

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 132 of 2019

**Ellora Sadhukhan
Vs
Tapan Kumar Saha Roy & Ors.**

For the petitioner : Mr. Gautam Chakraborty
Mr. Avijit Chakraborty

For the Opposite party :
Nos. 1(a) & (b) : Mr. Rwitendra Banerjee

For the Opposite Party :
Nos 2 and 3 : Mr. Gunjan Shah
Ms. Shreya Agarwal

Heard on : 16.01.2024

Judgment on : 02.02.2024

Ajoy Kumar Mukherjee, J.

1. The petitioner herein being aggrieved by the order no. 9 dated 12.10.2018 passed by the learned Civil Judge (Senior Division) 2nd Court Barasat, North 24 Parganas in T.S. No. 178 of 2017 has preferred this application under article 227 of the Constitution of India. Petitioner contended that the petitioner is the married daughter and executrix of her mother's last will which was duly registered on 13.03.2014 bequeathing the entire suit building in favour of petitioner and her brother. Petitioner's further case is that after the death of testatrix they have initiated probate proceeding which is pending before this Court.

2. The petitioner instituted aforesaid T.S. no. 178 of 2017 seeking eviction of the opposite party/defendants along with other reliefs as stated in the plaint. Petitioner's further case is that the points to be decided in the aforesaid suit, in short, is about petitioners claim of right to protect 'A' schedule property until the grant of probate and the question involving eviction of opposite parties/defendants from the suit property holding them rank trespassers. In the plaint plaintiff/petitioner alleged that the defendant no.1 is in illegal possession of two shop rooms in the suit building and it is her further case that neither the mother of plaintiff nor plaintiff herself has ever entered into any agreement with the defendants.

3. The defendant no.1 entered appearance in the said suit and filed written statement wherein she has denied all the material allegations made in the plaint. Petitioners further case is that after filing of the written statement, the defendant no.1 filed one application under order VI rule 17 of the Civil Procedure Code (CPC) for amendment of the written statement. By the proposed amendment defendant no.1 now tried to incorporate in their written statement a new fact that a Will was executed by the same testatrix in their favour on 22.05.2006 which was unregistered. The plaintiff petitioner herein filed written objection against the said amendment application. However court below after hearing both the parties has been pleased to allow the defendants prayer for amendment of the written statement.

4. Being aggrieved by that order Mr. Chakraborty, learned counsel appearing on behalf of the petitioner submits that learned court below had failed to appreciate that after filing written statement, defendant is not

legally entitled to prefer such prayer for amendment taking a completely different stand. He further submits that the order impugned is a non-speaking order without appreciating true scope and purport of the matter in controversy. If the proposed amendment is allowed there is serious chance of changing nature and character of the suit and as such court below ought not to have allowed the said application which has been filed at a belated stage. The defendant has not explained as to what prevented him to incorporate such pleading with the original written statement when her case is that alleged unregistered will was executed on 2nd May, 2006. In fact aforesaid story sought to be incorporated by defendant no.1, has been manufactured only to grab the property. He further contended that the court below has overlooked the fact that even a manufactured sale agreement was earlier exposed by Bidhannagar Municipal Corporation against an RTI application filed by the plaintiff.

5. Mr. Chakraborty further contended that in connection with the above mentioned forged will allegedly executed by the landlady Smt. Bharati Saha, the defendant herein started probate proceeding being allegedly Misc., Case no. 113 of 2013 but actually it is Misc. Case No. 113 of 2018, which has been challenged by the plaintiff/petitioner herein and therefore it was renumbered as O.S. 66 of 2018. However, defendant no.1 in the said suit, Tapan Kumar Saha Roy died on 19.10.2020 and thereafter petitioner claiming herself as wife and sole legal heir of Tapan Kumar Saha Roy filed substitution petition in the probate proceeding. The plaintiff filed written objection against the said prayer for substitution. After hearing, the probate court dismissed the substitution petition filed by the petitioner and also

observed that probate suit being O.S. No. 66 of 2018 filed by deceased Tapan Kumar Saha Roy stood abated. Accordingly Mr. Chakraborty submits that when the probate proceeding initiated by deceased Tapan Kumar Saha Roy has already been abated the contention made in the proposed amendment has become infructuous and is not at all required for adjudication of the present suit because subject matter of present suit relates to prayer for eviction of trespassers.

6. Mr. Banerjee learned counsel appearing on behalf of the opposite party submits that they have already preferred one application in the aforesaid O.S 66 of 2018 which is registered as Misc. Case no. 362 of 2023 wherein the wife of deceased Tapan Kumar Saha Roy has sought for recalling the aforesaid order of abetment and for transforming the said probate proceeding to a proceeding of letter of administration in terms of section 232 of the Indian Succession Act 1925 on the grounds stated therein. He further submits that he has specifically pleaded in the written statement that the Will executed in favour of plaintiffs is not a genuine one and argued that the will executed in favour of Tapan Kumar Saha Roy is the last will of the testator. He further submits that the plaintiff has made several prayers in the plaint along with prayer for eviction and the present issue as to whether the will stands in the benefit of Tapan Kumar Saha Roy is the last will of the testatrix or not, has a direct bearing upon the reliefs sought for by the plaintiff in the plaint and as such the proposed amendment is very much required for the purpose of conclusive and effective adjudication of the suit. Accordingly he submits that the order impugned does not call for any interference.

7. I have considered submissions made by both the parties.

8. On perusal of the schedule of the proposed amendment it appears that the defendant in their written statement wants to incorporate that her previous landlord Bharati Saha @Anu Bharati Sanyal had executed a will also in respect of the suit property in favour of the defendant on 22nd May, 2006. On perusal of written statement it appears that in paragraph 18, the defendants have stated that the will executed and registered by self same Bharati Saha on 10.03.2014 in favour of plaintiff is false and manufactured instrument and he has further stated that a will is invalid unless and until a probate is granted in favour of the beneficiary from the competent court.

9. It is not in dispute in the present context that the trial of the suit has not yet commenced. However the main ground of objection raised by the plaintiff is that the case of execution of unregistered will dated 22.05.2006 by the same testatrix which the defendant wants to incorporate as a defence by way of amendment, has become infructuous in view of the fact that the probate court has been pleased to dismiss the prayer for substitution filed by Tripti Saha Roy and observed that the probate suit being O.S. 66 of 2018 arising out Misc. Case 113 of 2018 with regard to the alleged unregistered will dated 22.05.2006 has abated.

10. Referring a judgment passed in **Vatsala Srinivasan Vs. Narisimha Raghunathan** reported in **2011 (2) Mh.L.J 953** learned counsel for the opposite party submitted that they have already filed a Misc. Case being no. 362 of 2023 in connection with aforesaid O.S. No. 66 of 2018 wherein they have prayed that the aforesaid order of abatement be recalled and to transform the said probate proceeding, to a proceeding of a letter of

administration in terms of section 232 of the Indian Succession Act since with the death of sole executor during testamentary proceeding, sole beneficiary i.e. the wife of sole executor can be substituted by converting said proceeding into a proceeding for letter of administration. He further submits that said application is still pending for disposal.

11. Needles to reiterate that the aforesaid suit being T.S. No. 178 of 2017 has been instituted mainly seeking the following reliefs along with others

- (a)** The Plaintiff's right to protect the A schedule property until the grant of probate of the Will left by her mother is declared.
- (b)** That all such deeds purported to have been entered into by and between the plaintiff's mother Bharati Saha and in the changed name Anubharati Sanyal with the defendants or any person claiming through and under them be decreed as void initio and obtained by fraud, coercion and not binding on the plaintiff.
- (c)** The decree of eviction of the defendants holding them rank trespassers be declared directing the defendants to deliver the suit premises in favour of the plaintiff by the time fixed by the Id. Court.
- (d)** The decree of wrongful occupation charge at the rate of Rs. 1000/- per diem against the defendant No.1 and Rs. 1500/- per diem as against the defendant No.2 and 3 and tentative court fee of Rs. 10/- is paid thereon.
- (e)** That the defendant and their men and agents be restrained by a decree of perpetual injunction from claiming any right in the suit property by the strength of any document purported to

have been executed by the mother of the plaintiff either in the name of Bharati Saha or Anubharati Sanyal and from making any wastage and damage to the suit property and from causing any nuisance and annoyance in the suit building and from transferring possession of the same to any third party and from changing the nature and character of the same.

12. It is well settled that the main important factors which need to be taken into consideration while dealing with an Application under order VI rule 17 of the Code of Civil Procedure is as follows:

- (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.*

(Re: Revajeetu Builders and Developers vs. Narayanaswamy and Sons and others (2009) 10 SCC 84)

13. It is also settled position of law that while considering an application for amendment, the court should not go into the correctness or falsity in the case of amendment. Accordingly the real controversy test is the basic test by which the court is to decide whether such an amendment is necessary to adjudicate the real controversy between the parties. Now with the help of above touch stone let me consider whether the proposed amendment is required or not.

14. At the cost of repetition it can be said that from the case and counter case what emerges is that according to plaintiff the original owner executed registered will in respect of the entire property in favour of plaintiff in 2024 and now what the defendant wants to incorporate by way of amendment is that self-same Anubharati also executed will in respect of a portion of the property in their favour on 22nd May, 2006 in respect of which they intend to convert a probate proceeding into a proceeding of letter of administration. Learned counsel for the petitioner submits that with the execution of the subsequent registered will in respect of the entire property, the earlier will even if is in existence, that has automatically got cancelled and the defendants claim on the basis of the said will must have become infructuous and referring section 211 of the Succession Act 1925 he submits that the plaintiff being the executor of the will he is the legal representatives for all purposes and accordingly with the death of Anubharati, all the properties of deceased person vests in her and defendant cannot have any right title interest in the property.

15. Needless to say that vesting of the property of the deceased depends upon the facts which is the last will of the deceased and the proceeding in connection with both will have not yet been disposed of finally. Accordingly the question which might have become important for the suit to consider which of the two wills is the last will because section 227 makes it clear that probate of a will when granted establishes the will from the death of testator and renders valid all immediate acts of the executor as such. In a probate proceeding usually two important things are to be proved

i) *That the will executed by testatrix.*

ii) *It was the last will executed by testatrix.*

16. Now probate or letter of administration as the case may be will be granted in favour of either the plaintiff or in favour of the defendant and as soon as it will be granted, the effect of section 227 of the Act of 1925 will operate. Now if I again look at the prayer portion of the plaintiffs plaint it clearly reveals that whether defendants aforesaid alleged will is a valid and last will of the testatrix or not has a direct impact upon the final adjudication of the suit in terms of plaintiff's prayer. Accordingly the proposed amendment is required to be incorporated for the purpose of effective adjudication of the real controversy between the parties.

17. Proposed amendment, if allowed will also neither fundamentally or constitutionally change the nature of the case or the defence of defendant since even after amendment, the suit will remain a suit for eviction and defence of defendant will not materially change as defendant's defence will remain the same that the will executed in favour of plaintiff is a false and manufactured document.

18. Such amendment if allowed will also not cause such prejudice to the defendant which cannot be compensated because it appears that the plaintiffs herein as opposite parties duly contested/contesting aforesaid O.S. 66 of 2018 and accordingly they are also well aware about the defence case about aforesaid will allegedly executed by the testatrix in the year 2006. The dominant purpose of order VI rule 17 is to minimize litigation. Since the existence of the aforesaid alleged will had already come to the notice of the parties, it cannot be said that the prayer for amendment has been made by

the defendant with *malafide* or dishonest intention or has been designed merely to delay the legal proceeding.

19. It is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both but the rules that the plaintiffs cannot be allowed to amend his pleading so as to alter materially or substitute his cause of action or the nature of his claim, has necessarily no counterpart in the law relating to amendment of written statement. In ***Baldeb Singh and others Vs. Monaohar Singh & another, (2006) 6 SCC 498***, Apex court further held that adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding altering or substituting a new cause of action. Accordingly court held in the case of amendment of the written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the later case.

20. Such being the position I am of the view that learned court below has not committed any illegality or impropriety nor he has exceeded his jurisdiction in allowing the amendment with the observation that proposed *amendment if allowed will not change the nature and character of suit and on the contrary such amendment if allowed may assist the court in arriving at just decision in the real question in controversy in the suit.*

21. In view of aforesaid discussion the order impugned does not call for any interference by this court invoking jurisdiction under Article 227 of the Constitution of India.

22. C.O 132 of 2019 is thus dismissed.

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.)

Later: - After delivering the judgment, learned Counsel appearing on behalf of the petitioner seeks leave to formulate a certificate under Article 134 A that the case is a fit one for appeal to the Supreme Court.

I do not find any merit to issue such certificate, accordingly such prayer is rejected.

Learned Counsel also prayed for stay of operation of the aforesaid judgment and order, which is also considered and rejected.

(AJOY KUMAR MUKHERJEE, J.)