

01
26.06.2023
KAUSHIK

CO 3507 of 2019

Chayan Sengupta & Ors.
Vs.
Manindra Chandra Mazumdar & Ors.

Mr. Probal Kumar Mukherjee
Mr. Suhrid Sur
... for the petitioner

Mr. Partha Pratim Roy
... for the Opposite Parties

Being aggrieved by and dissatisfied with the Order
No. 194 dated March 14, 2019 passed by the learned Civil
Judge (Senior Division), Durgapur in Title Suir No. 64 of 1997,
present application under Article 227 of the Constitution of
India has been preferred.

The petitioners contended that, the predecessor
in interest of the opposite parties has filed a suit for
declaration and permanent injunction against the predecessor
in interest of the present petitioners in connection with RS
Suit Plot Nos. 4103 and 4104. The defendant/petitioners
contested the same by filing a written statement. Learned
Trial Court after contested hearing was pleased to pass a
decree against the principal defendant/petitioner and ex
parte against the proforma defendant. In the said suit, the

plaintiffs right, title and interest over the suit property was declared and the defendants/petitioners were directed to deliver vacant possession of the suit property in favour of the plaintiff/opposite parties.

Being aggrieved by the said judgment and decree dated May 29, 2003, defendant/petitioners preferred an appeal and the learned First Appellate Court by a judgment and decree dated November 27, 2007 set aside the impugned judgment and decree passed by the learned Trial Court and send the suit back on remand to the learned Trial Court for a fresh decision. In the said judgment, the learned First Appellate Court was also of the view that identification of the suit property is necessary and as such framed an additional issue to the effect.

"Does the appellant/defendant adversely possess the suit land as alleged, apart from his alleged independent title over the suit land by purchase?"

and sent the suit back on open remand before the learned Trial Court.

The opposite party no. 1 herein being aggrieved by and dissatisfied with the aforesaid judgment and decree preferred a First Miscellaneous Appeal before this Court

being FMA 796 of 2008. This Court disposed of the said appeal by modifying the impugned judgement of the First Appellate Court, instead of sending the entire suit back to the learned Trial Court, referred the additional issue back to the learned Trial Court concerned for disposal after taking evidence of the parties and after giving opportunity to the parties to make appropriate application for local investigation of the property in dispute for the purpose of establishing the identity of the suit property concerned. The learned Trial Court was further directed to consider the evidence on record and on the basis of the evidence that may come on record in future to come to a finding which the learned Trial Court shall, thereafter, send back to the learned First Appellate Court when the learned First Appellate Court shall decide the entire Title Appeal concerned afresh taking into consideration the materials already on record and also the materials that may come on record in future while the learned Trial Court decides the additional issue.

Learned advocate for the petitioner submits that, since this Court directed the learned Trial Court to decide the additional issue after taking evidence of the parties and after giving opportunity to the parties to make appropriate

application for local investigation of the property in dispute for the purpose of establishing the identity of the suit property concerned, the petitioners preferred an application under Order 26 Rule 9 of the Code of Civil Procedure for determination of the real demarcation and identification of the suit property. The learned Trial Judge allowed the said application for local investigation commission.

Now in compliance of the aforesaid order of this Court, passed in abovementioned FMA 796 of 2008, the parties are now contesting before the learned Trial Court for adjudication of the additional issue as framed by the First Appellate Court so far as it relates to the defendants' acquisition of title in the suit property adversely apart from having independent title over the suit land by purchase. It is also worthy to be mentioned that the defendants/petitioners were served with a notice by the Indian Railway for construction of dedicated freight corridor upon acquiring a part of the suit property.

Now for effective adjudication of the lis the petitioner preferred an application for amendment of written statement under Order VI Rule 17 of the CPC and the plaintiff/opposite party herein filed a written objection

against the said amendment application and after contested hearing, the Court by the order impugned was pleased to reject the petitioner's said application for amendment of the written statement.

Being aggrieved by and dissatisfied with the order of rejection, the petitioner herein contend that the Court below has failed to exercise its jurisdiction by passing the impugned order which is required for adjudication of the lis. He ought to have allowed the amendment which was formal in nature but erroneously came to a conclusion that since the suit has been remanded before the learned Trial Court to decide the issue framed by the First Appellate Court, the petitioner's right to pray for amendment of the written statement ceases. Accordingly, he has prayed for setting aside the order impugned and prayed for allowing the prayer for amendment of written statement as per schedule of the petition.

Mr. Partha Pratim Roy, learned advocate appearing for the opposite parties submits that, the proposed amendment is not at all required for adjudication of the controversy as per order of this Court passed in First Miscellaneous Appeal and proposed amendment, if allowed, will change the nature and character of the dispute raised by the

plaintiff and the proposed amendment is not at all formal in nature and accordingly learned Court below was justified in dismissing the prayer for amendment and no interference is needed.

On perusal of the written statement it appears that in paragraph 9, the defendant has pleaded that since his purchase he has been possessing the property as described in the schedule of the written statement, adversely uninterruptedly and to the exclusion of all others, as shown and delivered by his vendor and by virtue of such possession the defendant acquired title by way of adverse possession apart from independent title of the said property by purchase. In the schedule of the written statement, they have mentioned plot no. 4103 measuring 07.1/3 decimal. In the schedule of written statement, they have not stated anything about plot no. 4104. Though the First Appellate Court after setting aside the judgment and decree was pleased to send the case for open remand and an additional issue has been framed whether the appellant/defendant adversely possess the land as alleged apart from defendants alleged title over the suit land by purchase, the plaintiff opposite party preferred an appeal against the said order of remand before

this Court. While disposing FMA No. 796 of 2008 this Court has made following observations:

"This Court is of the view that the learned First Appellate Court was right in holding that the identity of the suit property should be established before the merits of the suit can be decided effectively. Accordingly, the impugned judgment is modified to the extent that instead of sending the entire suit back to the learned Trial Court, the additional issue, as noted above, is referred to the learned Trial Court concerned and the learned Trial Court shall decide such issue after taking evidence of the parties and after giving opportunity to the parties to make an appropriate application for local investigation of the property in dispute for the purpose of establishing the identity of the suit property concerned, and thereafter the learned Trial Court shall come to its findings on the basis of the evidence already on record and also on the basis of the evidence that may come on record in future. The learned Trial Court shall thereafter send back its findings to the learned First Appellate Court and after such findings of the learned Trial Court on the additional issue is sent back to the learned First Appellate Court, the learned First Appellate Court shall decide the entire title appeal concerned afresh taking into consideration the materials already on record and also the materials that may be coming on record in future while the trial court decides the additional issue."

Needless to say that Cardinal Principle for amendment is to allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to

the other side. The real controversy test is the basic test. In view of the order passed in FMA 796 of 2008, the only dispute that needs to be investigated and reported to the Appeal Court by the Trial Court after making his observation is only to the point "does the appellant/defendant adversely possess the suit land as alleged, apart from his alleged independent title over the suit land by purchase?".

Now let me consider whether for adjudication of aforesaid issue, proposed amendment is at all required or not. On perusal of schedule of amendment, it appears that the first and second paragraph marked as paragraph (a) and (b) of schedule of amendment are vague and indefinite and it does not refer to any particular land or nature of claim in respect of which defendants wants to establish his right title. In the third paragraph mentioned in para (c) of schedule of amendment petition refers to a notice of acquisition issued by Indian Railway in respect of plot no 4103, which has got no bearing on the question of acquisition of title by way of adverse possession by the defendants. Again in paragraph (D) i.e in fourth paragraph of schedule of amendment defendant wants to incorporate that defendants have purchased plot no 4104 in the year 1988 and plaintiffs' possession over plot no

4104 is unauthorized, unlawful and without any lawful title. Such contention intended to be incorporated in the written statement by the defendant has also got no relevancy to adjudicate the issue as to whether defendant adversely possess should property irrespective of his independent title in the suit property. The last paragraph wherein defendant has sought to pray for deposit of court fee in terms of counter claim is absolutely beyond the scope and ambit for the adjudication of additional issue as ordered by the Court in FMA No. 796 of 2008. Accordingly, proposed amendment is not at all required to be incorporated in the written statement by way of amendment for adjudication of additional issue and as such the ultimate finding of the learned Trial Court does not call for any interference.

CO 3507 of 2019 is accordingly dismissed without any order as to costs.

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

(Ajoy Kumar Mukherjee, J.)

