

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.626 of 2018**

=====

Tarkeshwar Pandey S/o Late Vedvyas Pandey, Resident of Village- Harihans,
P.S.- Hussainganj, P.O.- Harihans, District- Siwan.

... .. Petitioner/s

Versus

1. Sahabuddin Ansari S/o Late Ajimuddin Ansari
2. Saheb Alam @ Munna, S/o Late Jamil Miya
3. Rahimuddin Ansari, S/o Late Ajimuddin Ansari
4. Yusuf Jamal, S/o Haider Ali,
5. Amzad Ali, S/o Late Ashad Ali, All Resident of Village- Harihans, P.S.- Hussainganj, District- Siwan.

... .. Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. Parth Gaurav, Adv. Mr. Umesh Kumar Singh
For the Respondent/s	:	Mr. Chandra Kant, Adv.

=====

**CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
CAV JUDGMENT**

Date : 11-01-2023

1. The present application has been filed challenging the order dated 12.03.2018 passed by learned Sub-ordinate Judge XII, Siwan in Title Suit No. 110 of 2013 whereby the amendment petition of the petitioner filed in the counter claim has been rejected.

2. The brief facts of the case is that Title Suit No. 110 of 2013 was filed by the plaintiff-respondent 5th set in the court of Subordinate Judge-1st, Siwan for declaration that the disputed property is the ancestral property of the plaintiff and defendant 1st set and defendant 2nd set have no concern with the property in



dispute along with other reliefs. The defendants appeared and filed collusive written statement inasmuch as according to the petitioner the suit filed by the plaintiff -respondent 5th set was collusive in nature. When the petitioner came to know about the filing of the suit he immediately filed an application for adding him as party defendant in the suit in which he succeeded and was allowed to be impleaded as defendant no. 5 in the suit.

3. The petitioner / defendant no. 5 filed contesting written statement and also filed his counter claim on 27.04.2015 praying therein to declare his title and possession over Schedule- 1 land described in the counter claim and also to hold that the plaintiff as well as defendant nos. 1-4 have no concern with the property in dispute. It has also been prayed to declare that the sale deed dated 13.09.1940 executed by Most. Bahora Kuer in favour of Kitabuddin and also the sale deed dated 07.03.2011 executed by Haider Ali in favour of the plaintiff and defendant 1st set as void, illegal, inoperative etc. It has also been prayed in the counter claim to declare that the sale deed dated 15.02.2011 executed by Riyazuddin Ansari as power of attorney holder in favour of Haider Ali as void, illegal, inoperative and subsequent sale deed in favour of the plaintiff and defendant nos. 1-4 be also declared as void and illegal and not binding upon the defen-



dant no. 5 / petitioner.

4. Further case of the petitioner / defendant no. 5 in the counter claim in short is that for the first time after going through the plaint the defendant no. 5 got knowledge that the plaintiff and defendant 1st set were claiming their title over the land in dispute on the basis of a forged sale deed dated 07.03.2011. After being added as a party in the suit, the defendant no. 5 / petitioner came to know that Riyazuddin Ansari and Juber Ansari have executed sale deed dated 15.02.2011 in favour of Haider Ali, S/o Asad Ali on the basis of power of attorney from the defendant no. 5 with respect to the disputed land. It has also been stated that Matsira Kuer, Bahora Kuer and Manu Pandey had no relation with the defendant no. 5 neither with the disputed land and no sale deed dated 13.09.1940 was ever executed by the defendant no. 5 in favour of Kutibadin Ansari, S/o Imamudin Ansari and if any document of such nature is produced by the other side then the same be considered as fraudulent and without any consideration. The so-called vendee namely, Kutibuddin Ansari has got no title on that basis. Kutubuddin Ansari had two sons namely, Riyajuddin Ansari and Jubair Ansari, who had no concern with the land in question which was in exclusive possession of the petitioner and any



power of attorney executed on 15.02.2011 in favour of Haider Ali, S/o Asad Ali and consequent thereto the execution of sale deed on 07/03/2011 is completely fraudulent act and has no concern with the petitioner and not even binding on him as the disputed property is the property of the petitioner and he is in peaceful possession over the land in dispute.

5. The defendant no. 5 / petitioner in the counter claim further stated that the disputed land is the ancestral property of the petitioner standing in the name of Tapeswar Pandey and even his name was recorded in the recent Survey Khatian. The said Tapeswar Pandey had mortgaged the suit property to Md. Musa on 28-12-1917 and 14.6.1920.

6. The grandfather of the petitioner namely Brij Kishore Pandey paid the mortgaged money in favour of Md. Musa on 20.07.1932 and redeemed the mortgaged property. Md. Musa acknowledged the receipt of the amount on a plain paper.

7. In the year 2017, the Title Suit No. 110 / 2013 filed by the plaintiff- respondent 5th set was withdrawn by him and the suit proceeded with the counter claim / plaint. During pendency of the suit the petitioner was dispossessed by the defendant nos. 1 – 4 on 12/12/2017 before framing of issues i.e. at pre-trial stage. The defendant no. 5 filed an application under Order 6



Rule 17 of the C.P.C. on 15-01-2018 for amendment of the counter claim. The necessity for filing this amendment according to the petitioner arose when defendant nos. 2 to 4 dispossessed the petitioner on 12/12/2017 and on the basis of reply of the counter claim submitted by defendant nos. 2 to 4 before the trial court.

8. Reply to the amendment petition has been filed by defendant nos. 3 & 4 on 29.01.2018 contending that the amendment petition is barred by law of limitation and the amendment sought is frivolous, malafide and will change the nature of the suit.

9. Learned counsel for the petitioner while assailing the impugned order submits that the amendment petition has been filed in order to bring the subsequent event on record and for determination of the real question of controversy between the parties and that too at pre-trial stage i.e. before framing of issues. Order 6 Rule 17 of the C.P.C. confers wide jurisdiction on the court to allow either party to alter or amend pleadings at any stage of the proceedings on such terms as may be just. Pre-trial amendment ought to be allowed liberally than those which are sought to be made after commencement of the trial. At the stage when amendment application is filed, the court is not required to



investigate the truth or falsehood of the same. The dominant purpose of allowing the amendment is to minimize the litigation and the plea that a relief sought by way of amendment was barred by time is arguable in the facts of the case. There is an arguable point whether limitation is applicable in seeking relief of declaration and whether facts of this case falls under Article 58 of the Limitation Act, 1963 or under Article 64 or Article 65 of the Limitation Act, 1963 which is to be decided in the trial. The merit of the amendment sought to be incorporated by way of amendment is not to be adjudged at the stage of consideration of the prayer for amendment. He further argues that no period of limitation applies in redemption of usufructuary mortgage. For such the limitation is usually governed as per Section 62 of the Transfer of Property Act and in case of usufructuary mortgage mere expiry of period of thirty years from the date of creation of mortgage does not extinguish the right of the mortgagor. Learned counsel for the petitioner in support of his argument has relied upon the judgments reported in 2014(4) PLJR 457, (2001) 2 SCC 472, (2004) 6 SCC 415, (2006) 4 SCC 385, (2014) 9 SCC 185, Civil Appeal No. 89 of 2012 and 2018 (1) PLJR 91 (S.C.).

10. Learned counsel for the respondents submits that in



the counter claim the petitioner has claimed the relief for declaration of title over the suit land with a declaration that the original plaintiff and defendant nos. 1 - 4 have no concern with further relief that the sale deed dated 13.09.1940 & 07.03.2011 and power of attorney dated 15.02.2011 be declared as forged and fabricated.

11. In the amendment petition at page no. 5 it has been prayed to add some line in the relief no. (i) which is about cancellation of the sale deeds dated 13.09.1940 & 07.03.2011 and power of attorney dated 15.02.2011. This part of the relief is barred by law of limitation inasmuch as as per Article 59 of the Limitation Act only three years time is allowed to file suit for cancellation of the sale deed but by way of amendment sale deed dated 13.09.1940 has been challenged and on this ground the relief claimed by the petitioner is barred by limitation and amendment cannot be allowed. Learned counsel relies upon a judgment reported in AIR 2019 SC 1430 in support of this argument.

12. Learned counsel for the respondents further submits that insofar as relief no. 1(k) is concerned, the same will completely change the nature of the suit inasmuch as the suit has been filed for declaration of title and now by the proposed



amendment the suit would be converted into a mortgage suit for redemption, which is not permissible as it is settled law that nature of suit cannot be changed by the party and if the nature of the suit is going to change then that cannot be allowed by the Court. He next submits that earlier suit was filed under Section 34 of the Specific Relief Act for declaration of title and now if amendment is allowed then it will come under Order 34 of the Civil Procedure Code which relates to suit relating to mortgage of immovable property in which preliminary decree as well as final decree are passed. In support of his argument he relies upon the judgment reported in AIR 2008 SC 2134. He further argues that the judgment cited by the petitioner reported in (2014) 9 SCC 185 is not applicable in the facts of this case inasmuch as the point for consideration in the aforesaid case was that where no time limit was fixed for redemption then limitation will apply in the case of usufructuary mortgage or not but in the present case four years time has been fixed in the mortgage deed to redeem which expired in 1924 and thereafter limitation of thirty years provided by Article 61(a) of the Limitation Act starts clicking.

13. I have heard learned counsel for the parties and have perused the material on record including the counter claim as



well as amendment petition filed by the petitioner. From perusal of the amendment petition it appears that petitioner has sought to amend the counter -claim cum plaint and the proposed amendment no. (i) is for restoration of possession inasmuch as according to the petitioner the petitioner was in possession of the disputed property from where he has been dispossessed during pendency of the suit. The second proposed amendment pertains to correction of paragraph numbers of the counter -claim. The third proposed amendment pertains to Ad Valorem Court Fee and by fourth proposed amendment the petitioner wants to add in relief no. (i) the word “cancellation of sale deeds mentioned in relief no. (i)” and by proposed amendment no. (v) the petitioner wants to add that if the petitioner fails to prove the redemption of the mortgaged property during the course of the trial in that event, the petitioner be permitted to redeem the suit property by paying the mortgage money to the defendant nos. 2-4, who in turn be directed to accept the same and to hand over the possession in favour of the petitioner.

14. Insofar as the proposed amendment no. (i) is concerned, the petitioner has prayed for restoration of possession inasmuch as as per the contention of the petitioner that the petitioner was in possession of the disputed property and during



pendency of the suit he has been dispossessed on 12.12.2017. This proposed amendment is based upon the subsequent event as such in my opinion the same can be allowed.

15. Insofar as proposed amendment no. (ii) is concerned, it pertains to correction of paragraph numbers in the plaint and is corrective and formal in nature. Accordingly, proposed amendment no. (ii) can also be allowed.

16. By the proposed amendment no. (iii) the petitioner wants to pay Ad Valorem Court Fee in view of the prayer of the petitioner for restoration of possession, in my opinion, proposed amendment no. (iii) can also be allowed.

17. From the facts narrated by the petitioner in the counter- claim and the relief claimed therein it transpires that the petitioner has stated that for the first time after going through the plaint the petitioner / defendant no. 5 got knowledge about the forged sale deeds dated 07.03.2011 and sale deed dated 13.09.1940. The petitioner in relief no. (i) has already sought a declaration that the sale deeds dated 07.03.2011 & 13.09.1940 be declared void and fabricated and now by way of amendment the petitioner wants to add further that the said sale deeds be cancelled.

18. The contention raised by learned counsel for the re-



spondents that addition of the word “cancellation of sale deeds” will render the suit as time barred as per Article 59 of the Limitation Act is not acceptable at this stage on the ground that the petitioner has already in his counter -claim as relief no. (i) has sought to declare the sale deeds in question as void and fabricated and merely adding the word “cancellation of the sale deeds” does not change the nature of relief which the petitioner has already claimed. The question of relief being time barred is a mixed question of law and fact which can be decided during the course of trial after framing of the issue. Accordingly, in my opinion, the proposed amendment no. (iv) to the extent addition of the word “cancellation of sale deeds” to be added in the relief no. (i) should be allowed. The Hon’ble Supreme Court in a judgment reported in (2008) 14 SCC 632 South Konkan Distilleries & Anr. Vs. Prabhakar Gajanan Naik & Ors. in paragraph no. 21 has held that amendment seeking to introduce claim which was arguably time barred, in such case, the amendment should be permitted and an issue be framed on the question whether the amended claim was barred by law of limitation or not.

19. Insofar as proposed amendment no. (v) is concerned, in my opinion, the same can not be allowed for the reason that it



is specific case of the petitioner in the counter- claim cum plaint that his grand father Brij Kishore Pandey had paid the mortgage money to Md. Musa in the year 1932 and redeemed the mortgage on 20.07.1932. Now by way of amendment the petitioner wants to add further relief in the plaint on the plea that if during course of trial the petitioner fails to prove the redemption of the mortgage property the petitioner be permitted to redeem the suit property by paying the mortgage money to the defendant nos. 2-4. The basis of the suit is based on the fact that mortgage property was redeemed in 1932 and the petitioner has acquired title and possession over the suit property since then, the suit filed by the petitioner is a declaratory suit and if the proposed amendment no. (v) is allowed the basis of the suit along with nature and character of the suit will certainly change inasmuch as the suit for declaration of title will change into a mortgage suit that too after full fledged trial if the petitioner fails to prove the redemption of mortgage in 1932.

20. I find force in the argument advanced by learned counsel for the respondents as well as the finding of the court that if this amendment is allowed the same will change the nature of the suit.

21. Since I have arrived at the conclusion that the amend-



ment no. (v) can not be allowed, therefore, I am not entering into the question raised by the parties as to whether redemption of usufructuary mortgage in question is barred by limitation or not.

22. In view of the discussions and reasons stated herein-
above, the impugned order dated 12.03.2018 passed in T.S. No. 110 / 2013 is modified to the extent that proposed amendment no. (i), (ii), (iii) & (iv) are allowed and proposed amendment no. (v) is rejected.

23. Accordingly, the petitioner is permitted to incorporate proposed amendment nos. (i), (ii), (iii) & (iv) in the plaint with the permission of the trial court.

24. This application is disposed of accordingly.

(Anil Kumar Sinha, J)

praful/-

AFR/NAFR	AFR
CAV DATE	28-11-2022
Uploading Date	11-01-2023
Transmission Date	NA

