

(2013) 03 GAU CK 0055
In the Gauhati High Court
Case No : C.R.P. No. 92 of 2012

Premada Rani Debnath and Others

APPELLANT

Vs

Shri Jagdish Debnath and Others

RESPONDENT

Date of Decision : 20-03-2013

Acts Referred:

Citation : (2013) 3 GLD 197 : (2014) 2 GLT 693

Hon'ble Judges : Utpalendu Bikas Saha, J

Bench : Single Bench

Advocate : D.K. Das Choudhury, for the Appellant; Somik Deb, for the Respondent

Judgement

Utpalendu Bikas Saha, J.—Heard Mr. D.K. Das Choudhury, learned counsel appearing for the petitioners as well as Mr. Somik Deb, learned counsel appearing for the respondents. The instant application under Article 227 of the Constitution of India is filed by the petitioners, who are the plaintiffs in the Title Suit being T.S. 01 of 2012 pending in the Court of learned Civil judge (Sr. Division), Udaipur, South Tripura, challenging the legality of the order dated 30-07-2012 passed by the learned Civil Judge (Sr. Division), Udaipur, South Tripura in Civil Misc. Case No. 22 of 2012 arising out of the aforesaid Title Suit wherein the application filed by the plaintiff-petitioners under Order 1, Rule 10(2) and Order VI, Rule 17 of the CPC was rejected.

2. As agreed to by the learned counsel appearing for the parties, the instant revision petition is taken up for final disposal at the admission stage itself.

3. The brief facts needed to be discussed for disposal of the instant revision petition are as follows:--

The petitioners as plaintiffs filed the aforesaid Title Suit for declaration of title, recovery of possession, perpetual injunction and mesne profit against the respondents who are the defendants in the aforesaid title suit. The subject matter of the suit is the land measuring 1.92, under Cadastral Survey plots No.

330, 331 and 347 recorded in C.S. Khatian No. 530 of mouja-Dhajanagar under Udaipur Sub-Division originally held by Harendra Debnath alias Harendra Chandra Debnath, the predecessor interest of the plaintiff-petitioners as raiyat. The predecessor interest died intestate on 22-12-2005 leaving behind the plaintiff-petitioners as his legal heirs in respect of the said suit land and they have acquired ownership, right, title and interest over the suit land.

4. On 20-10-2010, all the defendant-respondents taking the advantage of the absence of the plaintiff-petitioners dispossessed them from the suit land and subsequently, the defendant-respondents claimed that under three registered deeds being deed No. 1-962 dated 22-02-1977, deed No. 1-963 dated 22-02-1977, and deed No. 1-2569 dated 01-11-1991 executed by Harendra Ch. Debnath, the predecessor interest of the plaintiff- petitioners in favour of one Kusum Bala Devi, the predecessor interest of defendant Nos. 3(a), 3(b), 3(c), 3(d) and 3(e) and defendant No. 2 as well as defendant No. 1, the defendant No. 1, the respondent No. 1(a) herein, Jagadish Debnath sold out some portion of the land purchased by him to some other persons. After collection of the certified copies of those sale deeds, it was detected that those deeds were in reality fabricated, false and fraudulently registered and when the plaintiff-petitioners became sure about in genuineness of those deeds, they asked the defendant-respondents to deliver the possession of the land from which they were dispossessed and being aggrieved, they filed the aforesaid suit.

5. All the respondents contested the suit as defendants and also filed three sets of written statements on different dates, i.e. on 29-03-2012 by the defendant No. 10, on 25-04-2012 by the defendant Nos. 2, 3(a), 3(b), 3(c), 4, 5, 6, 7, 8, 9, and on 25-04-2012 by the defendant Nos. 1(a), 1(b), 1(c) and 12 denying the averments made by the plaintiff-petitioners in their plaint. The respondents have also contended in their written statements that the sale deeds which are impugned in the suit are genuine and on the strength of those deeds they entered into the possession of the suit land and in their written statements they also stated that the predecessor interest of the plaintiff- petitioners Harendra Ch. Debnath, vendor, was capable of putting his signature in Bengali script at that relevant time. The defendant-respondent Nos. 1(a), 1(b), 1(c) and 12 in their written statement first time disclosed that one Upendra Das, Kulu Bala De (Datta) and Titan Majumdar are necessary parties as they are in possession of some portions of the suit land by purchase. Besides, the defendant-respondents No. 2, 3(a), 3(b), 3(c), 4, 5, 6, 7, 8, 9 in their written statements also pleaded that Laxmi Debnath and Manmohan Debnath are also necessary parties in absence of whom the suit cannot be determined effectively and completely and the suit is liable to be dismissed for non-joinder of parties. Some of the defendants also furnished some deeds on 11-05-2012 before the trial Court by way of filing a first in support of their pleadings.

6. Thereafter, the learned trial Court upon hearing the parties framed issues on 16-05-2012 fixing the next date on 30-05-2012 for filing examination-in-chief of

the plaintiff side. While the petitioners as plaintiffs were going to prepare their examination-in-chief, it was detected that in the written statements they mentioned regarding the aforesaid sale deeds and also took a plea about the possession of the lands by some persons who were not made party. Thus, the amendment of plaint as well as addition of parties are necessary for deciding the suit in question and hence, the plaintiff-petitioners have filed an application on 26-05-2012 for addition of parties as well as amendment of the plaint wherein it is stated that in both the written statements, the plea of these defendants are that some of these people purchased land from predecessor interest of the plaintiffs, namely, Harendra Debnath, or from the purchasers of the predecessors of the plaintiffs by registered sale deeds. They also supplied the particulars of the registered sale deeds. So, in this situation even though the sale deeds in the name of the defendant No. 1(a) was sought to be nullified, but subsequent sale deeds based upon the same were not sought to be declared as null and void. These allegations were first known to the plaintiffs from a reading of the written statements and as such these sale deeds are also liable to be declared as null and void etc. to avoid all future complicities with a prayer for addition of the aforesaid persons as defendants and amendment of the plaint.

7. The respondents as defendants filed their objection to the prayer for addition of parties as well as amendment of the plaint. Learned trial Court after hearing the parties rejected the prayer for addition of parties as well as the prayer for amendment vide the impugned order. Hence, the instant revision petition.

8. Mr. Das Choudhury, learned counsel for the petitioners, while questioning the impugned order would contend that the learned trial Court failed to consider the true prospective of the amended provisions of Order VI, Rule 17 which would be evident from the impugned order itself wherein the trial Court stated that, "as per the provisions of Order VI, Rule 17, of CPC "no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial." In this present case the plaintiff-petitioners side after filing of the written statement was at liberty to file the amendment petition before the issues were framed but as from the act of the plaintiff-petitioners side it is clear that the plaintiff-petitioners side were not diligent enough, hence, he could not file the amendment petition before the trial has commenced in this present case. The matter of amendment is not of such a nature which could not have been raised before the commencement of the trial. Non filing of the amendment petition before the trial has commenced is a fault on the part of the plaintiff petitioners for which he is liable. The amendment petition filed on behalf of the plaintiff-petitioners side at a belated stage after the commencement of the trial is definitely a bar under the provision of Order VI, Rule 17 proviso "

9. He further submits that by way of insertion of proviso in the amended provision, the legislature nowhere prohibits a justice seeker to come with an

amendment petition even after trial is initiated, subject to the justice seeker can satisfy the Court that such proposed amendment is required for deciding the issue before the Court and even on due diligence he was not aware about the facts which need amendment in the plaint or in the written statement. In the instant case, the present petitioners came to know regarding the aforesaid deeds only when they were examining the written statements for the purpose of preparing the examination-in-chief. Thus, it cannot be said that the plaintiff-petitioners were aware about those facts at the time of filing of the suit and unless those deeds are challenged by way of amendment of the plaint and by way of addition of the parties, then the suit cannot be decided properly by the trial Court and instead of getting justice, the petitioners would be non-suited.

10. He again submits that in various decisions, the Apex Court held that all amendments ought to be allowed which satisfy the two conditions; (i) of not working injustice to the other side, and (ii) of being necessary for the purpose of determining the real questions in controversy between the parties and the amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs, But in the instant case, it is the respondents who came with certain facts which were neither known to the petitioners as plaintiffs nor were they aware about those deeds and the names of those persons before filing of the written statements. Thus, the learned trial Court has committed error while passing the impugned order rejecting the prayer for addition of parties as well as amendment of the plaint.

11. In support of his aforesaid contention, he has placed reliance on Chander Kanta Bansal Vs. Rajinder Singh Anand, wherein the Apex Court considered the amended provisions of (Order VI, Rule 17 and held that, "it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases".

12. He has also placed reliance on a decision of this Court in Bharati Das (Modak) and Others Vs. Ranjit Kumar Das and Others, wherein this Court held as follows:--

In the instant case, there was no other, alternative to the respondents except to file application for amendment of the plaint to meet the plea of the petitioners. In similar situation, the Delhi High Court in the case of Mrs. Suneel Sodhi and Others Vs. M.L. Sodhi and Others, allowed the prayer for amendment, In that case, the suit was filed for partition and mesne profit and the plaintiffs prayed for amendment seeking to proffound Wills by defendant and the said application for amendment was filed before commencement of the trial. The Delhi High Court, in the aforesaid case, held that as the Wills in question were claimed to have been discovered upon death of testator and the onus of proving said Wills rested on defendants and the plaintiffs had the opportunity of questioning Wills and raising objection as to their genuineness, as effect of Wills was that it sought to deprive

the plaintiffs of their share and the said plea was not inconsistent with the plea of property being self acquired property of testators. In the instant case also, the suit land sought to be partitioned is the land belonged to the predecessor-in-interest of the parties in the lis and the information regarding the execution of the registered Will in favour of the husband of the petitioner No. 1 and father of the petitioners No. 2 and 3 had/has come to the notice of the respondents only after filing of the written statement in the suit by the petitioners herein. Therefore, the same cannot be overlooked by the respondents, rather they have the right to question the genuineness of the Will as the land involved in both the Will and the partition suit are same and it is also a settled law that development subsequent to filing of the suit can be raised in the amendment petition. In the instant case, the respondents wanted to include the subsequent development only in the plaint by way of amending the plaint and mere challenge of the Will for declaring the same as void would not change the nature and character of the partition suit. Applying the ratio laid down by the Apex Court in Ragu Thilak D. John Vs. S. Rayappan and Others, particularly in para 6, it can easily be held that the amendment sought for in the instant case, where in the instant petition have alleged how they have been prejudiced by the proposed amendment.

13. Mr. Deb, learned counsel appearing for the respondents while countering the contentions of Mr. Das Choudhury submits that the learned trial Court rightly rejected the prayer for addition of the parties as well as amendment of the plaint, as the petitioners being plaintiffs did not exercise due diligence to find out the sale deeds as well as the persons who were in possession of the land.

14. He has further contended that the parties sought to be impleaded by the amendment having not been impleaded in the instant case, on that ground itself the petition is not maintainable. He also submits that the proviso to Rule 17 of the CPC was inserted so that an amendment petition cannot be filed as and when the party desires, rather the legislature considers that in the name of filing amendment sometime the parties try to delay the trial and the same should be prohibited by way of inserting the proviso to Rule 17 of the Code.

15. This Court has gone through the impugned order passed by the learned trial Court as well as the prayer for amendment and the objection filed by the parties. Upon going through the impugned order, this Court is of considered opinion that the learned trial Court should have considered as to when the petitioners as plaintiffs came to know regarding those sale deeds and the names of the persons who are allegedly possessing a portion of the suit land, but the same were not considered and not only that, the learned trial Court also failed to consider the meaning of "due diligence", as used in the provision to Order VI, Rule 17 of CPC.

16. The words "due diligence" have not been defined in the Code. So, it would be proper for a Court to take assistance from the general meaning of the said words from the dictionary. According to Black's Law Dictionary, Sixth Edition, "due diligence" means such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and

prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. According to Oxford Dictionary, (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. The Apex Court also considered the words "due diligence" in Chander Kanta Bansal (supra).

17. In the instant case, the trial Court should have considered the relevant facts which would be evident from the record that the written statement first was filed by the respondent No. 10 as defendant on 29-03-2012 and thereafter the other defendants filed their written statements on 25-04-2012 and the issues were framed on 16-05-2012 and thereafter, on 26-05-2012 just after 10 days of framing of issues, i.e., the initiation of the trial, the plaintiffs came with their proposed amendment of the plaint as well as the prayer for addition of parties. Thus, it cannot be said that the plaintiffs approached the Court with an intention for delaying the trial of the suit. The learned trial Court even did not consider as to whether the proposed amendment is necessary for deciding the issues before him or not, which is sine qua non for a Court while considering the prayer for amendment.

18. Mr. Das Choudhury very rightly said that by way of amended provisions of proviso to Rule 17, the legislature does not prohibit the Court from exercising its power vested on it under Order VI, Rule 17, rather the legislature wants that there should be a check and balance.

19. In Chander Kanta Bansal (supra), the Apex Court held as follows:

13. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the Court to consider the same. "Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

20. A co-ordinate Bench of this Court in Anwar Ali & another v. Smti. Jola Bibi & others, CRP 15 of 2012, Agartala Bench, considered regarding the proviso to Order VI, Rule 17 of the Code and, noted, inter alia,

20. This decision was rendered by the Apex Court on consideration of the proviso to Order VI, Rule 17 of the Code and as such the fundamental principle for consideration is well-etched that whether an amendment would be allowed or not should be based on whether such amendment is required for deciding the real controversy between the parties or not. Aspect of due diligence has to be juxtaposed accordingly.

21. In the present case, the learned trial Court considered the prayer for amendment without proper appreciation of the attending fact. This Court finds that from the very beginning the pleadings in -regard to execution of the sale deeds in question found place in the plaint and the pleadings as advanced by the plaintiffs, the petitioners herein, were controverted by the defendant Nos. 2 and 4. Surprisingly, no issue in this regard was framed by the learned trial Court. The plaintiffs also failed to rise for framing such issue most callously. No doubt there is delay/laches on the part of the plaintiffs, the petitioners herein in preferring the petition for amendment and there is no statement in respect of due diligence. But when the proposed amendments are not for amendment of the pleadings but for insertion of one relief the element of due diligence gets subsided inasmuch as there is no question of discovery or not raising the same before the trial commenced. This Court could have scrutinized the efficacy of their prayer that has been sought to be incorporated in the context of pleadings but that could influence the trial Court and considering that aspect of the matter no analysis is attempted towards that. It is also to be noted that, for the belated attempt of the plaintiffs for incorporating the additional relief by way of amendment, the defendants have suffered and as such if this Court is inclined to allow the amendment, that is required to be done with compensatory cost.

22. After a focused analysis of the pleadings, it appears to the Court that if the amendment is rejected as a whole, the real controversy between the parties cannot be adjudicated. The pleadings as to the execution of the sale deeds in question is in severable part of the controversy.

21. There is no doubt that the Court should not allow each and every prayer for amendment or addition of parties in a routine manner without considering the contents in the petition as to whether the proposed amendment is necessary for deciding the controversy between the parties. But the Court is to see if the prayer for amendment is rejected only on the basis of an objection raised by the parties, whether the real controversy between the parties can be adjudicated in real term of justice and if not, then the Court should allow the prayer for amendment. In the instant case, the facts relating to the sale deeds are essentially a part of controversy between the parties. Thus, the amendment sought for is necessary for determination of the real question of controversy.

22. Accordingly, the order dated 30-07-2012 passed by the learned Civil Judge (Sr. Division), Udaipur, South Tripura in Civil Misc. Case No. 22 of 2012 is hereby set aside. The prayer for amendment is allowed, subject to payment of cost of Rs. 1,000/- (rupees one thousand) only to the contesting respondents herein within a period of one month from the date of this order. The petitioners are also directed to file the amended plaint within a period of one month from today in the trial Court without fail. The instant revision petition is accordingly allowed and stands disposed.