

IN THE HIGH COURT AT CALCUTTA

Circuit Bench at Jalpaiguri

(Civil Revisional Jurisdiction)

APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 40 of 2023

Ayub Ali Sarkar & Ors.

Vs.

Md. Bader Ali Mia & Ors.

For the petitioners : Ms. Suman Sehanabis (Mondal)
Mr. Salok Sah

For the opposite party Nos.1-3 : Mr. Bhaskar Roy Mahashya
Mr. Sannidhya Dutta

Heard on : 20.11.2023

Judgment on : 24.11.2023

Ajoy Kumar Mukherjee, J.

1. This application under Article 227 of the Constitution of India has been preferred against order dated 20th February, 2018 passed by the learned Civil Judge (Junior Division), Additional Court, Cooch Behar in connection with Title Suit No. 02 of 2008. By the impugned order learned Court below rejected

plaintiffs application under Order VI rule 17 of the Code of Civil Procedure (hereinafter referred as code).

2. Petitioners case in a nutshell is that petitioners as plaintiffs filed aforesaid suit for declaration and injunction against the defendant/opposite party no. 1, 2, 3 herein. During pendency of the suit, petitioners herein filed an application under order VI rule 17 of the Code for incorporation of a prayer in the plaint to the effect that the sale deed dated 12.12.2007 in favour of defendants is false, fictitious and fraudulent deed and the defendants have never acquired any right, title interest in the suit property, by dint of said deed.

3. The opposite parties herein as defendants filed their written objection in connection with the said application, contending that the proposed amendment, if allowed will change the nature and character of the suit and moreover the application for amendment is liable to be rejected, since it has been filed only to fill up the lacuna.

4. Learned court below had taken up said application for amendment of plaint along with its objection filed by the opposite parties/defendants and after contested hearing, learned Court below rejected the said application filed by the plaintiffs/petitioners with an observation that plaintiffs offered no explanation why the application for amendment was not filed before commencement of trial and the plaintiff also failed to show that after exercise of due diligence, they could not prefer amendment before the commencement of

the trial. The court below further held that there is no question that the suit is barred by the law of limitation or under the provision of section 34 of the Specific Relief Act. Court below further held that the suit is in preemptory stage and in the midst of argument, and as such the suit cannot be heard on preliminary issue, as claimed.

5. While passing the order impugned, the court below pointed out that evidence of both sides have already been completed and as such it will not be proper to decide the suit on preliminary issue. Order impugned clearly reflects that the court below is very much apprehensive that the prayer for amendment if allowed, he will have to hear the suit on preliminary issue under order XIV of the code.

6. Before going to further details let me state the schedule of proposed amendment which runs as follows:-

“that in paragraph 8 after the clause “a”, a new para to be added as “aa” as follows:-

“(aa) for a decree of declaration that the alleged sale Deed being No. j-3812 dated 12/12/2007 of the Office of the District Registrar, Cooch behar in the name of the defendants is out and out a false, fictitious and fraudulent Deed and through the said Deed defendants never acquired any right title, interest or possession over that said property nor Sahimuudin Miah executed such Deed at all.”

7. The principles governing the question of allowing or rejecting prayer for amendment under VI rule 17 has been reiterated in several salutary judgments which states that all amendments ought to be allowed which satisfy the two conditions **(i)** of not working injustice to the other side and **(ii)** of being necessary for the purpose of determining the real questions in controversy between the parties. Needles to mention that the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties and at this stage court is not supposed to go into the correctness or falsity about the subject matter of amendment.

8. From the averments made in the plaint, it is quite clear that the bone of contention of the plaintiff is that the original owner in the month of May 1987 gave away the schedule mentioned suit property to the plaintiff and proforma defendant no. 5 i.e. his grandsons through oral gift under the Muhammedan personal law and handed over possession of the gifted property/suit property to the donees and the donees accepted the gift and took over possession of the gifted property i.e. suit property and thereafter they have constructed structure and started business therein of their own. It is further case of the plaintiff/petitioners in para 5 of the plaint that the defendants/opposite parties herein have procured a sale deed in respect of the suit property alleged to have been executed and registered by proforma defendant no. 4 on 12.12.2007. Accordingly plaintiff contended that proforma defendant no. 4 who

had already gifted the suit property to the plaintiff and proforma defendant no. 5 in 1987, has no right to execute sale deed in respect of the self same suit property in favour of the defendants, who never got the possession of the suit property and as such plaintiff specifically contended in the said paragraph that the aforesaid sale deed in favour of the defendants is false, fictitious, invalid and inoperative document and title never transferred through the aforesaid sale deed but the defendants with the help of said false and fictitious document are trying to take forcible possession of the suit property by evicting the plaintiff and proforma defendant no.5.

9. In view of above, the real question in controversy in the present suit is whether defendants have acquired any right, title, interest in the suit property by dint of deed executed by proforma defendant no. 4 on 12.12.2007 and/or the deed dated 12.12.2007 is a false fictitious deed/document or not

10. Learned counsel on behalf of the petitioner Ms. Sehanabis submits that though plaintiff in his plaint has categorically stated that the proforma defendant no. 4 had no right to execute and register any deed on 12.12.2007 after making oral gift in favour of plaintiffs and proforma defendant in the year 1987 and as such deed dated 12.12.2007 is a fraudulent deed but due to inadvertence in the prayer portion plaintiffs have omitted to make a prayer for declaration of the said deed as null and void. She further submits that this is a pure mistake and is an outcome of careless drafting of pleading and as such

the prayer cannot be said to be barred by limitation, nor the plaintiff can be made to suffer for that mistake.

11. Accordingly the question that poses for deciding the issue of amendment is whether the proposed amendment made by the plaintiff in the schedule of amendment is barred by limitation or not and whether in view of proviso to order VI rule 17, the proposed amendment can be allowed or not.

12. in view of above it is clear that the prayer for amendment for incorporation of a prayer for declaration that the deed dated 12.12.2007 is barred by limitation has been made in the year 2022 in a suit which was filed in the year 2008 though in the body of plaint, plaintiff has specifically stated that sale deed dated 12.12.2007 is a false fictitious invalid document, when the plaintiffs have drafted the plaint.

13. In ***LICI Vs. Sanjib Builder Pvt. Ltd. and another (Civil Appeal No. 5909 of 2022)*** Apex Court while dealt with the cases where the prayer for amendment is to be allowed has clearly held that delay in applying for amendment alone is not a ground to disallow the prayer and where the aspect of delay is arguable the prayer for amendment could be allowed and the issue for limitation be framed separately for decision. It has been further held in the said judgment, where the amendment changes the nature of the suit or the cause of action so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where however the

amendment sought is only with respect to the relief in the plaint and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

14. Here in the present case the amendment sought with respect to the relief that the deed dated 12.12.2007 is a fraudulent deed has already been pleaded in the plaint and thereby relief sought to be incorporated by way of amendment has been predicated on facts, already pleaded in para 5 of the plaint.

15. The other issue involved in the present case is that admittedly the evidence of the parties have been closed and the prayer for amendment has not been sought for prior to commencement of trial and as such whether proposed amendment can be allowed in view of proviso to order VI, Rule 17. Needless to reiterate that the amendment which is required to adjudicate real controversy between the parties is required to be allowed, unless it caused injustice to the defendants/opposite parties and delay in applying for amendment alone is not a ground to disallow the prayer. Since the issue as to whether the deed dated 12.12.2007 is a genuine deed or not and whether proforma defendant no. 4 had the power to execute said deed in favour of the defendants or not is the real question in controversy, for effective adjudication of the suit, the proposed amendment is required to be allowed.

16. The plea taken by the defendants/opposite parties that if the proposed amendment is allowed it will change the nature and character of the suit, does

not find any substance, in view of the fact that the proposed amendment even if allowed, the suit will remain a suit for deciding the issue as to whether the defendants have acquired any right title interest in the suit property by dint of deed dated 12.12.2007. Since no *malafide* and/or dishonest intention has been reflected in the proposed amendment, the court below was not justified in rejecting the petitioners prayer for amendment, specifically when the proposed amendment, if allowed will not cause such prejudice to the defendants, which cannot be compensated by cost.

17. C.O. 40 of 2023 is allowed subject to payment of cost of Rs. 10,000/- (ten thousand only) which the plaintiff will pay to the defendants, within a period of four weeks from the date of communication of the order. On such payment by the plaintiff as above the plaint will be amended as per schedule of the petition and the plaintiff will file amended plaint within a fortnight. On filing such amended plaint, opportunity will given by the court below to the defendants to file additional written statement if any, within four weeks thereafter. On completion of such pleading, the court will frame two additional issues, if the said issues have not been framed already, namely (i) is the suit barred by limitation (ii) whether the plaintiff is entitled to get relief interms of amended prayer of the plaint.

18. It is further clarified that on payment of cost as above, if the plaint is amended and the issues are being framed, the court below will give opportunity to both the parties to recall witnesses for examination and cross examination

and further to give opportunity to the parties to adduce additional evidence in order to adjudicate aforesaid real question in controversy.

Urgent photostat certified copies of this order may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(AJOY KUMAR MUKHERJEE, J.)