

Ct. No. 652
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C.O. 1278 of 2019
Sri Dhiren Mondal
-Versus-
Sri Nakul Mondal & Anr.

Mr. B.K. Samanta

...For the Petitioner

Affidavit-of-service filed on behalf of the petitioner is taken on record. Despite service, opposite parties are not represented.

This is an application under Article 227 of the Constitution of India wherein the petitioner has challenged the order No. 47 dated 16th February, 2019 passed by the learned Civil Judge (Junior Division), Second Court, Malda in O.C. No. 13 of 2014.

By the impugned order the Court below rejected the defendants application under order VI Rule 17 read with Section 151 of the Code of Civil Procedure seeking amendment of the written statement. The petitioner's case in a nutshell is that the opposite parties herein as plaintiffs have filed the aforesaid suit for permanent injunction against the present defendant/petitioner herein claiming that the plaintiffs are the absolute owners and occupiers of the suit property and the defendant/petitioner has no right, title or interest over the suit property but the defendant/petitioner forcibly and illegally trying to occupy the suit property. The defendant/petitioner is contesting the said suit by filing written statement. The defendant's contention is that the plaintiffs predecessor, Tarubala Saha had no right, title or interest and as such she cannot transfer the suit property to anybody.

After closure of plaintiffs' evidence and also after

closure of evidence of Defence witness No.1, the defendant found that due to inadvertence, he failed to mention in the written statement as to how he acquired absolute right, title and interest in the suit property and to that extent counter claim is also required to be filed and for which he made the prayer for amendment of the written statement and also sought for incorporation of the counter-claim with the written statement for a declaration that the deed in favour of the plaintiffs' predecessor is void ab initio. Plaintiffs/opposite parties herein filed written objection against the said prayer for amendment made by the petitioner and learned court below after contested hearing, was pleased to reject the defendant's prayer for amendment of the written statement by the impugned order.

Mr. B.K. Samanta, learned counsel appearing on behalf of the petitioner submits that the lapses in not incorporating the subject matter of the proposed amendment in the original written statement in time was not intentional and as such the court below ought to have allowed the prayer for amendment of the written statement. In this context, he relied upon a decision of the Hon'ble Apex Court in the case of *Baldev Singh & Ors. Etc. Vs. Manohar Singh & Anr*, reported in (2006) 6 SCC 498.

He further contended that if the proposed amendment is allowed, it will not change the nature and character of the said suit and proposed amendment is formal in nature based on the facts and circumstances which has already been stated in the written statement.

I have considered the submissions made on behalf of the petitioner. On perusal of the copy of plaint, it appears

that subject matter of suit property is .02 ¼ satak being 1/4th of .08 1/40 satak, out of total .27 satak in R.S. plot No. 1938. The plaintiffs, Nakul Mondal & another have claimed that the said suit property originally belonged to one Santibala Sarkar who subsequently transferred the same in favour of Tarubala Saha by a registered deed dated 28th February, 1989 and Tarubala Saha thereafter transferred the same in favour of her son, Radheshyam Saha on 7th June, 2011 by a registered deed. While said Radheshyam Saha was in absolute possession he transferred the same in favour of plaintiffs by another registered deed dated 17th January, 2013.

In the said suit, the defendant appeared and denied all material allegations made in the plaint. The defendant contended that said Tarubala Saha in fact, filed a suit being Title Suit no. 206 of 1989 against present defendant claiming four annas in 8¼ sataks in the suit property but the court held that Tarubala cannot have any share in the suit property and as such the suit filed by Tarubala was dismissed with costs on 1st March, 1999. It is further case of the defendant in the written statement that, Tarubala thereafter preferred an appeal against judgment dated 1st March, 1999 being Title Appeal no. 9 of 1999 but the said appeal also got dismissed in the court of additional District Judge, 4th Court, on 26th November, 2013. Accordingly, Tarubala never acquired any right title and interest in the suit property and as such she has no right to transfer the suit property in favour of plaintiffs' predecessor and as such plaintiffs have no right, title and interest in the suit property.

Now by way of amendment the defendant/petitioner wants to incorporate in the written statement that

out of 27 sataks in the suit property $8\frac{1}{4}$ satak originally belonged to Laskari Mondal and said Laskari Mondal sold her said share in the suit property in favour of defendant's mother, Khukibala Dasi by a registered deed dated 1st Februar, 1963. Said Khukibala Dasi died leaving behind present defendant/petitioner and three daughters namely, Bimala, Bishaka and Santibala. Thereafter, Bimala, Bishaka transferred their share in favour of present defendant/petitioner by a registered deed which was executed on 18th February, 1989 and registered on 20th February, 1989. The defendant further sought to incorporate by way of amendment that though plaintiffs are claiming their share through aforesaid Santibala, claiming that she had inherited her mother's $\frac{1}{4}$ th share in $8\frac{1}{4}$ stake of land but by dint of judgment and decree passed in aforesaid partition suit 206/1989, Santibala Sarkar did not have any right, title or interest in the suit property and as such she did not have any right to execute any deed in favour of Tarubala Saha on 28th February, 1989 and as such the said deed is void ab initio.

So, the real issue involved in the aforesaid suit for adjudication is whether the defendant has absolute right title interest in the suit property or the plaintiffs have acquired absolute right title interest in the suit property by dint of aforesaid series of deeds and as such for effective and conclusive adjudication of the present dispute between the parties the proposed amendment as mentioned in the item Nos. 1 and 2 of the Schedule of amendment application is very much relevant even if it has been filed at a belated stage. In a salutary Judgement Apex Court in *Revajeetu Builders and Developers vs. Narayanaswami and sons & others* reported in (2009) 10 SCC 84 has clearly laid down

in paragraph 63, about the factors to be taken into consideration, while dealing with applications for amendment, which are 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.

Keeping in mind aforesaid important factors, it appears that in the present context proposed amendment is necessary for proper adjudication of the suit and *prima facie* there is nothing *malafide* in the prayer and such amendment if allowed will not cause such prejudice, which will not be compensated to the other side in terms of money. It also appears proposed amendment if allowed will not change nature or character of the suit, since even after amendment suit will remain a suit for declaration of ownership in respect of suit property and on the contrary if it is not allowed it may cause multiplicity of proceedings in order to enforce defendant's right in the suit property. Present amendment, if allowed will also not amount to *denovo* trial, since defendant's all along case is plaintiffs have not acquired title in the suit property by dint of deed executed in favour of Tarubala, in view of judgement passed in partition suit no. 206/1989.

Furthermore the supreme court in number of judgements laid down that the prayer for amendment of plaint and a prayer for amendment of the written statement

stand on different footings. In ***Baldev Singh and other vs. Manohar Singh & another*** reported in (2006) 6 SCC 498, it was hold in paragraph 15:-

That apart, 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 plaintiff cannot be allowed to amend his pleadings 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 the written statement. 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, in the case of amendment of 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 latter case.

However, Item No. 3 of the proposed Schedule of amendment wherein the defendant has sought for amendment in the form of counter claim for a declaration that the Deed dated 28th September, 1989 in favour of Tarubala Saha be declared as void Deed cannot be allowed since from the averment itself made in the written statement such prayer for amendment is barred by limitation in view of the fact that said Deed was executed in 28th September, 1989.

The impugned order No. 47 dated 16th February, 2019 is accordingly set aside in part.

In such view of the matter the Item Nos. 1 and 2 of the Schedule of amendment is allowed. The defendant is hereby directed to file amended written statement within a period of two weeks from the date of communication of this order. In the event of filing such amended written statement by the defendant, the Court below will give opportunity to both the parties to adduce additional evidence by way of recalling the witnesses and/or by giving them opportunity to

bring fresh witnesses and thereafter court shall deliver judgement at the earliest after hearing argument.

The revisional application, being C.O. 1278 of 2019 is accordingly disposed of.

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

(Ajoy Kumar Mukherjee, J.)