

Item No. 16
17.07.2023
Court. No. 19
GB

C.O. 1879 of 2022

Sri Swaraj Majhi
Vs.
Sri Phelu Ram @ Phelu Dhan Hazra & Ors.

*Mr. Tanmoy Mukherjee,
Mr. Souvik Das,
Mr. K. Haihan Ahmed,
Mr. Rudranil Das,
Mr. Soumava Santra*

...for the Petitioner.

*Mr. Soumik Ganguly,
Mr. Avik Kumar Das,
Mr. Dilip Kumar Sadhu*

...for the Opposite Party Nos.1 to 4.

Mr. Prosenjit Barman

...for the Opposite Party Nos.5 to 7.

The revisional application is directed against an order dated June 9, 2022, passed by the learned Civil Judge (Senior Division), 2nd Court at Howrah in Title Suit No.55 of 2016.

By the order impugned, the learned court below rejected an application for amendment of the written statement filed by the added defendant no.4. The defendant no.4 is the lessee in respect of a portion of the suit property which forms a part of the joint undivided property. During the pendency of the partition suit, some property which were included in the hotchpotch, had been transferred inter se between the parties. As a result of which, the landlord and/or the lessor of the defendant no.4 changed. This aspect was sought to be brought in by the defendant no.4, by filing an application for amendment.

The application for amendment was filed in order to incorporate the factum of transfer of 1/3rd share of Khandobala Dasi to the Bandopadhyays, by virtue of a deed of sale. On account of subsequent transfers, the shares were considerably reduced.

The defendant no.4 was impleaded as a party by the plaintiff. Assumption is that the defendant no.4 was a necessary and a proper party according to the plaintiff. Thus, the defendant no.4 has the right to rebut such assertion of the plaintiffs and also raise the further pleas. He had the right to set out his case and also elaborate and clarify his defence by incorporating new facts, especially with regard to subsequent transfers his position as a lessee on account of such transfer etc.

Mr. Ganguly, learned advocate for the plaintiffs/opposite parties submits that the lessee does not have any right to challenge the title of the lessor or the title of the co-sharers of the lessor. The right of the lessee would not be affected by the aforementioned transfers of the property which was sought to be incorporated by way of an amendment.

Heard the parties. Whether the quantum of property sought to be partitioned stood reduced or whether by virtue of the sale by Khandobala to the Bandopadhyays, some property was taken out from the joint property and had become exclusive properties of the Bandopadhyays and hence not amenable to partition are matters on merit. Genuineness and correctness of the statements made in the

amendment application shall be decided at the trial, on evidence. By way of an amendment, the defendant no.4 sought to introduce a case that the subsequent transfer by Khandobala Dasi to the Bandopadhyays amounted to sale of an exclusive demarcated area, which would not fall within the purview of the partition suit and which resulted in alteration of the shares of the co-sharers.

In ***Revajeevu Builders and Developers vs. Narayanaswamy and Sons and ors.*** reported in ***(2009) 10 SCC 84***, Paragraph 26, of which is quoted below:-

“26. In the same judgment of Usha Balashaheb Swami [(2007) 5 SCC 602] , the Court dealt with a number of judgments of this Court and laid down that the prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of claim applies to amendments to the plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.”

Thus, this Court is of the view that the learned court below ought not to have rejected the application for amendment on the ground that the lessee did not have any right to challenge the title of the lessor. Whether the amendment will affect the quantum of the property sought to be partitioned or whether the area purchased by the Bandopadhyays and leased out to the defendant no.4 would

be amenable to the partition suit, are matters which will be decided on evidence.

In the decision of ***Life Insurance Corporation of India vs Sanjeev Builders Private Limited & Anr.*** decided in ***Civil Appeal No. 5909 of 2022***, the Hon'ble Apex Court laid down the principles governing amendment in paragraph 70 of the decision. The relevant portion is quoted below:-

(ii) All amendments are to be allowed which are necessary for determining of the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed:-

- (i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and
- (ii) to avoid multiplicity of proceedings, provided
 - (a) the amendment does not result in injustice to the other side,
 - (b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and
 - (c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

- (i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,
- (ii) the amendment changes the nature of the suit,
- (iii) the prayer for amendment is malafide, or
- (iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach,

and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.”

Moreover, merits of an amendment application are not decided at this stage. In the decision of ***Rajesh Kumar Aggarwal and others vs. K.K.Modi and others*** reported in ***AIR 2006 SC 1647***, the Apex Court held that the Court was not to go into the merits. The relevant portion is quoted below:-

"While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."

Accordingly, the revisional application is allowed. The order impugned is set aside.

However, due to the delay in filing the amended application, the injury suffered by the plaintiffs shall be compensated by cost. Cost of Rs.5,000/- shall be paid to the plaintiffs' learned advocate, who shall grant a receipt to the defendant no.4. In case of default, the amended written statement shall not be accepted.

The defendant no.4 will file the written statement within three weeks from date. The plaintiffs will be allowed to file a rejoinder to the amended written statement.

If additional issues are required to be framed by the court, the learned court shall do so.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)