paying rent to them month by month. It is further contended in the said paragraph 13 of the written statement that the defendant/petitioner was the classmate of the plaintiff and they had very cordial relationship and for which the defendant and the defendant's wife never disbelieved them. All on a sudden in the month of June, 1997 plaintiff and his brother and sister came to the defendant and his wife and said as per the new rules for taking electric connection, meter is required to be installed in the name of each tenant and for which the tenant is required to prepare an application for getting separate meter through the owner of the house. Accordingly the defendant and his wife were asked to put signature on blank paper and at that time plaintiffs assured them that said

signed blank paper would be used as an application for getting new meter and would be deposited in the electric office at Uluberia. Due to cordial relationship and trust among the parties, the defendant and her husband had to put signature on blank paper but now it transpires that by practicing fraud, undue influence and misrepresentation the plaintiff has procured the said blank paper into a letter of surrender. In fact the letter of surrender dated 22.06.1997 as mentioned in the plaint is a fraudulent document and was never intended to be acted upon. In the said written statement an alternative prayer has been made contending that the term of lease granted to plaintiffs has already expired and as such the legal heirs of Haripada Bhattacharyaa has no right title interest in the suit plot and it has already been vested to the Government. In view of said fact also the defendant is not ejectable from the suit premises.

6. On perusal of the judgment passed by the trial court in Title Suit No. 88/2000, it appears that learned court below has dealt with the issue appropriately under the heading “Issue no. 4 and 6” and has made the following observation:-

“Both the issues are taken up simultaneously. This is very important issue which is to be decided in the light of evidence that have been adduced by the party. It is an admitted position that the defendants happened to be the tenant in respect of the suit premises till 01.12.1998 on and from 01.01.1999 the defendants became trespasser to the suit property. Documents related to surrender of tenancy has been executed by the defendants on 22.06.1997 which will take effect from 01.01.1999. The ld. Advocate for the defendant submitted that document related to the surrender of tenancy has been obtained by fraud by the plaintiff but after perusal of the entire evidence adduced by DW. Nothing transpires that the defendant was made to sign over white sheet of paper which was subsequently manufactured into document related to surrender of tenancy. On the other hand, the plea that has been taken up by the defendant was negated in cross-examination when he admitted in the

cross-examination that “there are electric connection over the said two rooms”. This clearly gives an idea that there was electric connection and the defendant, at best could have executed the document for some other purpose but not for obtaining electric connection. In the cross-examination he further admitted that he has not lodged any complaint before the local police station regarding the signature that was obtained by the plaintiff in a white sheet of paper in order to obtain electric supply. From the question that comes in mind is why he kept silent for such long period of time till the suit has been filed and then he came up with this plea. Thus, the plea regarding signing in a white sheet of paper and the documents of tenancy being manufactured does not hold good. The defendant, on the other hand, in his cross-examination admitted that he has surrendered the tenancy right in favour of Hiren Banerjee after the expiry of December, 1989 and executed document of surrender by putting his signature voluntarily. Thus, from the scanning the entire cross-examination of D.W. 1 it is clear that he executed document of surrender of tenancy out his own volition and it is not the manufactured document. The same is corroborated when P.W.1 was cross-examined, it transpires that the defendant put his signature on the deed of surrender in presence of P.W.1 and the latter of surrendering the tenancy has been executed in favour of P.W.1’s father. Another question that came up is whether notice is required to serve upon the defendant as this is the case related to eviction of tenant. The ld. advocate for the defendant submitted that in case of eviction serving of notice to the defendant/tenant is a mandate and there cannot be any deviation from the same. In reply to the contention raised by ld. Advocate for the defendant ld. Advocate for the plaintiff Sri Majumder cited 85 CWN 494 wherein the Hon’ble court decided that if the eviction sought is on the ground of agreement to vacate u/s. 13 (1) (k) then the question of notice u/s. 13(6) of the WBPT Act, 1956 does not arise at all. Thus, the question of serving notice upon the defendant is not at all necessary. Upon consideration of all the discussions made earlier it is clear that the defendant on and from 01.01.1999 became the trespasser to the suit property by virtue of executing documents relating to surrender of tenancy on 22.06.1997 and the same document is not null and void as alleged by the defendant and it is binding upon the defendant. Thus, both the issues are decided in favour of the plaintiff.”

7. Now on perusal of the schedule of the amendment as filed before the Appellate court, it appears from the translated version that the schedule of the amendment runs as follows:-

“Schedule of the amendment

At the end of paragraph 13 of the written statement before the words “for the aforesaid reasons”, the following portion to be added in the written statement:-

Now the defendant further submits that in fact in the year 1997, the original plaintiff came to the defendant and his wife with two independent blank sheet of papers obtained their respective signatures

on the plea of providing separate electric meter though signed blank papers are in the custody of the plaintiff. In fact, there is no agreement of surrender of tenancy in the year 1997. So far the defendant now remembers in the month of 1997 at the request of the plaintiff since deceased to maintain friendship and cordiality having agreed to release the suit room by the end of December, 1988, the said plaintiff in his own handwriting drafted the dispute letter and this defendant and his wife put their signatures therein. The plaintiff with an ulterior motive has written the said letter in such a manner as if the same was written in the year 1997 by putting the date under such writing and subsequently the last two lines has been incorporated for the purpose of suit and filed in court and in order to prove that the said letter was written in the year 1997. There is tampering of the digit 8 by practicing fraud and has been used with mala fide motive for the purpose of the suit.

This defendant further submits that though there was understanding of surrendering of the said room by the end of December, 1988 but in view of the long understating cordial relation and the faith and in the abuse of the requirement of the plaintiff, the defendant and his wife was allowed and accepted to continue with the tenancy on receipt of the monthly rents.

It is also stated that after the amendment of Section 3 (A) of the L.R. Act, 1986 by way of paramount title, the title of the plaintiff underneath, the suit property having vested to the State and recorded in Khatian No. 1, the plaintiff lost all his claim therein or after the death of original plaintiff, his heir could not inherit anything.”

8. In view of the of the aforesaid quotations it is clear that the issue which defendant /appellant wants to substitute by way of amendment in the written statement, has been sought to be made to make out a new story in their original written statement. As during evidence it has been established that there were previous electric connection in the tenanted premises and that defendant had executed deed of surrender voluntarily, as reflected in the judgment, so by way of amendment they now want to patch up a new story that a talk of surrender held in 1988 and a deed of surrender was signed in 1988 which has been subsequently manipulated , by tampering digit “8”, which he could not recollect at the time of filing written statement and now he has allegedly recollected the incident of said execution and subsequent manipulation done by plaintiff, which he want to incorporate by way of

amendment, “ under the advice of the newly appointed advocate” at the appellate stage.

9. Under the proviso to rule 17 of order VI, no application for amendment shall be allowed after trial has commenced, unless inspite of due diligence, the matter could not be raised before the commencement of trial. The back ground of introduction to that proviso has been discussed by the Apex Court in para 43 in the matter of **A.N. Pandey & another Vs. Swami Keshavprakeshdasji N. & others** reported in **(2006) 12 SCC 01** which runs as follows:-

“43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief.”(emphasis added)

10. Although there is no dispute that civil court has absolute discretion to allow amendment at any stage of suit, but applicant has to explain that despite due diligence, such amendment could not be made before commencement of trial and such amendment is required to be incorporated in the pleading to adjudicate real question in controversy between the parties. Here

defendant/petitioner has explained “due diligence” by stating that he could not recollect the incident of executing deed of surrender in 1988 and that after death of earlier advocate as per advice of new advocate, petitioner wants to elaborate his defence. Such conduct of the petitioner persuaded to hold this court that proposed amendment has been filed by defendant in order to adopt dilatory tactics so that the decree of eviction dated 19.04.2011 in connection with a suit instituted in 2000 get frustrated. I am also of the view that by way of praying such amendment defendant made an attempt to put the clock back, when the trial completed and suit decreed. In support of the same one judgment of this court reported in **2001(3) CHN 228** in the matter of ***Aktar Hossain & others Vs. Susama Rani Sahoo & others***, can be referred wherein it was held that no amendment can be allowed which will mean a retrial of the whole case on a new footing at a late stage.

11. In view of the aforesaid discussion I find nothing to interfere with the ultimate finding of the trial court and I am of the clear view that the present vexatious application for amendment has been filed by the defendant/appellant before the appellate Court in order to take a chance to delay the proceeding further before the Appellate Court for an indefinite period, so that the decree obtained by plaintiff get frustrated. The proposed amendment which is not only inconsistent but also a clear afterthought, incorporation of which is not at all required because said controversy about surrender of tenancy has already been dealt with elaborately by the trial court and has been adjudicated finally and obviously Appellate Court will not indulge to change colour of defence at

appellate stage specially when petitioner has not explained that despite due diligence such amendment could not be made at early stage.

12. C.O. 1795 of 2016 is accordingly dismissed with a cost of Rs. 25,000/-. The petitioner shall deposit the cost of Rs. 25,000/- to the Calcutta High Court Legal Services Authority within a period of four weeks from the date of communication of the order as condition precedent for further proceeding with the appeal and if such deposit is made within the prescribed period, the Appellate court shall make every endeavour to dispose of the appeal within a period of six months thereafter.

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.)