

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Shampa Sarkar

C.O. No. 26 of 2024

Ashok Kumar Jaiswal & Anr.

Vs.

Matru Prosad Show

For the petitioners : Mr. Pinaki Ranjan Mitra

For the opposite party : Mr. Somnath Roy Chowdhury
Ms. Arpita Chowdhury

Hearing concluded on : 21.02.2024

Judgment on : 05.03.2024

Shampa Sarkar, J.:-

1. The order dated December 6, 2023 passed by the learned Civil Judge, (Junior Division), 3rd Court, at Howrah, in Title Suit No.13 of 2007, is the subject-matter of challenge, in this revisional application.
2. By the order impugned, the learned court rejected an application for amendment of the written statement filed by the defendants. According to the learned court, the amendment was not relevant to the suit as the factual aspects were completely different. The amendment was belated, as trial had commenced. PW1 had been partly cross-examined.
3. By the proposed amendment, the defendants wanted to bring on record that Title Suit No.08 of 2001, which had been decreed in favour of the plaintiff and the deed of sale which was executed on the basis of the decree,

were vitiated by fraud. The plaintiff had claimed title over the suit property, on the basis of such fraudulent decree and title. The defendants wanted to incorporate pleadings that the decree which was obtained by fraud and the title deed of the plaintiff were void ab initio. In the schedule of amendment, it was further averred that although the defendants were impleaded in the said suit as defendant nos.3 and 4, they did not appear in the suit as summons were not served. They also contended that the alleged Vakalatnama and the petition for adjournment seeking time to file the written statement, were fabricated and illegally procured by the plaintiff.

4. Mr. Pinaki Ranjan Mitra, learned Advocate for the petitioners/defendants submitted that amendment of a written statement should be allowed liberally. Mr. Mitra, next contended that in the written statement the defendant denied the plaintiff's title. The manner in which title had been derived, as pleaded in the plaint, was also denied. Although, specific averments with regard to the said Title Suit and the decree passed were not made in the written statement, there was a denial that the plaintiff did not acquire any title in the manner in which the plaintiff had described in the plaint.

5. In the counter-claim filed by the defendants, in Paragraph 17D, an averment had been made that any decree in favour of the plaintiff for specific performance of contract, was not binding upon the defendants.

6. According to Mr. Mitra, by the proposed amendment the defendants did not seek to incorporate any new fact which would change the nature and

character of the suit or the nature and character of the defence. Only an elaboration and further explanation with regard to the plea already taken in the counter-claim that the decree was not binding, being a result of conspiracy, was sought to be incorporated. Unless the pleading that the decree was obtained by fraud, misrepresentation and collusion, were specifically incorporated, the defendants would not be able to establish why the decree was not binding upon them.

7. Reliance was placed on the decision of the Calcutta High court in ***Mahesh Chandra Bayan vs. Manindra Nath Das and Ors.***, reported in ***AIR 1941 Cal 401***. Paragraph 14 of the said judgment was relied upon in support the contention that a judgment so long as it stood was conclusive, but if it was obtained by fraud, the bar created under Section 11 of the Code of Civil Procedure would be automatically removed. Section 44 of the Evidence Act, also did not stand in the way. The said provision was permissive and not prohibitive. It allowed a party to avoid a judgment by proving fraud or collusion.

8. Thus, according to Mr. Mitra, the fact that the decree for specific performance was obtained by the plaintiff by practicing fraud and collusion, was required to be pleaded in the instance case. The issue to be decided in the suit, was the title of the parties. The plaintiff filed the suit for ejectment against the defendants, claiming ownership through the decree passed in Title Suit No.8 of 2001. On the other hand, the defendants claimed title

through purchase of the same. Thus, the question of title in this case was to be decided as per the plaint case and the counter-claim.

9. The specific case of the defendants in the counter-claim was that the defendants were owners of the property in question. The erstwhile vendor had also instituted a suit against the defendant no.1, praying for a decree of declaration and recovery of khas possession. The suit was dismissed for non-prosecution.

10. The defendants have specifically prayed for a decree that they were absolute owners in possession of the property in question and the plaintiff did not have any right, title and interest in respect of the scheduled property. Under such circumstances, the amendment of written statement was not only necessary, but relevant for a complete adjudication of the dispute between the parties.

11. Further reference was made to the decision of the Hon'ble Apex Court in the matter ***S.P. Chengalvaraya Naidu v. Jagannath (dead) by L.R.S. & Ors.***, reported in **1994 1 SCC 1**. It was stated that the finality of the decree passed in Title Suit No.8 of 2001 could not be relied upon as the same was engineered by fraud played by dishonest litigants. Courts of law were meant to impart justice between the parties. It was the duty of the plaintiff to come with a true case and clean hands. Fraud would avoid all judicial acts, and as such, the judgment and decree of the first court or even the highest court, would be treated as a nullity. Such decree could be challenged in any court and even in collateral proceedings. Not allowing the amendment, was a

denial of an opportunity to the defendant to avoid the decree on the ground of fraud.

12. Mr. Mitra urged that the decision of the learned court that the decree was passed by a superior forum and the same could not be assailed in the present suit by amending the written statement was erroneous, apart from the other grounds which made the order impugned, perverse.

13. Mr. Somnath Roy Chowdhury, learned Advocate appearing on behalf of the plaintiff submitted that the learned court had rightly rejected the said application for amendment. The same was hit by the proviso to Order 6 Rule 17 of the Code of Civil Procedure. In the instant case, the trial had commenced and the cross-examination of the PW1 was near completion. At such advanced stage of the suit, the proposed amendment was brought in, only to cover up the lacuna in the defence case and to dislodge the evidence of the P.W.1. P.W.1 who had proved the plaint case.

14. Mr. Roy Chowdhury submitted that the facts sought to be incorporated by the proposed amendment were within the defendants' knowledge and such defence was available to them, since the very inception. The amendment was only to negate the averments of the plaintiff made in the written statement filed in response to the counter-claim.

15. Relying on the plaint, Mr. Roy Chowdhury submitted that the plaintiff's case was specific. The plaintiff had acquired title in respect of the suit property upon execution of a decree for specific performance of contract, passed in Title Suit No.8 of 2001. To such averment in the plaint, the written

statement was a vague denial. Rather, the plaintiff was put to strict proof of such statement.

16. In Paragraph 7 of the counter-claim, the defendants had mentioned that any decree that may have been passed in favour of the plaintiff by way of specific performance of contract, was not binding on the defendants. Neither any elaboration of such pleadings based on supporting documents were stated in the said paragraph.

17. The defendants claimed title through a registered deed of sale dated June 24, 1993, and prayed for declaration on the basis thereof. There was no prayer for setting aside any decree that may have been passed in favour of the plaintiff, in any suit for specific performance.

18. In the written statement to the counter-claim, the plaintiff narrated the entire facts. Paragraph 9 of the said written statement was specifically relied on by Mr. Roy Chowdhury.

19. In the said written statement, the plaintiff averred that Nitish Kr. Mukherjee and his wife Smt. Rina Mukherjee were the owners of the property. Plaintiff got information about the desire of the Mukerjees' to sell the suit property for a valuable consideration of Rs.6 lakhs. Earnest money of Rs.1,50,000/- was paid. The vendors had undertaken that in case they were unable to refund the earnest money within 5 years from the date of the agreement for sale, the suit property would be transferred by sale in favour of the plaintiff, upon payment of the remaining consideration money. The suit property was not transferred. The plaintiff filed Suit No.8 of 2001 before

the learned Civil Judge (Senior Division), Howrah, against Nisith Mukherjee and Rina Mukherjee as also the defendants, for specific performance of the contract. The plaintiff was already in possession of the property and upon the decree for specific performance, the deed of sale was executed and registered in favour of the plaintiff. The plaintiff become absolute owner thereof.

20. It had been further stated that the defendants/petitioners filed Title Suit No.40 of 2010 against the plaintiff and his vendors in respect of the suit property, thereby, challenging the sale deed of the plaintiff dated October 16, 2006. In the said suit, the ex parte decree passed in Title Suit No.8 of 2001 was also challenged. A prayer seeking a declaration that the sale deed was void and inoperative was sought. The defendants claimed title and ownership in respect of the suit property on the basis of the deed dated June 24, 1993. The suit was dismissed for non-prosecution on July 13, 2011. Similarly, the defendants filed another suit before the learned Civil Court being Title Suit No.103 of 2010, for declaration and injunction and for a decree that the plaintiff had no right, title and interest in respect of the suit property. On November 19, 2012, the said suit was dismissed for default. The defendants filed a third suit being Title Suit No.100 of 2012, before the learned Civil Judge (Senior Division) 3rd Court, at Howrah, again challenging the deeds of the plaintiff and also prayed for other reliefs. The said suit was withdrawn on August 28, 2012. Next, Title Suit No.261 of 2012 was filed against the plaintiff and his vendors, challenging the title deed of the plaintiff dated

October 16, 2006. The title of the plaintiff and his vendors were challenged in the said suit. The said suit was dismissed by the learned court.

21. After dismissal of all the suits, the ownership of the plaintiff in the suit property had become final. The decree for specific performance reached a finality. In the counter-claim, all the aforementioned facts with regard to the dismissal of the defendants' suits, one after the other, were narrated in great detail. At that stage, no prayer for amendment was made. Issues were framed.

22. Mr. Roy Chowdhury further submitted that in the cross-examination of the PW1, the certified copies of the orders passed in the suits and the Vakalatnama filed by the defendants in Title Suit No.8 of 2001, were tendered in evidence and marked as exhibits. In order to avoid such proof of the documents, indicating that the contentions of the plaintiff that the suits filed by the defendants had been dismissed on earlier occasions, the proposed amendment has been brought in at the stage of trial with the intention to displace the evidence. Amendment should be allowed for the interest of justice and not in abuse of the process of court.

23. Moreover, the aspect of due diligence should have been looked into in this case. It was a situation where the defendants wanted to incorporate facts which were known to them and not discovered subsequently. In the instant case, the defendants suppressed the facts relating to dismissal of their suits. In those suits, the decree passed in Title Suit No.8 of 2001 and

the right, title and interest of the plaintiff in the suit property had been challenged. In all the cases, the defendants were unsuccessful.

24. These facts were known to the defendants, but they kept silent about the same. Even in the written statement to the counter-claim, these facts and details of each and every suit had been brought on record, but the defendants did not seek amendment at the appropriate stage.

25. When the results of the suits as also participation of the defendants in Title Suit No.8 of 2001, had been proved in evidence, the defendants came up with the proposed amendment.

26. Mr. Roy Cchowdhury has relied on the following decisions :-

1. ***Vidyabai and Ors. vs. Padmalatha and anr.*** reported in **(2009) 2 SCC 409.**
2. ***Pandit Malhari Mahale vs. Monika Pandit Mahale and ors.*** reported in **2020 11 SCC 549.**
3. ***Gurabakhsh Singh and ors. vs. Buta Sigh and anr.*** reported in **(2018) 6 SCC 567..**
4. ***Life Insurance Corporation India vs. Sanjib Builders Pvt. Ltd. and anr.*** reported in **2022 8 SCR 1121.**

27. After having heard the learned Advocates for the respective parties, the question required to be decided is whether the learned trial judge committed an error of jurisdiction in rejecting the amendment application.

28. Undoubtedly, amendment of a written statement should be allowed liberally. However, a proviso was incorporated in Order 6 Rule 17 of the Code

of Civil Procedure, to prevent abuse of the process of court and the tendency of litigants to drag suits, thereby causing irreparable loss and injury to a party.

29. The proviso states that no application for amendment should be allowed after trial had commenced, unless the court would come to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

30. In my opinion, the defendants had to satisfy the condition precedent, before the amendment could be allowed. The trial had commenced. The defendants must establish before the court that in spite of due diligence, the parties could not have raised the matter before commencement of trial. The court too, must arrive at a conclusion with reasons, that in spite of due diligence the contents of the amendment application could not be brought on record.

31. The evidence had started and the PW1 had proved the documents which would indicate that all the four suits filed by the defendants, had been dismissed either for non-prosecution or for default or otherwise. In those suits, the deed of the plaintiff and the decree passed in the Title Suit No.8 of 2001 as also the right, title and interest and ownership of the plaintiff had been challenged repeatedly, but the defendants were unsuccessful for some reason or the other.

32. Whether those decisions would operate as res judicata or not, is a matter of trial, which will be decided in the suit. However, allowing the

defendants to incorporate the allegation of fraud at this stage, would be contrary to the proviso to Order 6 Rule 17 of the Code of Civil Procedure.

33. The proposed amendment is not one for incorporation of an omission which was vital, or for incorporation of certain facts by way of explanation or clarification of the pleadings which were already available and foundation of which had already been laid either in the written statement or in the counter-claim. It is not a case that in spite of exercise of due diligence, such facts were not within the knowledge of the defendants and could not have been brought on record at any stage prior to commencement of trial.

34. In this case, the defendants had suppressed that the suits filed by them had resulted in dismissal. The right, title and ownership of the plaintiff and his vendor, were challenged. The ex parte decree was challenged. The sale deed was challenged. All the suits were dismissed.

35. The defendants wanted to fill up the lacunae in the defence case as evidence had already been led by the plaintiff in support of his claim that various challenges of the defendants against the decree passed in the suit for specific performance, had failed. This is an abuse of process of court.

36. In **M. Revena vs. Anjanamma (Dead) BY LRS. & ors** decided in **Civil Appeal No.1669 of 2019**, the Hon'ble Apex Court held that the proviso to Order 6 Rule 17 to some extent curtails the absolute discretion to allow amendment at any stage. Therefore, the burden would be on the person who sought to file an application for amendment after commencement of trial, to

show that in spite of due diligence such amendment could not have been prayed for earlier.

37. Amendment could not be claimed as a matter of right under all circumstances. Though normally, amendments are allowed, in order to avoid multiplicity of litigation, the court needs to take into consideration whether the application had been made bona fide or mala fide and also whether the amendment would cause prejudice to the other side. This is a fit case in which the amendment should be disallowed on the ground that the same was mala fide. Introduction facts within the knowledge of the defendants, which were consciously suppressed in the written statement and the counter-claim, should not be allowed.

38. In the decision of **LIC (supra)**, the Hon'ble Apex Court summed up the parameters for grant of amendments in Paragraph 70. The relevant portion is quoted below:-

- “...(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,...

39. In the instant case, the learned trial judge refused to exercise discretion, upon holding that the amendment was barred by the proviso to Order 6 rule 17 of the Code of Civil Procedure.

40. In **Revajitu Builders** reported in **2009 10 SCC 2009**, also laid down the principles as follows :-

“Factors to be taken into consideration while dealing with applications for amendments

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.”

41. The Hon’ble Apex Court once again reiterated that whether the application for amendment was bona fide or mala fide ought to be looked into, while deciding the application.

42. The court held as follows :-

“64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.”

43. Under such circumstances, the order impugned does not call for any interference and the revisional application is dismissed.
44. There shall be order as to costs.
45. Parties are to act on the basis of the sever copy of this order.

(Shampa Sarkar, J.)