

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Shampa Sarkar

C.O. No. 1017 of 2024

Baijat Mallick & Ors.

vs.

Entaj Mallick & Ors.

For the petitioners : Mr. Amit Baran Dash,
Mr. Ankana Sarkar

For the opposite parties : Mr. Bharat Ch. Simai,
Mr. Kumaresh Dalal

Hearing concluded on: 22.04.2024

Judgment on: 13.05.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated March 02, 2024, passed by the learned Civil Judge, (Senior Division), 1st Court, Contai, Purba Medinipur, in Title Suit No.228 of 2009. By the order impugned, the learned court rejected an application under Order 6 Rule 17 of the Code of Civil Procedure, filed by the petitioners for amendment of the written statement.

2. The learned court found that the application for amendment could not be allowed as the petitioner sought to incorporate certain new facts and also prayed for incorporating of the names of certain persons, claiming them to be necessary parties in the suit. The court held that if the amendment was

allowed, it would change the nature and character of the suit and also violate the order of the high court passed in FA 228 of 2015.

3. Mr. Dash, learned Advocate submitted that the Hon'ble Division Bench of High Court while disposing of FA 228 of 2015, allowed the said appeal along with an application under Order 41 Rule 27 of the Code of Civil Procedure. The Hon'ble Division Bench had come to a specific finding that the documents sought to be relied upon by way of additional evidence, were vital. Thus, the application for adducing additional evidence had been allowed. The Hon'ble Division Bench, held that those documents would have relevance in the final adjudication of the shares of the parties in respect of the suit property. Accordingly, the decree passed by the learned trial judge was set aside and the matter was remanded for consideration by the learned trial judge, afresh. Hon'ble Division Bench took the documents sought to be produced, on record and directed that those should form part of the records of the suit in the trial court, subject to formal proof. Their Lordships' specific observation was that the additional documents that were disclosed before the high court should be proved to the satisfaction of the court, by the petitioners. Upon recording of further evidence and upon allowing all the witnesses to be examined, the trial court was further directed to re-appreciate the evidence which were already on record along with the fresh evidence and take a suitable decision in the matter. Possibility of addition of parties was left open for the learned Court to decide. The Hon'ble Division Bench expressed a desire that the learned trial judge should decide the matter within six months. The appeal was allowed with a direction upon the

petitioners to pay cost of Rs.41,000/- to the DLSA, Purba Medinipur, as their conduct demonstrated laches.

4. Mr. Dash urged that once the High Court had remanded the suit for a fresh adjudication by the learned trial judge, upon allowing the petitioner to adduce additional evidence on the basis of the documents produced before the High Court, and also to advance arguments on the same, the learned Court should not have rejected the application for amendment of the written statement. The relevance of such documents would have to be pleaded in the written statement. Without the pleadings, the documents could not be taken into evidence as they would be beyond the scope of the pleadings.

5. Mr. Simai, learned Advocate appearing on behalf of the opposite parties submitted that the Hon'ble Division Bench allowed the petitioner to rely on the documents which were filed before the high court by way of additional evidence, subject to formal proof. Directions to allow amendment of the written statement, had not been issued. Parties were not permitted to submit further pleadings. The Hon'ble Division Bench left everything to the discretion of the learned trial judge. The admissibility of the documents, framing of issues, necessity to implead further parties were all left to the learned trial Judge. By filing the application for amendment of the written statement, the petitioners were actually trying to change the nature and character of the suit and enlarge the scope of the suit. The learned Judge rightly rejected the application for amendment, by exercising discretion.

6. Considered the submissions of the learned Advocates for the respective parties. The opposite party Nos.1 to 3 as plaintiffs, instituted Title Suit No.228 of 2009, in the court of the learned Civil Judge (Senior Division)

1st Court Contai, Purba Medinipur, by impleading the petitioners and the opposite party Nos.4 to 8 as defendants. The suit was for partition of 'Ka', 'Kha', 'Ga' and 'Gha' schedule property.

7. The petitioners filed the written statement denying all the material allegations made in the plaint and prayed for dismissal of the suit. After a contested hearing of the suit, the learned trial judge decreed the suit in preliminary form on the basis of the plaint case by judgment and decree dated February 29, 2012. The plaintiffs got a decree for 1/6th share in respect of 'Ka' schedule property, 1/4th share in respect of 'Kha' schedule property, 16 anna share in respect of 'Ga' schedule property and 1/6th share in respect of 'Gha' schedule property. The defendants were restrained permanently from disturbing the peaceful possession of the plaintiffs.

8. Challenging the aforementioned judgment and decree dated February 29, 2012, the petitioners as appellants filed a first appeal before this court being FA 228 of 2015. The petitioners also filed an application under Order 41 Rule 27 of the Code of Civil Procedure, praying for an opportunity to adduce additional evidence. After contested hearing, the appeal was allowed along with the said application. The preliminary decree was set aside and the Hon'ble Division Bench remanded the matter to the trial court for fresh adjudication, upon allowing the petitioners to adduce additional evidence on the basis of the documents filed in court, subject to formal proof and also subject to the satisfaction of the learned court with regard to the proof of the documents. The Hon'ble Division Bench while disposing of the appeal also held that the trial judge had failed to consider the contention of the petitioners that the predecessor of one of the co-sharers had transferred

some property to a mosque, by way of an 'Arpannama'. The mosque had not been made a party to the suit. The second omission recorded by the Hon'ble Division Bench was that one of the properties in the schedule was a burial ground, which had not been considered when the decree was passed. Such burial ground could not be partitioned. Thirdly, the shares of the defendants had not been declared. The Hon'ble Division Bench held that the materials on record had not been considered before the preliminary decree was passed. The judgment was incomplete. The matter was required to be remanded back for consideration afresh, on the evidence on record along with the evidence which were produced before the Hon'ble Division Bench by way of an application under Order 41 Rule 27 of the Code of Civil Procedure. The Hon'ble Division Bench recorded that one of the defendants, who was conducting the suit was 66 years old and he had forgotten about those documents. Those had been misplaced for a while, and the learned Advocate conducting the matter was not informed about the existence and relevance of such documents. Although the explanation was found to be feeble, but Their Lordships observed that the title deeds were substantial proof of ownership of the property and the same constituted vital evidence, without which an effective judgment could not have been delivered by the learned court. The documents were crucial and necessary for effective decision on the respective shares of the parties. Thus, the application for adducing additional evidence was allowed.

9. The decision of the Hon'ble Division Bench is as follows :-

“20. The title deeds sought to be produced before this Court and leave sought under Order 41 Rule 27 of the Code of Civil Procedure are indeed the vital evidence that would have a bearing result on the suit

decision i.e. as to whether the plaintiffs and the defendants have any share whatsoever in the suit property, and if so, to what extent do they have such share.

21. Since this Court has already indicated that the matter must be considered afresh by the Trial Court on remand, the application under Order 41 Rule 27 is allowed.

22. The documents sought to be produced are taken on record and shall form part of the records of the suit in the Court below, however, subject to formal proof. The Court below shall consider the matter afresh. The additional documents that are disclosed before this Court under Order 41 Rule 27, may be proved to the satisfaction of the Court below by the appellants herein.

23. The Court below shall thereafter hear arguments on the additional evidence and, if necessary, frame further issues within the meaning of Order 15 Rule 3.

24. After recording evidence and allowing the witnesses of the appellants to be examined, the Court below shall reappraise the evidence already recorded along with fresh evidence and take a suitable decision in the matter.

25. The observations of this Court as indicated hereinabove, as regards the mosque and burial ground shall be borne in mind and, if necessary, the Court below may add parties. Such parties shall be given an opportunity to file written statement in the matter”.

10. After the remand and a direction for fresh hearing of the suit, the petitioners filed an application for amendment of the written statement. The petitioners sought to incorporate pleadings to lay the foundation for those additional documents/title deeds which the Hon’ble Division Bench had permitted to be adduced in evidence, subject to formal proof.

11. Upon contested hearing of the said application, the court was of the view that incorporating names of certain persons as necessary parties and amending the pleadings to lay the foundation of those documents which were not mentioned in the pleadings, could not be allowed as the Hon’ble Division Bench had not permitted amendment of the written statement.

12. In my opinion, although the Hon’ble Division Bench had not specifically issued any direction permitting the petitioners to amend the

written statement, but the true spirit and purport of the judgment was that entire suit should be heard afresh on the basis of oral and documentary evidence which had been adduced and were to be adduced by way of additional evidence. The Hon'ble Division Bench however, ensured that the additional documents sought to be tendered, would have to be formally proved to the satisfaction of the learned judge before the same were marked as exhibits. Although, the explicit direction for amendment of the written statement or the procedure by which the documents should be marked as exhibit were not spelt out, but a meaningful reading of the decision of the Hon'ble Division Bench and the intention and the purport of the said decision was that the entire matter was to be freshly adjudicated by the learned trial judge upon allowing additional evidence, arguments on those documents, framing of additional issues and if necessary by addition of necessary parties if the documents revealed that parties had been left out, in whose absence the suit could not be effectively adjudicated or whose rightful claim was involved in the suit.

13. Thus, reading between the lines, the correct interpretation of the judgment would be that the Hon'ble Division Bench consciously set aside the preliminary decree upon coming to a specific finding about the illegalities in the earlier preliminary decree.

14. The application for amendment should have been allowed on appreciation of the fact that once the High Court had allowed additional evidence to be adduced on the basis of the documents, sufficient pleadings with regard to the said documents should be available in the written statement.

15. This Court deems it fit to refer to a decision of the Hon'ble Apex Court with regard to the liberal approach to be adopted by courts while considering amendments of written statements. Substituting or altering a plea is permissible in case of written statement. Reliance is placed on ***Revajeetu Builders and Develpers vs. Narayanaswamy and Sons and ors.*** reported in **(2009) 10 SCC 84**. Paragraph 26, of which is quoted below:-

"26. In the same judgment of Usha Balashaheb Swami [(2007) 5 SCC 602] , the Court dealt with a number of judgments of this Court and laid down that the prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of claim applies to amendments to the plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable."

16. The Apex Court in the case of ***Andra Bank vs. ABN Amro Bank N.V. and others*** reported in **2007 SC 2511**, observed that delay was no ground for refusal of a prayer for amendment of a written statement. The only question to be considered by the Court was whether such amendment would be necessary for adjudicating the real controversy between the parties in the suit. The Court could not go into the question of merits of the amendment. The Hon'ble Apex Court in the case of ***Ramchandra Sakharam Mahajan vs. Damodar Trimbak Tanksale (Dead) and others*** reported in **(2007) 6 SCC 737**, held that if the amendment enabled the Court to pin-pointedly consider the real dispute between the parties and helped to decide the case more satisfactorily, the amendment ought to be allowed.

17. Moreover, merits of the pleadings sought to be incorporated by the amendment application was not required to be looked into. Whether the contentions of the petitioners in the amendment application were correct or not, would be decided at the final hearing of the suit, on evidence.

18. Amendment of the written statement should always be allowed liberally. In the decision of **Rajesh Kumar Aggarwal and others vs. K.K.Modi and others** reported in **AIR 2006 SC 1647**, the Apex Court held that the Court was not to go into the merits of the facts sought to be incorporated by the amendment. The relevant portion is quoted below:-

"While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."

19. In the decision of **Life Insurance Corporation of India vs Sanjeev Builders Private Limited & Anr.** decided in **Civil Appeal No. 5909 of 2022**, the Hon'ble Apex Court laid down the principles of governing amendment in paragraph 70 of the decision. The relevant portions are quoted below:-

(ii) All amendments are to be allowed which are necessary for determining of the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(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, or
 - (iv) by the amendment, the other side loses a valid defence.
- (v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.”

20. In paragraph 24, of the order in F.A 228 of 2015, the Hon’ble Division Bench had clarified that witnesses of the appellant shall be examined and the court shall re-appreciate the evidence already recorded along with the fresh evidence and take a suitable decision.

21. When the court was required to hear the entire matter afresh, upon considering whether necessary parties were to be impleaded or not, and also upon considering whether further issues should be framed, it goes without saying that the suit was directed to be heard from its very inception. In a written statement, contrary pleas can also be raised. Thus, the ground for rejection of the amendment that the nature and character of the suit would be changed, is not accepted. Moreover, the additional documents could not

be adduced in evidence unless pleadings were available in the written statement.

22. It is also pertinent to note that if the documents were allowed to be adduced as evidence by the defendants, unless the plaintiffs got a chance to deal with the said documents, the plaintiffs' right would also be affected. Thus, for the ends of justice and for the benefit of the plaintiffs as well, the pleadings with regard to the said documents are required to be a part of the written statement, so that the plaintiffs are not taken by surprise and they are allowed to deal with such documents by taking necessary steps to rebut those documents in the appropriate manner and by recalling themselves to adduce further evidence/additional evidence.

23. If the order of the Hon'ble Division Bench is interpreted in a way that the petitioners would straightaway start with the formal proof of the documents, in that event the plaintiffs do not get a chance to controvert those documents except by cross-examining the petitioners.

24. It is for the plaintiffs to prove their case. Thus, documents which were allowed to be adduced as additional evidence subject to proof, should be within the knowledge of the plaintiffs. The entire procedure would be faulty, defective and in violation of the principle of natural justice, if the amendment is not allowed.

25. The Hon'ble Division Bench had left it to the discretion of the learned trial judge to decide whether necessary parties were required to be added or not. Thus this process could be achieved either by an application under Order 1 Rule 10 (2) of the Code of Civil Procedure or by the court, suo motu.

26. It is also significant to note that the Hon'ble Division Bench observed that if the court found that necessary parties were to be impleaded, the court was required to add them and then give them an opportunity to file their written statement. Thus, this was an open remand to be decided by the trial court from the very beginning upon allowing parties to start afresh in accordance with law and also with a specific direction upon court to do certain acts with regard to addition of parties, framing additional issues and allowing further evidence.

27. The learned court erred by resorting to a strict interpretation of the order of the Hon'ble Division Bench, thereby overlooking the true meaning and purport thereof. The documents could be adduced in evidence only when foundational basis had been laid in the pleadings. The order of remand required fresh hearing of the suit. Ends of justice demands that the amendment of the written statement should be allowed.

28. Under such circumstances, the revisional application is allowed.

29. The order impugned is set aside.

30. The petitioners are allowed to amend the written statement.

31. The petitioners are at liberty to file a separate application for addition of party, which shall be decided on contest and strictly in accordance with law, by the learned court. The plaintiffs will be at liberty to file their written objection to such application.

32. The amended written statement shall be filed within a period of two weeks from reopening of the court after the summer vacation. The rejoinder/replication to the amended written statement shall be filed by the

plaintiffs within two weeks thereafter. The learned trial judge will frame additional issues.

33. The application for addition of parties will also be filed within two weeks after reopening of the court after the vacation. The objection to the same shall be filed within two weeks from receipt of a copy thereof. The learned trial court shall decide the application for addition of party on its own merits, first. If the same is allowed, the learned court shall direct necessary steps be taken to amend the cause title of the plaint and effect service of summons upon the added parties. The added parties shall be allowed to file their written statement and also adduce evidence. The plaintiffs shall be entitled to file additional evidence-in-chief and recall themselves to adduce further evidence in view of the change in the circumstance. Thereafter, the petitioners/defendants as also the added parties shall proceed with their evidence. The suit will be disposed of in accordance with law. This decision shall not be construed as a decision on the merits of the suit or the application. The procedure envisaged in the law of evidence shall be applicable when the parties tender documents for being admitted in evidence.

34. There will be no order as to costs.

35. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)