

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 2964 of 2019

**Sri Dibakar Roy
Vs.
Sri Mahadeb Samanta**

For the Petitioner : Mr. Dilip Kumar Saila

For the Opposite party : Mr. Ashis Kumar Chowdhury
: Ms. Sabita Mukherjee
Ms. Rajasree Paul
Mr. Rohan Paul

Heard on : 27.09.2022

Judgment on : 11.11.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order no. 32 dated 17th August 2019 passed by the Additional District Judge, 1st Court, Suri, Birbhum in Miscellaneous appeal No. 2/2017, present application under Article 227 of the Constitution of India has been preferred.

2. Petitioners contended that the petitioner filed an application under section 8 of the West Bengal Land Reforms Act 1955 before the Civil Judge,

(Junior Division) 1st Court at Bolpur being Misc. Case No. 28/2011. Petitioner's contention in the said pre-emption case is that 'kha' schedule property originally belonged to Nilkantha Roy and after his death the same was devolved upon his three sons namely Ganapati, Sripati and Ramapati Roy in equal share. Subsequently 1/3rd share of Sripati devolved upon his five sons, out of which pre-emptor is one of the said sons. Property in question never partitioned among co-sharers. Subsequently 1/3rd share of Rampati devolved upon his two sons Gadadhar and Gangadhar. Gadadhar and his wife subsequently transferred their share in favour of pre-emptee described in 'kha' schedule. The pre-emptee is a stranger to the property in question, therefore on the ground of co-sharership the petitioner is entitled to pre-empt the transaction.

3. Opposite party contested the said application by filing written objection contending that the opposite party is not the stranger to the property in question but he is the co-sharer of the holding of the original raiyat. He further contended that the application for preemption is barred as the petitioners have prayed for partial pre-emption, which is not permissible in the eye of law. Accordingly prayed for rejection of pre-emption application.

4. Said application came up for consideration before the trial court and by an order dated 17th January, 2013 the said application was dismissed and challenging the said order the petitioner herein preferred an appeal being misc. appeal no. 8/2013, but said appeal was also dismissed. Further case of the petitioner is that challenging the said order petitioner herein preferred revisional application before the Hon'ble Single Bench, being C.O. 3587/2017

and the Hon'ble Court vide order dated 8th July, 2015, was pleased to dispose of the Revisional Application by remanding the matter before the learned Trial Court with a direction to the learned Trial Court for fresh considerations and Hon'ble Court was further pleased to keep open all the points for consideration by the Trial Court.

5. After remand the trial court by order dated 17th December 2016 was pleased to allow the said application for preemption by holding that the petitioner herein is a co-sharer in respect of 'Kha' schedule property and opposite party failed to prove any title in respect of the suit plots.

6. Being aggrieved by the said order the opposite party preferred said appeal before the Learned District Judge, Birbhum which was registered as Misc. Appeal No. 2/2017. During the pendency of the said appeal the opposite party herein filed three applications, two were under order XLI rule 27 of the Code of Civil Procedure and the other one under order VI rule 17 of the code of Civil Procedure.

7. Mr. Dilip Kumar Saila learned Counsel appearing on behalf of the petitioner submits that in the application under order VI rule 17 of the code of Civil Procedure the opposite party intended to bring certain facts afresh in the written objection by way of amendment, stating *interalia* that the opposite party purchased property of plot No. 960,1046 and 1219 and further got share in plot No. 960/1232/2315/1233/1266/1267 by way of inheritance from his father jointly with his three other brothers prior to the purchase of plot by the petitioner herein. He further contended that the aforesaid fact was not brought due to laches and negligence on the part of the learned advocate. Mr. Saila

further contended that the petitioner herein contested the said application by way of filing written objection and denied all material allegations and specifically contended that the opposite party herein is trying to plug the loop holes in the pleading and further case of the petitioner is that in view of the amendment of Civil Procedure code made in 2002, the proposed amendment is clearly barred in terms of proviso to order VI rule 17 of the code.

8. However, the learned Appellate Court by the impugned order was pleased to direct that the applications under order XLI rule 27 will be heard and disposed of at the time of final hearing but the Appellate Court allowed the application under order VI rule 17 of C.P.C. filed by the opposite party herein. Mr. Saila further contended that the trial court failed to appreciate that at the appellate stage, amendment of written objection cannot be allowed for the purpose of plugging the loop holes in the original pleading. He further contended that the Appellate Court acted illegally in allowing application under order VI rule 17 without recording any finding, whether the opposite party in spite of due diligence could not bring those facts, before commencement of the trial. Mr. Saila further contended that the Appellate Court failed to appreciate that in the order of remand passed by this Hon'ble Court, there is no permission for either amendment of pleadings or for adducing any additional evidence and in the absence of such permission, Appellate Court acted without jurisdiction by allowing the amendment application to plug the loop holes in the pleading. Accordingly he prayed for setting aside the impugned order dated 17th December, 2016 passed by learned ADJ, 1st Court Birbhum in aforesaid Misc. Appeal No. 2/2017. In this context he relied upon

case laws reported in **2006(12) SCC 1, 2022 2 ICC 726 (Cal), 2019 (1) WBLR (Cal) 595, 2009 (2) SCC 409, 2022 (1) ICC 588 (Cal), 2016 (2) WBLR (Cal) 135.**

9. Mr. Asish Kumar Chowdhury learned Counsel appearing on behalf of the opposite party submits that the power of court to grant amendment to pleading is intended to serve needs of justice, and is not governed by any narrow or technical limitations. He further contended that court should always take liberal view to give relief to amend pleading unless it is satisfied that party applying for amendment had acted *malafide* or that by his blunder he had caused injury to his opponent which cannot be compensated. He further contended that the prayer for amendment of plaint and a prayer for amendment of written objection does not stand on same footing. He further contended that in order to clarify existing pleading, present amendment is required to be allowed which does not in substance add or alter any new case and learned Appellate Court was justified in allowing the amendment as merely for a mistake or inadvertence, the amendment cannot be refused unless it is shown that such amendment, if allowed, would cause prejudice to the other side. In this context he has relied upon the judgment of the Apex Court passed in **Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and others** and another case **Mahila Ramkali Devi and others Vs. Nandram and others.**

10. On perusal of the judgment passed by trial court it appears that in support of allowing the aforesaid prayer for amendment of plaint at appellate stage the learned Appellate Court was pleased to held that the trial court

allowed the prayer for pre-emption observing that it was pleaded specifically that although some documents were adduced by opposite party but there was no such pleading regarding those documents and in some matters, although there was pleading, but evidence was not adduced in that line. Accordingly the court held that if the amendment is allowed it will not change the nature and character of the proceeding but will only explain or narrate as to how the opposite party has inherited or acquired his co-sharership over the suit plots where he himself purchased the suit property, which was prayed to be pre-empted by the petitioner. Accordingly if amendment of written objection is allowed, the trial court held, that there would be no change of nature and character of the proceeding. On the contrary if the amendment is refused and Appellant be not allowed to adduce evidence for want of pleading, then it will amount to throwing him out from the purchased land inspite of being a co-sharer if he can prove his co-sharership and appellant would be non-suited inspite of having his claim of co-sharership for not giving an opportunity to prove it. Therefore the learned Appellate Court held that the prejudice that may be caused to the opposite party herein, in case the amendment is not allowed is far more than the prejudice that may be caused to the Appellant/pre-emptor, and in case the opposite party fails to prove his co-sharership as claimed in the pleading by way of amendment, certainly he would not succeed to defend the case and petitioner would succeed. So according to the court below since no nature and character of proceedings will be changed by the proposed amendment and since there is no chance of causing prejudice to the others side if proposed amendment is allowed so,

amendment application was allowed by the court below subject to payment of cost of Rs. 3,000/-.

11. I have gone through the proposed amendment along with its objection. The objection raised by the petitioner herein is mainly on the ground that the amendment at appellate Stage cannot be allowed for the purpose of plugging loop holes in the original pleading and learned court below had not recorded any finding whether the opposite party inspite of due diligence could not bring those facts before the commencement of trial. The other part of argument raised by the petitioner is that while the remand order was passed by this Hon'ble Court, no permission for amendment of pleading or for adducing any additional evidence was given and as such learned court below had gone beyond his jurisdiction, while allowing the prayer for amendment under order VI rule 17.

12. Needless to say that when an order of open remand has been made by the Appellate Forum, no further permission for amending plaint or for adducing additional evidence is required to be given. It is true that in view of the proviso to order VI rule 17, no application for amendment shall be allowed after the trial has commenced, unless the court comes to conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial. In the present case what the opposite party by way of amendment wants to incorporate is that opposite party was already a co-sharer in respect of suit property both by way of purchase in respect of some suit plots and also by way of inheritance from his father who happened to be a co-sharers of those plots since long before the petitioner /respondent became

co-sharer of the suit plots by virtue of purchase in 2011. Further contention is unfortunately due to the laches and negligence on the part of the learned advocate appeared before the Trial Court, inspite of having those documents in their custody, those were not tendered during trial nor those facts were mentioned in the pleading for which he prayed for allowing the amendment of written objection.

13. In *Mahila Ramkali Devi and others Vs. Nandrarm and others* reported in **(2015) 13 SCC 132**, the Hon'ble Apex Court clearly held that it is well settled that rules of procedure are intended to be a hand made to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting *malafide* or that his blunder caused injury to his opponent, which cannot be compensated for by an order of cost.

14. In *Revajeetu Builders and Developers Vs. Narayanaswamy & Sons and others*, reported in **(2009) 10 SCC 84** the Apex Court has laid down the factors to be taken into consideration while dealing with application for amendments in paragraph 67 which may be quoted 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.”

15. There is no dispute over the well-settled proposition of law and as mandated in the statute and reflected in the case laws cited as above by the petitioner that upon failure to exercise due diligence at the appropriate stage inspite of having sufficient opportunity to do so, the mandatory proviso to rule 17 of order VI of the code attracts. But here proposed amendment is not sought to introduce any new or inconsistent case, nor proposed amendment appears to be an afterthought or has been filed only to drag the proceeding, but has been sought to be incorporated for complete and effective adjudication of the dispute between the parties, in order to avoid multiplicity of judicial proceedings over the self-same subject matter of the case and as such, in my view, said cases laws are not strictly applicable in the present context.

16. In the present context for determination as to whether the opposite party's claim of co-sharer ship is justified or not, the proposed amendment is required for proper and effective adjudication of the case. There is nothing to show that the application for amendment is made *mala fide* because inspite of having the documents in their custody, the opposite party cannot have any just ground for not filling the same before the trial court unless there is any unintentional latches on the part of the opposite party or his conducting lawyer. Proposed amendment if allowed, would not cause such prejudice to the other side which cannot compensated adequately in terms of money, on the

contrary refusal of amendment may give birth to multiple litigations. Furthermore, proposed amendment will not fundamentally change the nature and character of the case, because the proposed amendment, if allowed, the case will remain a case for pre-emption.

17. In view of above I find nothing to interfere with the ultimate findings made by the trial court as by way of proposed amendment the opposite party only wants to elaborate the grounds that he has already taken in the case and it would not amount to addition of new ground of defence or proposed amendment if allowed would not amount to substituting or altering a defence nor it would amount to inconsistent pleading in the written objection.

18. C.O. 2964 of 2019 is thus dismissed on contest.

19. However 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.)