

Ct.
No.
237

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27.06
2024

C.O. 188 of 2020
Achiya Dhabak & Ors.
-Versus-
Chhabdar Hossain Mondal & Ors.

Mr. Arijit Sarkar
Mr. Parikshit Goswami **...For the Petitioners**

Mr. .b. Dash
Mr. Subhrajyoti Ghosh
Ms. Ankana Sarkar **...For the Opposite Parties**

The present application under Article 227 of the Constitution of India has been directed against the order No. 32 dated 27th November, 2019 passed by the learned Civil Judge (Junior Division), 2nd Court, Ranaghat in Title Suit no. 115 of 2015. By the impugned order learned Court below rejected the plaintiffs'/petitioners' prayer for amendment of the plaint.

The background of the present application as submitted by the parties is that the plaintiffs instituted a suit against the defendant opposite party for declaration of title and for injunction, being aforesaid Title Suit No. 115 of 2015. The defendants contested the suit by filing written statement denying and disputing the case of the plaintiffs. During cross examination of PW 1, plaintiff filed an application for amendment of plaint in order to insert facts of a particular Deed in the plaint which comes out during cross examination of the defendant in the suit and according to petitioner such amendment is necessary for proper adjudication of the suit and the same, if allowed will not also

change nature or character of the suit.

It is submitted in the plaint that the properties described in the schedule 'A' and 'B' of the plaint were the properties owned and possessed by the parents of the plaintiffs, principal defendants as well as promorma defendants No. 3 to 7 namely Sakubari Mondal and Jaheda Khatun Bibi, both are since deceased. It is further case of the plaint that 'B' schedule properties were initially owned and possessed by Sakubari Mondal but he gifted away the said schedule property to his wife Jaheda by way of a registered Deed of Gift. Further plaint case is though Sakubari Mondal and Jaheda Khatun Bibi never intended to alienate the 'A' and 'B' schedule property to the principal defendants but the principal defendants on unholy alliance with the Deed writer and the attesting witnesses, who all were their own persons have procured the 'C' schedule Deed in their favour absolutely behind the back of the plaintiffs and the proforma defendant Nos. 3 to 7 by false personification in the name of their parents being Deed No. 609 of 1990 dated 29th January, 1990 by using an imitation rubber stamp of ADSR, Ranaghat-II and on and from first part of March 2015, they suddenly started demanding that they are exclusive owners of 'A' and 'B' schedule property since Sakubari Mondal and Jaheda Khatun Bibi had

executed a Deed of Gift in their favour in the year 1990. It is further alleged in the plaint that since thereafter the plaintiffs and proforma defendants No. 3 to 7 started searching in the concerned Registry office in respect of deed no. 609 of 1990 but after searching it revealed to them that transferred property under said deed no. 609 of 1990 relates to some other property and parties to the said deed are also different persons. Accordingly plaintiff came to the conclusion that the alleged Deed No. 609 of 1990 by which the principal defendants claimed ownership in the property is a fictitious Deed. It is further alleged in the plaint that they have issued a notice under R.T.I. Act to know how many Deeds were executed vide Deed No. 609 of 1990 from the concerned Registry office but they did not get actual answer to that effect from the Registry Office.

In the petition for amendment plaintiff alleged that with reference to Deed No. 609 of 1990, there exists two Deeds, one allegedly executed by Sakubari Mondal and Jayeda Khatun in favour of Chhabdar Hosain Mondal and Asarul Mondal, which according to the plaintiff is a fictitious deed and another Deed was executed under same number in favour of one Jharna Biswas. Plaintiff further stated in the petition that though in their written statement defendant has specifically stated in paragraph 8 that the said

original Hebanama (deed of gift) dated 18th Magh 1397 B.S. has been lost due to the flood in the year 2000, but during cross-examination from defence side, another alleged deed containing same no. 609 but for the year 1991, allegedly registered from same Registry office and allegedly executed by their parents in respect of self same property was shown to the plaintiff's witness. Accordingly, the plaintiff sought for amendment of the plaint in order to substantiate their claim that the defendant procured another alleged deed in their name by false personification and thereby prayed for cancellation of aforesaid deed dated 01.12.1991 along with deed dated 29.01.1990.

Learned counsel appearing on behalf of defendant/opposite party herein argued before this court supporting order impugned passed by the Trial Court.

Learned Court below while dealt with the issue came to a finding that in the cross-examination plaintiff admitted that the Deed No. 609 of 1991 was executed by Sakubari Mondal and others in favour of defendant but they did not file any criminal case against the defendant and moreover the suit is at the stage of taking evidence of the plaintiffs' witnesses and as such Trial has already been commenced and in spite of specific knowledge, the plaintiff was not diligent in incorporating said plea in the plaint

before commencement of trial. Accordingly Court below rejected the prayer for amendment.

Learned Counsel appearing on behalf of the plaintiff has relied on an unreported decision in the case of *Asit Bhattacharya Vs. Sangham Bhattacharya & Anr. (C.O. 3115 of 2016 with CAN 5431 of 2017)* decided on 7th July, 2017, wherein it was held when the evidence of PW 1 had been tendered and PW 1 had not been cross-examined, the embargo may not have been in operation in the proceedings before the Trial Court. Further, even if the proviso were seen to be in operation it does not absolutely prohibit an amendment to be allowed. All that the proviso requires is for the appellant seeking an amendment to demonstrate that despite exercise of due diligence, the matters sought to be incorporated by way of amendment, could not have been included earlier.

I have considered the submissions made on behalf of the parties. In the present case the defendant has taken a defence in their written statement that the Deed of Hebanama by which they are claiming their title in the suit property was lost due to flood in the year 2000. However during cross-examination they have filed original deed before the Court. It further appears that the plaintiff has taken a specific plea that the defendant had referred the Deed

No. 609 of 1990, while they threatened to take possession of the suit property, claiming title, in March 2015 and photocopy of one such deed for the year 1990 was allegedly shown on the material date by the principal defendants to the plaintiffs (Para-6 of Complaint) and accordingly plaintiffs have allegedly made exhaustive searching in the Registry Office but could ascertain that no such Deed for the year 1990 was executed in favour of the defendant. It is only during cross-examination, they have referred the Deed for the year 1991.

It is fact that plaintiff in this case has tendered his evidence and cross-examination has been made by defendant. Plaintiff in support of his prayer for amendment has also made out a case of “exercising due diligence” as stated above and correctness or falsity of which shall be decided during trial and not at this stage of deciding amendment application. It is settled law that commencement of trial as used in proviso to order VI, Rule 17 in the code must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. (Re: (2006) 6SCC 498). As stated above admittedly defendants initially in the written statement taken plea that the deed was lost and thereafter filed it only during cross-examination and not at

the time of filing written statement.

An amendment which merely clarifies on existing pleading and does not in substance add to or alter it, it is incorrect to held that the question of bar of limitation, which involves both question of law and fact, will stand in the way of allowing such application. It is cardinal principle of law of amendment that if the proposed amendment is bonafide, legitimate ,honest and necessary, the court must not refuse the prayer for amendment. In cases like this the court should take notice of subsequent events in order to shorten the litigation and to sub-serve the ends of justice because the dominant purpose of amendment is to minimize litigation. The court should always give relief to amend the pleading of the party unless it is satisfied that the party applying was acting malafide or that by his blunder he had caused injury to the other side which cannot be compensated.

Accordingly since proposed amendment is mainly with respect to the relief in the plaint and is predicated on facts which are already pleaded in the plaint and when the amendment appears to be necessary for the court to effectively adjudicate on the main issue in controversy between the parties namely whether defendants have acquired title in the suit properties by dint of impugned deed or not , proposed amendment is required to be allowed.

The issue about genuineness of defendants' deed by which they are claiming title in the suit property is certainly an issue for adjudication in the present suit and plaintiff has prima facie made out a case as to why inspite of due diligence they could not incorporate such issue in the plaint before commencement of trial.

Furthermore if the proposed amendment is allowed by giving opportunity to the defendant to file additional written statement and by giving opportunity to both the parties to examine and cross-examine their respective witnesses who have already been examined on the point of proposed amendment and also if the issue as to whether plaintiffs prayer for cancellation of deed dated 01.12.1991 is barred by limitation or not, shall be kept open for adjudication at the time of final hearing of the suit, I find defendants will have no cause to prejudice.

In such view of the matter the prayer for amendment filed under Order VI, Rule 17 of the Code of Civil Procedure by the plaintiff on 21st January, 2019 is allowed.

Let the plaint be amended as per schedule of the petition. The plaintiff is directed to file amended plaint within a period of two weeks from the date of communication of this order.

The defendant will be at liberty to file additional written statement, if any, within a period of two weeks from the date of filing of the amended plaint.

Learned Court below will give opportunity to both the parties to examine and cross-examine the witnesses who have already been examined on the point of proposed amendment. The issue as to whether plaintiffs prayer for cancellation of deed dated 01.12.1991 is barred by law or not shall be kept open for final adjudication since it involves both question of law and fact.

The application, being C.O. 188 of 2020 is accordingly disposed of.

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

(Ajoy Kumar Mukherjee, J.)