

S/L 28 & 29
30.01.2023
Court No.652
SD

CO 709 of 2021
With
CO 713 of 2021

Sri Nirapada Hazra & Ors.
Vs.
Sekh Sarfuddin & Ors.

Mr. S.T. Meena
Mr. Anirban Datta

...for the Petitioner.

Mr. Debjit Mukherjee
Ms. S. Chatterjee
Ms. D. Ganguly
Mr. K. Bhattacharya

...for the Opposite Parties.

Being aggrieved and dissatisfied with the order no.25 dated February 14, 2020 passed by the learned Civil Judge (Senior Division), Sreerampore, Hooghly in Title Appeal No.26 of 2016 arising out of Title Suit No.62 of 2006, the application being CO 709 of 2021 has been preferred.

Similarly, being aggrieved and dissatisfied with the same order dated February 14, 2020 passed by the same court in Title Appeal No.27 of 2016 arising out of Title Suit No.196 of 2005, the application being CO 713 of 2021 has been preferred.

Be it mentioned Title Suit No.62 of 2006 was instituted by Sekh Sarfuddin and others (sekhs) for declaration of title and injunction against Nirapada Hazra and others (Hazras) and on the other hand Title Suit No.196 of 2005 was instituted by aforesaid Hazras against aforesaid Sekhs for declaration of absolute right, title and interest in respect of schedule mentioned property to plaintiff. Learned

trial court heard both the aforesaid suits between Hazras and Sekhs analogously and after trial decreed Title Suit No.196 of 2005 instituted by Hazras and dismissed Title Suit No.62 of 2006 instituted by Sekhs. Being aggrieved by the judgment and decree, Sekhs being plaintiffs of Title Suit No.62 of 2006 preferred Title Appeal No.38 of 2014 subsequently renumbered as Title Appeal No.27 of 2016 said Sekhs being defendants of Title Suit No.196 of 2005 preferred Title Appeal No.37 of 2016 which renumbered as Title Appeal No.26 of 2016. While learned First Appellate Court is hearing both the appeals analogously, common appellants of both the appeals filed amendment application for making same amendment in plaint of aforesaid Title Suit No.62 of 2006 and written statement of aforesaid Title Suit No.196 of 2005.

Since the issues involved in both the revisional applications are same in connection with same prayer for amendment, one in the plaint in Title Suit No.196 of 2005 and the other in respect of same amendment in written statement in Title Suit No.62 of 2005, both the revisional applications are hereby disposed of by this common order.

By the impugned order, learned court below was pleased to allow common appellant's prayer for amendment and thereby allowed amendment of plaint of Title Suit No.62 of 2006 and written statement of Title Suit No.196 of 2005.

In the said judgment passed by the trial court analogously in the aforesaid Title Suit No.196 of 2005 along with Title Suit No.62 of 2006, the court below observed that

the defendant of Title Suit No.196 of 2005 asserted their title over the suit property by three registered deeds of sale which have been marked as Exhibit A, B and C and from the cross-examination of DW1 it appeared that the vendor of defendants, namely, Aminur Bibi is the mother of the defendant no.1 and the court below prima facie disbelieved that Aminur Bibi, mother had sold the property to her sons and he held that it is quite impossible that a mother had sold her property to her son. Moreover, the learned court below also held that vendor of the defendant, Aminur Bibi, claimed that she acquired the property by way of purchase and she purchased the same from auction sale but defendants never pleaded anything about the acquisition of property by Aminur Bibi by way of auction purchase and in the Exhibit A, B and C nothing has been mentioned from whom and in which auction sale Aminur Bibi purchased the suit property. Accordingly, the court below held that though defendant could not state as to who were the owner of the suit property prior to Aminur Bibi and defendants have heard from their mother that their mother purchased the suit property by auction sale which took place at Serampore Court in the year 1935 but they do not know anything about the sale certificate and they could not say the case number in connection with which the auction took place, and as such disbelieving appellant's purchase from Aminur Bibi decided both the suits against present appellants.

In the said two appeals, the appellants have sought for the amendment that on 20.6.1935 in a rent execution case

no.168 of 1935 Aminur Bibi purchased the suit property from auction sale on a consideration price of Rs.120/- and said auction sale was in connection with above execution case arising out of Rent Suit No.253 of 1932 in the court of 3rd Munsif, Serampore.

In support of the aforesaid amendment prayer, the appellants have contended that during pendency of the suit, the sale certificate was not traceable and now the appellant has got the sale certificate all of a sudden and as such, they want to incorporate the said fact in the plaint.

Learned counsel appearing on behalf of the opposite party vehemently opposed the said prayer and contended that in view of the proviso to Order VI Rule 17, the appellant has not pleaded the case of due diligence and the ground stated in the petition that the said sale certificate was not traceable at that time and now they have found it all of a sudden, is not sufficient to prove that they exercised due diligence before commencement of trial of the suit.

In this context, they have relied upon judgment of Apex Court in the case of **Pandit Malhari Mahale vs. Monika Pandit Mahale & Ors.** reported in *AIR Online 2020 SC 847* and in the case of **Shri P. Sivan & Ors. vs. Smt. P. Shantha & Ors.** reported in *(2019) 6 WBLR (Cal) 153*, in the case of **Krishna Pan (Dutta) vs. Dulal Das** reported in *2020 (2) ICC 24 (Cal)*.

Learned counsel appearing on behalf of the opposite parties in reply submits that by way of amendment, he is not going to incorporate any new case and on the contrary this is

the case of explanation of the earlier case by way of amendment. He is not going to incorporate any inconsistent fact or anything new fact by way of amendment and as such, prayer for amendment is required to be allowed.

On perusal of written statement filed by defendant nos.1, 2 and 3/appellants herein in Title Suit No.196 of 2005, it appears that in paragraph 19 they have taken a specific plea that the defendants had purchased the property from Aminur Bibi by three separate deeds in 1972, 1975 and 1989. They have further stated that the name of their vendor Aminur Bibi was duly recorded in RS settlement and before the aforesaid sale in favour of the defendants, she had absolutely right, title and interest in the suit property.

Learned court below while allowing the aforesaid prayer for amendment was pleased to held:-

“In the instant case on hand the amendment has been sought for to incorporate the fact that Amanu Bibi became owner of the property by way of purchase in auction sale in rent execution case No.253 of 1932. Wherein sale certificate was issued in her name. The amendment do not seem to me as inconsistent with the plea already taken by them in their plaint as it has been stated that Amanu Bibi was the owner of the property in whose name RS-ROR was duly recorded. The Ld Trial Court while passing the judgment has held that from Exbt. A, B and C it is found that the vendor Aminur Bibi acquire the property by way of purchase from auction. But the said fact has not been mentioned in the W/S nor any document has been produced. The Trial Court therefore finding no case in favour of the plaintiff dismissed the suit. The petitioner therefore, has moved this Court filing appeal wherein the present amendment has been sought for.

In the present circumstances it can well be construed that the facts sought for to be amendment is not inconsistent with the plea of ownership of Aminur Bibi already taken in the plaint rather it is in consonance to the plea already taken by the defendant and it can better be called as a vital omission on the part of the defendant. The documents marked Exbt. 1 also speaks about the issuance of sale certificate in favour of Aminur Bibi. So the fact of ownership of Aminur Bibi is already on record and though the fact about the sale certificate is not the part of the plaint filed by the plaintiff. Such omission on the part of the plaintiff as is not inconsistent with the plea cannot take a way the right of the plaintiff to bring home the contention that Aminur Bibi was the owner of the property by virtue of the sale certificate issued in her name. I therefore is inclined to allow the instant petition but with cost.”

On perusal of the pleading of the appellant in both the aforesaid suits, it cannot be said that by way of amendment the defendant/appellant has tried to taken away any admission in their original pleadings nor had the appellant sought to withdraw any admission made by them in their pleading.

After going through the schedule of amendment, it appears that the appellant seeks only elaboration and want to clarify the earlier inadvertance and confusion made in the pleading. The proposed amendment being not inconsistent plea and since it is already subsisting in the pleadings, it can be said that it has been filed only to elaborate his earlier pleading.

In this context reliance has been placed in the case of **Baldev Singh & Ors. vs. Manohar Singh & Anr.** reported in **(2006) 6 SCC 498** where it was held in paragraph 14.

“14. As noted hereinafter, the case set up by the plaintiff-Respondent 1 was that his parents had no money to purchase the suit property and it was the plaintiff-Respondent 1 who paid the consideration money. In the written statement, this fact was denied and further it was asserted in the written statement that the suit property was in fact purchased by their parents and they had sufficient income of their own. In the application for amendment of written statement it was stated that the plaintiff-Respondent 1 did not have any income to pay the consideration money of the suit property and in fact the parents of the plaintiff-Respondent 1 had sufficient income to pay the sale price. It was only pointed out in the application for amendment that after the death of their parents, the suit property was mutated in the joint names of the plaintiff-Respondent 1 and the defendants in equal shares. Therefore, the question whether certain admissions made in the written statement were sought to be withdrawn is concerned, we find, as noted hereinafter, there was no admission in the written statement from which it could be said that by filing an application for amendment of the written statement, the appellants had sought to withdraw such admission. It is true that in the original written statement, a statement has been made that it is Defendant-Appellant 1 who is the owner and is in continuous possession of the suit property, but in our view, the powers of the court are wide enough to permit amendment of the

written statement by incorporating an alternative plea of ownership in the application for amendment of the written statement. That apart, in our view, the facts stated in the application for amendment were in fact an elaboration of the defence case. Accordingly, we are of the view that the High Court as well as the trial court had erred in rejecting the application for amendment of the written statement on the ground that in the event such amendment was allowed, it would take away some admissions made by the defendant-appellants in their written statement. That apart, in Estralla Rubber v. Dass Estate (P) Ltd. [(2001) 8 SCC 97] this Court held that even if there were some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff-Respondent 1 so as to take away any accrued right.”

In this context, reliance has also been placed upon **Usha Balashaheb Swami & Ors. vs. Kiran Appaso Swami & Ors.** reported in **(2007)5 SCC 602** wherein it was held that admission can be explained and it would be permissible while keeping the admission intact. Here even if proposed amendment is allowed, the admission made by the appellant that their vendor, Aminur Bibi was the original owner of the suit property remains intact.

It is now well-settled that even the admission can be explained and even inconsistent pleas could be taken in the pleadings when a definite stand has been taken and subsequent application has been made to modify their earlier stand, I find that there is no material irregularity committed by the first appellate court in allowing the said application for amendment.

In **Baldev Singh & Ors. vs. Manohar Singh & Anr.**, it has been held that if the fact as mentioned in the schedule of amendment is merely an elaboration of defence case then such amendment can be allowed.

From the written statement filed by defendant in Title Suit No.196 of 2005 it appears that in paragraph 19, defendants/appellants herein had taken specific plea that they purchase property from Mst. Aminur Bibi was in absolute possession before sale by paying rent and taxes and the name duly recorded in R.S. settlement. From trial court's judgment it is apparent that in the defendant/appellant's purchase deed, it is recited that defendant/appellant's vendor Aminur Bibi got the suit property by way of purchase from auction. It also appears from said judgment that defendant as DW-1 stated that auction sale took place in the Serampore Court. In spite of that learned trial court disbelieved the said evidence of DW-1 and also recitals in defendants deeds on the ground that if Aminur Bibi purchased the same from auction sale from Serampore Court, she must have sale certificate and recital in defendants deeds executed by Aminur Bibi cannot take place of sale certificate. Accordingly, Trial Court held in the absence of specific pleading on this point and in the absence of sale certificate, Aminur Bibi had no right, title and interest in the property and she had no authority to confer title to defendants. Now by way of amendments, defendants only wants to elaborate the aforesaid purchase by Aminur Bibi from auction sale in Serampore Court which the defendant/appellant had already disclosed before trial court.

It is true that amendment has been filed at a belated stage, when it is pending before the Appellate court i.e. long after commencement of trial, but the dominant purpose of

allowing an amendment application is to minimize litigation. The golden rule in this context as laid down in judicial pronouncements are, if the application for amendment is mala fide, worthless and dishonest and is designed to delay legal proceedings, the same should be discouraged, but if the amendment sought is bona fide, legitimate honest and necessary, the court must not refuse the same. Here proposed amendment even if allowed, it will not constitutionally or fundamentally changes the nature or character of the case, as even after amendment, the suit will remain a suit for determination whether plaintiff's vendor Aminur Bibi had any title in the property or not and whether defendants acquired any right, title and interest in the property from Aminur Bibi or not.

In answer to absence of exercise of due diligence by Appellants, I am inclined to refer a case in **Mahila Ramkali Devi & Ors. vs. Nandaram & Ors.** reported in **AIR 2015 SC 2270**, it was held in paragraph 20 as follows:-

“20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. 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 mala fide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.”

In **Revajeetu Builders and Developers vs. Narayanswami and Sons & Ors.** reported in **(2009) 10 SCC 84** laid down factors to be taken into consideration while dealing with application for amendment.

“63. *On critically analysing 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 the present case, I have already stated that both the parties have claimed their ownership in respect of the suit property by way of declaration and accordingly, whether the defendant’s vendor Aminur Bibi had any right, title and interest or not and whether she has acquired any such title in the suit property by way of auction sale or not is the important issue which is required to be considered while adjudicating the real dispute between the parties.

In view of the above, since there is nothing to show that the application has been made by the appellants is mala fide nor is of such that the other side cannot be compensated adequately in terms of money and on the contrary proposed amendment if allowed will not constitutionally or fundamentally change the nature and character of the case rather refusal may lead to multiple litigation and that the proposed amendment is required for effective and conclusive adjudication of dispute between the parties and, I find nothing to interfere with the order impugned.

In view of the above, both the revisional applications being CO 709 of 2021 and CO 713 of 2021 are dismissed.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)