

Ct.
No.
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2023

C.O. 3269 of 2018
Md. Ansar Rahaman Mollah @ Molla
-Versus-
Abdul Gazi & Ors.

Mr. Debdutta Basu
Mr. Nikhil Kumar Gupta ...For the Petitioner

Mr. Sounak Bhattacharya
Mr. Abhirup Halder ...For the Opposite Party No. 1

This revisional application has been filed by the petitioner against the order dated 9th August, 2018 passed by the learned Civil Judge (Junior Division), 6th Court, Alipore in Title Suit No. 81 of 2014.

The petitioner herein as plaintiff filed the aforesaid suit inter alia for partition and permanent injunction. The opposite parties herein appeared in the said suit and filed written objection. During pendency of the suit the petitioner filed an application under Order VI, Rule 17 of the Code of Civil Procedure for amendment of the written statement and the opposite parties/defendants filed written objection against the said amendment application. Learned Court below by the impugned order has rejected the prayer for amendment of the plaint filed by the plaintiff.

Mr. Debdutta Basu, learned Counsel appearing on behalf of the petitioners submits that the learned Trial Judge committed a grave error in not considering the *prima facie* case of the plaintiff and has misconstrued and misappreciated the case of the plaintiff. Learned Court below failed to consider that in a suit for partition, each co-sharer has share in each and every part of the undivided suit land and the defendant/opposite parties have no right to make any construction as per their own choice and the learned Court below also failed to consider the eminent dander, the

plaintiff is likely to face due to forcible construction made over un-partitioned property. Learned Court below also failed to consider that until the Deed was produced before the Court below at the time of recording evidence, there was no scope for the petitioner/plaintiff to verify the executant's LTI (left thumb impression) and other factors which can be the subject matter of challenge. Accordingly, plaintiffs have gathered the knowledge about the falsity of the Deed only when it was filed before the Court below during evidence and the period of limitation will start from the date, when it was brought to the notice of the plaintiff and such right to challenge accrued on perusal of the contents of the original Deed.

Mr. Sounak Bhattacharya, learned Counsel appearing on behalf of the opposite party No. 1 submits that the defendants in their written statement, which was filed on 16th December, 2014, have categorically stated about the said Deed and accordingly at least from that date the plaintiff has gathered knowledge about the said Deed.

In this context he also referred to proviso under Order VI, Rule 17 of the Code of Civil Procedure which provides that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the plaintiff could not have raised the matter before the commencement of trial.

Here the defendants in the year 2014 had brought within the knowledge of plaintiff about the existence of the said Deed which the plaintiff now seeks for cancellation by way of amendment but plaintiffs did not pray for interrogatories or discovery or inspection to make scrutiny about the Deed and as such the plaintiff has miserably failed

to show that he had exercised due diligence in support of his not filing the amendment application before commencement of Trial.

He further submits that since the Deed was executed on 13th December, 1965 and it was brought to the notice of the plaintiffs on 16th December, 2014, so the amendment application which was filed on 23rd February, 2018 is hopelessly barred by limitation and the defendants by this time have accrued valuable right and accordingly he has prayed for rejection of the present application. Learned Counsel for the opposite party No. 1 relied upon decision in the case of *Revajeeetu Builder and Developers Vs. Narayanaswamy & Sons. & Ors.*, reported in (2009) 10 SCC 84 to support his contention.

Considered the facts of the case as well as the prayer for amendment and the impugned order. It appears from the schedule of amendment that the plaintiff has sought to incorporate by way of amendment a declaration that the said Deed dated 13.12.1965 is null and void.

The Court below while rejecting prayer for amendment has observed, when the defendants in their written statement dated 16th December, 2014 has brought to the knowledge about the existence of the said *kobala* dated 13th December, 1965, the plaintiffs ought to have prayed for discovery and inspection. Moreover, P.W.-1 admitted during his cross-examination by the defendants on 20th March, 2017 about his knowledge of the said registered Deed of sale.

It is settled position of law that it is not in every case, wherein the plea of limitation is raised, amendment

should be disallowed. If the plea of limitation is disputed bona fide, it should be made the subject matter of the issue after allowing the amendment, since it may involve both question of law and fact. But where it is clear from the facts of the case, as in the present, that the plea raised by way of amendment is surely time barred on the date of application, the court must not allow such amendment. Here fact of the case shows plaintiff gathered knowledge about the deed at least on 16.12.2014 from the contents of written statement but he filed the petition for amendment seeking cancellation of said deed on 23.02.2018 and as such the proposed amendment is barred under Article 56 read with Article 58 of the Limitation Act, 1963. Such amendment, if allowed, would take away the accrued right of the opposite party/defendants.

Furthermore the suit is at the stage of recording evidence of defendant's witness. Pre-condition that court should be satisfied that in spite of due diligence, party could not introduce amendment before commencement of trial, under proviso to rule 17, is couched in mandatory form. Here plaintiff who is seeking amendment is duty bound to explain as to why he could not have raised this point relating to forgery of deed before the commencement of trial despite exercising due diligence, when he became aware of the deed at least on 16.12.2014. plaintiff gathered knowledge about forgery of deed when the deed is physically produced before the court by the defendants, is no answer to the said query.

In view of the above, the order impugned does not call for any interference.

The revisional application, being C.O. 3269 of

2018 is dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)