

23.2.2023
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Ct. no. 652
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**C.O. 536 of 2019
With
CAN 1 of 2020 (Old CAN 1290 of 2020)**

**Everglow Investment (P) Ltd.
Vs.
Rupesh Kr. Shaw & Anr.**

Mr. Farhan Gaffar
Mr. Navneet Bhotika
Ms. Sangita Sarkar
Ms. Soba Yasmin
Mr. Rittik Chowdhury ...for the petitioner

Mr. Sourajit Dasgupta
Mr. Akash Munshi
Ms. Susrea Mitra ...for the O.P. No. 1

Mr. Arijit Bardhan
Mr. Rashab Dutta Gupta ...for the O.P. no. 2

Being aggrieved and dissatisfied with the order dated 4.12.2018 passed by the learned Civil Judge, Senior Division, 10th Court, Alipore, South 24 parganas in Title Suit no. 56 of 2011 which heard analogously with Title Suit no. 24 of 2014, present application under Article 227 of the Constitution of India has been preferred.

Petitioner contended that in the year 1997, one Mishri Lal Shaw, deceased father of the opposite party no. 1 herein and Bhola Prasad Shaw, brother of Mishri Lal Shaw, who is opposite party no. 2 herein, represented them as joint and absolute owners of the premises in question to the petitioner company herein to sell entire

third floor measuring an area of 2650 square feet together with one covered car parking space on the ground floor with proportionate right and privilege to use the common area and benefits for an agreed sale consideration of Rs. 35,77,500/- to the petitioner herein. He further submits that an agreement for sale, dated 2.5.1997 to that extent was executed by and between the parties. Accordingly, from time to time, the petitioner herein has paid Rs. 35 lakhs out of total consideration amount of Rs. 35,77,500/- to the opposite parties herein and the same was duly acknowledged by the opposite parties. The balance amount of Rs. 77,500/- was to be paid by the petitioner to the owner at the time of execution and registration of deed of conveyance. The owners Mishri Lal Shaw and his brother, Bhola Prasad Shaw duly delivered vacant and peaceful possession of the said property in favour of the petitioner in the month of January, 1998. Said Mishri Lal subsequently died. Thereafter, from time to time, the petitioner made various personal representations for execution and registration of sale deed by accepting the balance of consideration amount but opposite parties on one pretext or other avoided to execute registered deed. Subsequently, in reply to the petitioner's letter dated 18.12.2020, to execute the deed of conveyance, the opposite party represented, as soon as completion certificate in term of sanctioned building plan will be awarded and corporation will issue clearance

certificate, the deed would be executed. Opposite parties instituted a writ application before the Calcutta High Court where the petitioner was also made a party and in the said writ application owners admitted that respondent no. 5 had purchased the entire third floor. The petitioner thereafter made payment of Rs. 8,50,000/- in respect of proportionate share of taxes in respect of entire third floor. The petitioner requested on various occasions for execution of deed of conveyance in respect of suit property which was ultimately turned down by the opposite parties and under such circumstances the petitioner was compelled to institute the suit for decree of specific performance of contract calling upon the defendants to execute the deed of conveyance. Said suit originally numbered as T.S. 2149 of 2019 and subsequently said suit renumbered as T.S. 24 of 2014. Subsequently opposite party no. 1 herein Rupesh Kumar Shaw, who is son of said Mishri Lal Shaw, instituted present Title suit being no. T.S. 56 of 2011 against petitioner herein as defendant no. 1 and said Bhola Shaw, brother of Mishri Lal Shaw as defendant no. 2, inter alia praying for a decree of eviction of licensee stating present petitioner/defendant no. 1 as licensee. As subject matter property of both T.S. 56 of 2011 and aforesaid T.S. 24 of 2014 are same, court below is trying both the suits analogously. In the said suit i.e. in T.S. 56 of 2011, after three years, plaintiff/opposite party no. 1

herein filed an application under Order VI rule 17, for amendment of the plaint and learned court below was pleased to allow the said application for amendment.

Learned counsel for the petitioner submits that the subject matter of amendment which the plaintiff/opposite party no. 1 wants to incorporate, is in contradiction to the admission made by his father, Mishri Lal Shaw in writ petition no. 213 of 2005 and also contents of reply given to the advocate of the petitioner against legal notice, on 3.9.2005. He further submits that in the written statement as well as in the additional written statement filed by the defendant no. 2 in T.S. 24 of 2014, it is admitted that the petitioner i.e. Everglow Investment Private Limited has entered into an agreement for sale for purchase of entire third floor and it was never alleged by the original owners that the payments made was towards licence fee as alleged now by the son of Mishri Lal Shaw. The petitioner had duly made payment a sum of Rs. 35,00,000/- out of total consideration price of Rs. 35,77,500/-.

Learned counsel for the petitioner specifically submits that though in the plaint n T.S. 56 of 2011 it has been stated by opposite party no. /plaintiff in paragraph 12 that taking advantage of payment of such sum, the defendant prevailed upon the defendant no. 2 and Mishri Lal Shaw to sign an agreement purported to be agreement for sale, but by the proposed amendment, the

defendant sought to delete the said portion by adding new sentence that it was not an agreement for sale but it was security against loan account. Such sort of admission that the defendant no. 1/petitioner herein agreed to purchase the said flat, cannot be taken away by way of amendment and as such learned court below was erred in allowing the said application. Learned counsel for the petitioner in support of contention relied upon two judgements reported in AIR 2008 SC 2003 and AIR 1977 SC 680.

Learned counsel for the opposite party in support of the order impugned contended that court below rightly held that by way of proposed amendment, the plaintiff/opposite party does not want to take away any admission. He only sought to elaborate the fact that they have already made in the plaint. He further submits that the merits of the subject matter of the amendment application cannot be adjudicated at the time of disposal of the amendment application. He also relied upon a judgement reported in (1996) 2 SCC 25 and contended that even inconsistent plea can also be incorporated by way of amendment, unless it cause, serious prejudice to the opposite parties.

I have gone through the schedule of amendment and considered the submissions made by both the parties.

Learned counsel for the petitioner submits that he has objection in connection with amendment that is sought to be incorporated in paragraph (b), (e) and (f) of the schedule of amendment application. On perusal of the said schedule of amendment application, it appears that plaintiff/opposite party wants to incorporate in point (e) that the “alleged agreement is nothing but security against such loan account, the alleged agreement is not an agreement for sale in respect of third floor of premises no. 56/2, Hazra Road, P.S. Gariahat, Kolkata-19” and in the point no. (f) of the schedule of amendment, he wants to incorporate the sentence that “the said amount is a loan amount and alleged agreement is nothing but a paper of security against the loan” and paragraph (b), he wants to incorporate the words “after completion of building”.

It appears that the plaintiff/opposite party no. 1 herein has categorically stated in paragraph 11 of plaint that the plaintiff has come to know that the defendant has paid more or less Rs. 35, 34,000/- on various dates and this amount was received by defendant no. 2 for clearing the loan taken from different creditors and in paragraph 12, he has stated that taking advantage of payment of such sum, the defendant prevailed upon the defendant no. 2 and Mishri Lal Shaw to sign an agreement purported to be agreement for sale.

In view of above, it is quite clear that plaintiff/petitioner by way of amendment has not sought for deletion of any portion from the plaint and it is in fact, an attempt to explain in his own way the contention that he had taken in paragraph 11 and 12 of plaint by way of amendment as appearing in paragraphs (e) and (f) of the schedule of amendment.

In my view the question as to whether impugned agreement is an agreement for sale or agreement towards security cannot be considered at this stage and it will always be open for consideration before court below if the amendment is allowed. Though in paragraphs (d), (e) or (f), plaintiff/opposite party no. 1 has not prayed for deletion of any word and they wanted to add new sentence as a part of explanation but even if they would have made any admission in pleading earlier, explanation of such admission by way of amendment is not impermissible, though parties may not be allowed to withdraw admission from their pleading. Actually, withdrawal of admission means deletion of statement relating to such admission as substitution of one set of fact in place of facts already stated in the pleading, which is not the case in the present context. Merit of subject matter of amendment is not to be adjudicated at the time of hearing amendment application.

The case law relied by petitioner reported in AIR 1977 SC 680 is not applicable in the present context as it

is not a case where by way of amendment plaintiff wants to change completely the case, that he has made in his plaint earlier. Similarly the factual aspect in the other case law relied by petitioner and reported in AIR 2008 SC 2003, is different. Present case is not a case where effect of admission made in pleading earlier is sought to be taken away by way of amendment. Accordingly, principle laid down in said case is also not applicable in the present context. Accordingly, I find nothing wrong to interfere with the ultimate observations in the order impugned made by the court below.

In view of above, I do not find any merit in the present application. Accordingly, C.O. 536 of 2019 is dismissed and the order impugned is accordingly affirmed.

Pending application, if any, is also 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.)