

(1991) 03 PAT CK 0038

In the Patna High Court

Case No : Civil Revision No. 562 of 1990 (R)

Chandi Prasad Sarkar

APPELLANT

Vs

Satya Prasad Roy and Another

RESPONDENT

Date of Decision : 18-03-1991

Acts Referred:

Citation : (1991) 03 PAT CK 0038

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This application is directed against an order dated 12.9.1990 passed by the 3rd Subordinate Judge, Chaibassa in Title Suit No. 10 of 1982, whereby and whereunder the said learned court allowed an application for amendment of plaint filed by the Plaintiffs--opposite parties.

2. The fact of the matter lies in a very narrow compass.

3. The plaintiffs filed the aforementioned suit inter alia, for a decree of declaration in relation to their light, title and interest over the suit plot and a decree for permanent injunction against the defendant from transferring the suit plot in any manner to anybody.

4. According to the plaintiffs, the land in suit was purchased by a deed of sale dated 21.10.1938 by Ratneswar Roy in the name of benamdar of the mother of the defendant.

5. According to the plaintiffs, the said benamdar had never been in possession of the lands in question.

6. On the other hand, the case of the Petitioner was that his mother was the real owner of the property and not a benamdar of the said Ratneshwar Roy.

7. It was contended by the defendant that Ratneshwar Roy and consequently the plaintiffs were in impermissive possession of the property in suit and the right, title and interest as also the legal possession thereof had all along been with his mother and after her death he has been in possession.

8. On 5.12.1990, an application was filed by the Petitioner praying therein that the suit instituted by the plaintiffs be dismissed, in view of the provisions of Benami Transactions (Prohibition of the Right to Recover Property; Act, 1988 (hereinafter called as the Act").

9. On 19.4.1989, the opposite parties filed an application for amendment of plaint praying therein that they be allowed leave to amend the plaint contending inter alia, therein that as they had been" in possession of the property in suit openly, continuously and within the knowledge of the defendant as adverse to his interest, the plaintiffs had perfected their right, title and "merest by adverse possession, even if it be held that the defendant had legal title in relation to the property in suit.

10. By reason of the impugned order, the learned court below, as noticed hereinbefore, has allowed the said application.

11. Mr. P.K. Sinha, the learned Counsel appearing on behalf of the Petitioner submitted that a claim of right, title and interest a property by adverse possession is (sic) of a claim of lawful title by the Plaintiffs originally claimed by them in the suit.

12. The learned Counsel contended that by reason of the amendment of the plaint, the Plaintiffs have altered the nature and (sic) of the suit which is impermissible.

The learned Counsel, in this connection has strongly relied upon a decision of the Supreme Court in A.K. Gupta & Sons Ltd. v. (SIC) Valley Corporation (AIR 1967 S.C Page-96).

13. It was further submitted by the learned Counsel that even such a subsequent event could not have been permitted to be brought on records under Order 7, Rule 7 of the Code of Civil Procedure.

In this connection, the learned Counsel has relied upon in Prem Raj v. The D.L.F. Housing & Construction (Pvt.) Ltd. and Anr. (AIR 1968 S.C. Page-1355).

14. Mr. S.K. Chattopadhyay, the learned Counsel appearing on behalf of the opposite parties submitted that plea put forth by the plaintiffs by way of the amendment of the plaint is alternative in nature and has been takes] in view of coming into force of the said Act.

15. The learned Counsel further submitted] that it is not correct to contend that a plea off adverse possession can not co-exist with that plea of title claimed by the Plaintiffs.

The learned Counsel, in this connection, has relied upon in S.M. Karim Vs. Mst. Bibi Sakina, , AIR 1941 85 (Privy Council) , Mettu Bhimudu Vs. Duggirala Pitchayya and Others, , Gulwant Kaur Vs. Mohinder Singh and Others, Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, .

16. Prior to coming into force of the said Act, the benami transactions were recognised in India.

Some statutes, c.g. Section 66 of the Code of Civil Procedure, however, prohibited filing of a suit or recovery of property on the ground that the same had been acquired in benami.

17. In *Mithilesh Kumar and Another Vs. Prem Behari Khare*, , the Supreme Court held that the said Act is retro-active in operation and the coming into force thereof being a subsequent event, the same can be taken note of in a pending suit and/or appeal and in view of the provisions contained therein, a suit coming within the purview thereof must be held to be not maintainable.

18. "Benami transaction" has been defined in Section 2(a) of the Act as meaning, any, transaction, in which property is transferred to one person for a consideration paid or provided by any other persons.

Section 3 of the said Act prohibits benami transaction. Section 4 prohibits the right to recover the property held benami.

19. The Supreme Court in *Mithilesh Kurari's* case (supra) held that once, the property is found to be held benami, no such claim or action to enforce any right in respect thereof shall lie.

It further held:

When the law nullified the defences available to the real owner in recovering the benami property from the benamidar the law must apply irrespective of the time of the benami transactions.

20. The question which, however, arises for consideration is as to whether the plea of the plaintiffs to the effect that he is the real owner in respect of the -suit property is inconsistent with the plea that in the event of it be held that he is not the real owner thereof, has acquired title by ad Verse; possession.

In AIR 1941 85 (Privy Council) the Privy Council was considering the effect of its decision in AIR 1933 1 (Privy Council) wherein two, long standing decisions of the Bombay High Court relating to the power of a widow to adopt a son unless expressly forbidden by husband came for consideration and it was held that her husband died undivided and that he had not obtained the consent of his surviving coparceners.

In view of the alteration in the case law, proceeded to decide the question of adverse possession as to whether in such a situation the defendant had been in possession of the property in suit adverse to the interest of the Plaintiffs.

21. In *S.M. Karim v. Mst. Bibi Sakina* AIR 1968 S.C. 1254 the Supreme Court was considering a case u/s 66 of the Code of Civil Procedure. In that case, having held that the suit was barred u/s 66 of the Code, the Supreme Court considered the plea of adverse possession, on merits, but in the facts of that case, held that

such a plea of adverse possession cannot be entertained.

It further held:

As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the Plaintiff. The High Court did not accept this case. Such a case is of course, open to a Plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benamdi nature of the transaction. But the alternative claim must be clearly made and proved.

22. In *Nettu Bhimudu v. Buggirala Pitchayya* AIR 1946 Madras, 497, it was held that when necessity for amendment of plaint arises out of the circumstances which happened after filing of the suit, certain subsequent events which may be necessary in the changed circumstances but which does not alter the fundamental character of the suit, amendment of plaint should be allowed.

The Madras High Court further held that:

The statutory test, therefore, is whether the alteration of the pleadings or amendment thereof that is asked for is just or whether it is necessary for the purpose of determining the real question in controversy between the parties. To determine this question and applying this rule the Courts have applied from time to time various tests. While it is recognised that in order to avoid multiplicity of suits and to enable the final determination of all questions arising in the litigation, the rule should be administered in a fairly liberal manner. It has at the same time been emphatically laid down that under the guise of alteration or amendment of the pleadings, a party should not be allowed to substitute one cause of action for another or to change the subject matter.

23. In *Sribhagwan Singh and Others Vs. Rambasi Kuer and Others*, , a Division Bench of this Court has held that a transferee having acquired title under an invalid transaction, and continuing in possession for more than twelve years, would be deemed to have acquired a perfectly good title to the property.

24. In *Gulwant Kaur Vs. Mohinder Singh and Others*, , a learned Single Judge held that when the defence under the original plea as also under the new plea sought to be introduced by the amendment being that the defendant is the owner of the property and is in possession of the same from a particular date to the exclusion of her husband, it cannot be said that there is any change in the front in defence on the part of the defendant.

25. In *Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others*, the Supreme Court held that sometimes subsequent event may be taken into consideration and amendment should be allowed to shorten the litigation and avoid circuity of action.

26. From the decisions aforementioned there can not be any doubt that in a given case, the claim of title of the Plaintiff in respect of the suit property or in the alternative the plea that he has acquired an indefeasible title thereof by prescription cannot be said to be so inconsistent with each other that they can not stand together.

27. Such a plea of adverse possession in certain circumstances may be held to be alternative to the plea of general title.

28. It is further well known that the question as to whether a person has acquired title in himself by prescription or not is a question of fact.

Such a question has to be answered upon consideration of the evidences adduced by the parties to the case.

29. It is further well known that an application for amendment of pleading should be allowed liberally.

30. In *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*, , the Supreme Court held that:

Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the Rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs.

31. It is further well known that where provision of law has come into being with retrospective effect, a Court should exercise injudicial discretion in allowing the amendment.

Reference, in this connection may be made to *Ashalata Dey and Others Vs. Kamal Kumar Bose*, . In *Mibir Dutta v. Anadi Lal Mukherjee and Ors.*, AIR 1980 Cal 339, the Calcutta High Court relied upon the decision of Supreme; Court in *Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others*, and in *Pandit Ishwardas Vs. State of Madhya Pradesh and Others*, , held that an application for amendment of pleading should be allowed in order to bring on the records subsequent events.

32. In *Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another*, , the Supreme Court allowed an amendment, whereby an earlier admission was sought to be taken away.

33. The courts have also allowed amendment of the plaint even if the cause of action is barred under the law of limitation.

(See- *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*,

In *Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others*, the Supreme Court allowed an amendment in the pleading in order to shorten

litigation.

34. In *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, union which strong reliance has been placed by Mr. P.K. Sinha, the Supreme Court has. merely reiterated the general rule that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit in new cause of action was barred.

35. The Supreme Court, however held that the amendment sought for therein did not constitute alteration of a new cause of action and, a different cause but amounts merely to a different and additional approach to the same facts, the amendment has to be allowed even after the expiry of the statutory period of limitation.

36. The Supreme Court held:

The expression "cause of action" in the present context does not mean every fact which it is material to be proved to entitle the Plaintiff to succeed as was said in *Cooke v. Gill* (1873) 8 CP 107 in a different context, for it were some no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. The expression for the present purpose only means, a new claim made on a new basis constituted by new facts.

(Underlining is mine for emphasis:)

37. In this case, the plaintiffs, by reason of the amendment are not intending to bring new facts. Even in the original plaint, they had pleaded that they came in possession of the suit properties in their own right.

38. As noticed hereinbefore, the case" of the defendant Petitioner was that the possession of the Plaintiffs was permissive in nature.

In that view of the matter, an issue with regard to the nature of possession of the plaintiffs would fall for determination in the suit.

39. In the event, if it be held that the plaintiffs have been exercising acts of possession over the suit properties in the their own right, it may be open to them to contend that they have acquired title by adverse possession, subject of course, to their proving necessary ingredients thereof.

40. In *Mathura Prasad and Ors. v. Badri Dass Chela. Mahanth Bhagwan Dass and Ors.* (F.A. No. 272 of 1978) disposed of on 17th December, 1990, it was held that:

So far as animus possidendi is concerned the same being an intention on the part of the person to possess adversely, such a fact can be proved by bringing evidence on records and by attending circumstance. Reference to *Abodur Rahman Kha v. Anmad Khan AIR 1939 Oudh 427 B. Budhram Rai Vs. Benarsi Rai and Others, Machingal Potte Veetu alias Thakke Veettil Seetha Neithyar and Others Vs. Machingal Potte Veetu alias Patinhara Veettil Karnavan Kelu Menon*

and Others,

41. In Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, upon which strong reliance was also placed by Mr. P.K. Sinha the Supreme Court in view of the Sections 35 and 37 of the Specific Relief Act, 1877 held that there is no provision therein that a Plaintiff suing for rescission of the agreement may sue I n the alternative for specific performance. It was held that such plea cannot be justified under Order 7 Rule 7 of the CPC as although under this provision it is competent for the Plaintiff to pray for inconsistent reliefs, it must be shown that each of such pleas is maintainable.

42. Before coming into the force of the said Act, suit based on the plea that the Defendant?s mother was their benamdar was maintainable.

43. Even in such a case, an alternative pleading of acquisition of title by adverse possession was permissible.

44. For the reasons aforementioned, there is no merit in this application, which is accordingly dismissed.

However, in the facts and circumstance of, the case, there will be order as to costs.