

18.1.2024
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Ct. no. 652
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CO 2479 of 2019

**M/s. Bindal Vanijya Pvt. Ltd.
Vs.
Smt. Chaina Karmakar & Ors.**

Mr. Jayanta Kumar Mukhopadhyay
Mr. Purnasish Gupta
Ms. Sruti Das ...for the Petitioner

Mr. Nilanjan Bhattacharjee
Mr. Abhilash Chatterjee
Mr. Saikat Dey ...for the Opposite parties

An order dated 17.4.2019 passed by learned Civil Judge, Senior Division, 3rd Court, Howrah in Title Suit no. 123 of 2012 is under challenge in the present application.

The petitioner contended that the opposite party nos.1 to 6 herein as plaintiffs filed aforesaid suit for partition being Title Suit no. 123 of 2012 with prayer for declaration and permanent injunction against the present petitioner and the opposite party nos. 7 to 11. In the said suit, plaintiffs have interalia sought for declaration of three registered sale deeds dated 28th December, 2011, 5th September, 2011 and 6th April, 2011 executed by some of the defendants in favour of the defendant no. 6 as void.

In the said suit, plaintiffs contended that Dudh Kumar Karmakar by way of an oral amicable partition

absolutely got A schedule noted properties to the plaintiff and he died in the year 1369 B.S leaving behind his wife, Urmila Karmakar who is defendant no. 4, three sons being defendant nos. 1 to 3 and seven daughters being the six plaintiffs and defendant no. 5 as his legal heirs. He further contended that all the daughters of Dudh Kumar Karmakar married long before and after their marriage, they started residing at their matrimonial home. Plaintiffs made a request to defendant nos. 1 to 5, for making amicable partition in respect of suit Schedule mentioned properties but the defendant no. 1 to 5 always tried to avoid to make amicable partition in respect of the suit properties. they further contended that in the month of March 2012 when the plaintiffs further asked the defendant no. 1 to 5 to make amicable partition in respect of A schedule noted suit properties, they openly declared that neither the plaintiffs are the co-sharers nor they have any right, title or interest in respect of the A Schedule noted suit properties and they further declared that all the properties left by Dudh Kumar Karmakar have been inherited by the defendant no. 1 to 4 only and accordingly, they have mutated their names in the record of rights. They further disclosed that they have already sold some of the properties acquired by way of inheritance from Dudh Kumar, in favour of the defendant no. 6 who is the petitioner

herein. Subsequently, the plaintiff got searching report from BL& LRO and obtained B schedule noted certified copy of purported deeds from which it appears that the defendant no. 1 to 4 by suppressing material facts and on the basis of erroneous record of rights, most illegally transferred some of the properties in favour of the defendant no. 6. The plaintiffs' further case in the plaint is that they are the co-sharers in respect of the suit property and they have 1/11th share each in the properties left by Dudh Kumar Karmakar and accordingly, the defendant no. 1 to 4 had no right to transfer plaintiffs' share in the suit properties through B schedule mentioned deeds in favour of the defendant no. 6. The plaintiffs' further case in the plaint is that they are in joint possession in respect of the A schedule noted suit properties and they are also owner in respect of the properties under B schedule noted purported deeds having 1/11th share each. Accordingly, they have sought for declaration and partition along with cancellation of three deeds executed by defendant nos. 1 to 4 in favour of defendant no. 6 mentioned in B schedule.

The defendant no. 6/purchaser of the B schedule deeds appeared in the suit and filed written statement and denied all material allegations. Thereafter, trial commenced and while evidence of defendant continuing, the plaintiff of the said suit filed

an application for amendment under Order VI rule 17 of the Code with a prayer for incorporating another sale deed executed in favour of the self-same defendant no. 6 by other defendants to be declared as void. Learned court below by the impugned order allowed the said prayer for amendment.

Being aggrieved by that order, Mr. Gupta, learned counsel for the petitioner submits that the purported amendment is hopelessly barred by limitation since the plaintiff came to know about the said deed on or before institution of the suit. Furthermore, the plaintiff in the earlier amendment applications did not care to incorporate the same in the plaint. He further referred proviso to Order VI rule 17 of the Code and contended that suit is posted for cross examination of the DW 1. Now at this stage, prayer for amendment cannot be allowed unless the plaintiffs make out a good case that in spite of due diligence, they could not have raised the matter before commencement of trial and that sufficient reasons had prevented them from making the amendment before commencement of trial. Learned court below also without considering the said issue involved in proviso to Order VI rule 17 of the Code had passed a cryptic order and thereby allowed the prayer for amendment.

Mr. Gupta further referred the paragraphs 4,8 and 11 of the Affidavit-in-opposition and has taken a

specific plea that the averments in the said paragraphs discloses that the plaintiff was all along aware about the said deed. In fact, in the amendment application, the plaintiffs want to incorporate a prayer for declaration of the deed dated 19th August, 2011 as void, by filing application for amendment in the year 2019 and accordingly under Article 56 of the Limitation Act, the proposed amendment is hopelessly barred by limitation and as such the present application cannot be allowed.

In this context, he referred the following judgments:

- i) Nemai Chandra Basuri Vs. Chandra Mohan Ghosh reported in CAL/H/N 2016(2) 354,
- ii) Radha Mohan Saha Vs. Kinkar Chatterjee & Another, LAWS (Cal) 2017 9 112,
- iii) Anima Das Vs. Hind Engineering And Wire Products, 2013 (3) Cal L J 61,
- iv) Faroja Bibi Vs. Sk. Mustafa Ali, CAL LJ 2013 (3) 269,
- v) Roop Ram Educare Pvt. Ltd. vs. Exclusive Floor Owners Society, LAWS (sc) 2017 8 204,
- vi) M. Revanna Vs. Anjanamma, AIR 2019 SC 940.

Mr. Bhattacharya, learned counsel for the opposite party submits that this is a suit for partition and unless the proposed amendment is incorporated in the plaint, the plaintiff who have 1/11th share each in the suit property will be highly prejudiced. He further contended that in the amendment application, they have taken the specific plea that they had handed over a copy of the said deed sought to be cancelled to his lawyer for incorporation in the plaint but due to his lawyer's latches, it was not incorporated in the schedule of plaint and for which the plaintiff must not suffer. He further submitted that object of every amendment is to avoid multiplicity of proceedings. Even though the present amendment has been filed at a belated stage, it should be allowed, as such amendment is very much required for the purpose of adjudication of the real dispute between the parties. Accordingly, he submits that the order impugned does not call for interference by this court. In this context, he relied upon judgments of -

- I) **Life Insurance Corporation of India vs. Sanjeev Builders Private Limited & Anr. reported in 2022 (4) ICC (SC) 645,**
- II) **Abdul Rehman and Another Vs. Mohd. Ruldu and Others reported in (2012) 11 Supreme court cases 341,**

III) **Tapan Paul Vs. Anju Paul & Others**
2015(2) WBLR 597

IV) **Pankaja & Ors. vs. Yellappa (D) by Lrs.**
And ors., AIR 2004 SC 4102.

I have considered the submissions made by both the parties. According to the plaint case, the property originally belonged to Dudh Kumar Karmakar who died leaving behind seven daughters (out of which six are plaintiffs and the other is defendant no. 5) and his widow who is defendant no. 4 and three sons who are defendant nos. 1 to 3 in the present suit.

According to the schedule of the plaint, the plaintiffs have sought for cancellation of the B schedule mentioned three deeds, being item no. 1,2 wherein the defendant no. 1,3 and 4 have transferred property in favour of the defendant no. 6/petitioner herein and defendant no. 2 alone sold some properties to defendant no. 6 mentioned in item no. 3. The plaintiffs' specific claim is that since Dudh Kumar Karmakar died leaving behind 11 heirs, so each of the heirs have 1/11th share and accordingly, defendant nos. 1 to 4 cannot claim that they are the exclusive owners of the suit properties. They cannot also sell the properties in favour of the defendant no. 6 without disclosing other's co-sharer's share in the suit property. Accordingly, the plaintiff in the plaint, tried to assert their right of 1/11th share each in respect of all the properties left by

Dudh Kumar Karmakar including the properties covered by the three deeds mentioned in B schedule to the plaint.

It is apparent that the aforesaid deed sought to be incorporated in the plaint was executed in the year 2011 and the prayer for amendment has been made in the year 2019. The petitioner's case is that under Article 56 of the Limitation Act such prayer for amendment is barred by limitation and on the contrary it is the case of the plaintiffs/opposite parties as appearing in the petition for amendment that they have handed over certified copy of aforesaid 4th deed being no. 3844 of 2011 dated 19th August, 2011 to their lawyer for seeking cancellation of the said deed also but due to laches on the part of their advocate it had not been incorporated in the plaint. Accordingly, whether the aforesaid prayer for amendment regarding cancellation of the 4th deed being no. 3844 of 2011 is barred by limitation or not, is a mixed question of law and fact.

Needless to repeat that in the suit for partition plaintiffs have prayed for declaring therein share in the suit properties including the properties covered in the 'B' schedule mentioned deeds as well as property mentioned in the fourth deed sought to be incorporated by way of amendment. This factual aspect of having plaintiffs' share in the suit properties

including property covered in the proposed amendment deed has not been admitted by the defendants. Accordingly, this is a vital issue to be decided in the partition suit as to whether plaintiffs at all have any share claiming themselves as heirs of original owner in the properties covered in the 'B' schedule mentioned deeds as well as in the deed sought to be incorporated by way of amendment.

In this context, this court in the case of **Tapan Paul (supra)** made a clear observation that the amendment of plaint should generally be allowed if the same does not cause irreparable prejudice to the other party because one of the primary purpose for amendment is to avoid multiplicity of proceedings. There is no bar in law regarding allowing incorporation of a prayer by way of amendment even if the same appears to be barred by time on the date of application, more often when limitation is a mixed question of fact and law and the issue of limitation should be adjudged at the final trial of the suit upon taking proper evidence.

In the present case also, claiming heirs of original owner, Dudh Kumar Karmakar, plaintiffs have sought for declaring their share in the suit properties and have filed the suit to establish their right, title, interest in the suit properties including the properties mentioned in B schedule deeds and the property

covered in the deed sought to be incorporated by way of amendment. In a partition suit, if the plaintiffs find that the deed which has been set up by the defendant casts a cloud in their share in the suit properties, that must create an important issue for the purpose of adjudicating real controversy between the parties. I also find while the learned court below allowed the prayer for amendment was of the clear view that on perusal of the contents of the plaintiffs' application, the amendment sought for seems to be necessary for effective adjudication of the suit and the said amendment is not inconsistent with the nature and character of the suit. I do not find any illegality or impropriety or perversity in the aforesaid finding nor it can be said that court below has exceeded his jurisdiction in passing the order impugned which can call for interference by this court invoking jurisdiction under Article 227 of the Constitution of India. Furthermore, though the petitioner herein has taken a specific plea that the prayer for amendment has been made at a belated stage after commencement of the trial but in this context, relying upon the judgment reported in 2022 (4) ICC (SC) 645 as well as (2012) 11 Supreme court cases 341, it can be said that if the granting of amendment really sub-serve ultimate cause of justice and avoid further litigation, the same should be allowed. In this context, the proposed amendment if

allowed, will not introduce any separate cause of action nor it will change the nature and character of the suit because even after proposed amendment, suit will remain a suit for asserting plaintiffs' right over the properties left by original owner, Dudh Kumar Karmakar at the time of his death.

In such view of the matter, I do not find that this is a fit case where interference by this court under Article 227 of the Constitution of India is warranted specially when the court below is of the view that the proposed amendment is very much required for the effective adjudication of the suit.

C.O. 2479 of 2019 is accordingly dismissed.

However, since the issue, as to whether plaintiffs' prayer as added by way of present amendment is barred by law of limitation or not involves question of law and fact, such question shall be kept open pending final adjudication of the suit and court below will adjudicate such issue without being influenced by any observation made herein.

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.)