

(2016) 01 CAL CK 0101
In the Calcutta High Court
Case No : C.O. No. 626 of 2011

Shyamal Kanti Chakraborty

APPELLANT

Vs

Pranabendu Mohan Chakraborty & Anr.

RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Citation : (2016) 2 CalJ 499 : (2016) 4 ICC 565

Hon'ble Judges : Ashoke Kumar Dasadhikari, J.

Bench : Single Bench

Advocate : Mr. M.P. Gupta, Advocate, for the Appellant; Mr. Soumya Majumdar, Mr. Uttam Monda and Mr. Anuran Samanta, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Ashoke Kumar Dasadhikari, J.—Order impugned dated 25th January, 2011 passed by the learned Civil Judge (Senior Division), 3rd Court, Howrah in Title Appeal No. 177 of 2007 allowing the application of the appellant/defendant in the original suit, under Order 6, Rule 17 read with Section 151 of the Code of Civil Procedure is under challenge in this revisional application.

2. The petitioner being the plaintiff in the suit and respondent in Title Appeal filed a suit being Title Suite No. 244 of 1981 before the Civil Judge (Junior Division) 1st Court, Howrah, against the opposite party no.1/defendant for a declaration that the petitioner/plaintiff has absolute right and the opposite party no.1 herein being the defendant in the main suit has no right in respect of plot No. 1524 and sale of 5 sataks from Plot No. 1524 to opposite party/defendant no.2 by deed dated 9th March, 1981 be declared illegal, void and inoperative and not binding upon the petitioner/plaintiff. A further prayer was made for a decree for confirmation of possession in favour of petitioner/plaintiff and recovery of possession of 5 sataks from defendant no.2 out of plot no. 1524. A decree for permanent injunction restraining the defendant from interfering with the absolute right of the petitioner/plaintiff in respect of the suit property and causing any disturbance and/or making any attempt of change the nature and character of

the suit property in any manner whatsoever and for mandatory injunction against opposite party/defendant no.2 for dismantling the unauthorised and illegal structure raised on the basis of purchased deed of 9th March, 1981, and decree for damages etc. Plaint was subsequently amended. Suit was contested by the defendants by filing separate written statements. Suit was decreed on 31st July, 2007 in favour of the petitioner/plaintiff thereby declaring him the absolute owner of the suit property and defendant no.1 was directed to refrain from interfering with the absolute right of the petitioner/plaintiff in respect of property in question, amongst others. So far 5 sataks land is concerned, the learned Trial Court did not grant any decree in favour of the plaintiff.

3. Defendant/opposite party no.1 being aggrieved and dissatisfied with the judgment and decree, preferred an appeal being Title Appeal No. 177 of 2007 before the learned Civil Judge (Senior Division), 3rd Court at Howrah. The appellant/opposite party no.1 herein filed an application for amendment of written statement on 9th February, 2010. Appellant/opposite party no.1 wanted to amend the written statement in terms of the schedule contained in his application. By the proposed amendment the opposite party no.1 intended to claim a right of direct tenancy under the State of West Bengal by virtue of a patta in respect of plot no. 1525 under Mouza-Bally given by the then zamindar Jogesh Chandra Mukhopadhyay and, on that basis, he claimed absolute ownership. It was also proposed in the amendment application that actually the aforementioned property belonged to Jogesh Chandra Mukhopadhyay and Gopal Patra had no right, title and interest in respect of the suit property and in respect of other properties as mentioned in the said deed. But due to ignorance about the existence of exhibit no.1, the opposite party no.1 could not aver such fact and, therefore, such fact is required to be incorporated in the written statement by way of amendment for the purpose of determination of the real question in controversy. The opposite party no.1 also contended that Gopal Patra has no right, title and interest over the property and, as such, petitioner/plaintiff could not acquire any right, title and interest on the basis of deed executed by Gopal Patra. It was also contended that in the year 1951 petitioner/plaintiff had no independent source of income. He was a minor at that point of time. It was further contended that the original deeds and documents and other materials which were in the custody of the mother of the petitioner/plaintiff, were taken away by the appellant/opposite party no.1 in a very tricky manner by exercising undue influence upon the mother of the petitioner/plaintiff. According to appellant/defendant no.1 in the Title Suit, such facts are required to be incorporated in the written statement by way of amendment for the purpose of determination of the real question in controversy.

4. The application for amendment was served upon the petitioner/plaintiff who has filed his objection. He has contended that the amendment, which has sought for, is not necessary for determination of the issues involved.

5. The proposed amendment is not sought for on discovery of any new fact or

document nor the same relates to any subsequent event and/or incident occurred after passing of the judgment and decree.

6. The proposed amendment being mala fide is liable to be rejected outright. It was also contended that the suit was of 1981 continued for a long time. After disposal of the suit in the year 2007, the petitioner has sought for amendment of the written statement in appellate stage and is trying to delay in disposal of the appeal. It was further contended that exhibit no.1 was disclosed at the time of trial and the plaintiff claimed that the suit properties were purchased from Gopal Patra @ Netai Charan Patra.

7. The petitioner/plaintiff denied all allegations made in the application for amendment. The amendment application was heard before the learned Court below. Learned Court below after careful consideration of the arguments advanced by the learned Counsel appearing for the respective parties and also considering the judgments referred by the appellant/opposite party no.1 herein and also the petitioner/plaintiff allowed the application for amendment with a finding that the amendment sought for by the appellant/opposite party no.1 is formal in nature and will not change the nature and character of the suit and the amendment ought to be allowed for proper adjudication of the suit.

8. Petitioner/plaintiff has come up against the impugned order dated 25th January, 2011 which is the subject matter of consideration in this revisional application.

9. Mr. Gupta, learned Counsel appearing for the petitioner/plaintiff submits that exhibit no.1 was already on record, which was disclosed at the time of trial. Exhibit no.1 was not a new document nor it has come to light after filing of appeal and had the defendant/opposite party claimed any right, title and interest on the basis of exhibit no.1. He could have made a prayer for amendment when the suit was pending but that was not done. At this belated stage, after filing appeal, opposite party/defendant is seeking amendment of his written statement. He submitted that at this belated stage the amendment is not permissible. He submitted that the petitioner/plaintiff had already got a decree before the Civil Court and he had acquired a right over and in respect of a property and in such a situation if the amendment of written statement is allowed, the opposite party no.1/defendant no.1, in effect, would get the decree upset and there would be a fresh trial which would cause serious prejudice to the petitioner/plaintiff. He submitted, if the amendment is allowed by this Court it would take away the petitioner's vital right accrued in his favour and, therefore, proposed amendment ought to have been rejected by the learned Appellate Court. He submitted that by way of amendment some new pleas are being taken in effect changing the nature and character of the suit, which would require re-hearing and re-adjudication of the whole matter. He submitted that the proposed amendment being mala fide in nature is liable to be rejected outright. It was also submitted that both exhibit I and exhibit F are known to the parties and those documents are on record and marked as exhibits. Therefore, it is not open to the

opposite party no.1/defendant to feign ignorance of the same. He then cited a few judgments in support of his submissions, which are as follows:

- (1) (2010) 2 SCC 124 [Jaswant Kaur & Anr. v. Subhash Paliwal & Ors.]
- (2) (2014) 4 SCC 516 [Voltas Limited v. Rolta India Limited]
- (3) (2009) 3 SCC 467 [Alkapuri Co-operative Housing Society Ltd. v. Jayantibhai Naginbhai (Deceased) through LRS.]
- (4) (2010) 15 SCC 510 [Amrit Lal v. Shiv Narain Gupta]
- (5) (2013) 9 SCC 485 [Mashyak Grihnirman Sahakari Sanstha Maryadit v. Usman habib Dhuka & Ors.]

10. Mr. Sanyal, learned Counsel appearing for the opposite party no.1/appellant on the contrary submitted that the amendment sought for by the opposite party no.1 is very much relevant and necessary for deciding the issue involved in the matter. He submitted that all the documents which were in the custody of the mother of the opposite party no.1/defendant were taken away by the petitioner/plaintiff in a very tricky manner by exercising undue influence. In fact, he had no knowledge about the documents. He submitted that the patta, which was given by the original owner Jogesh Chandra Mukhopadhyay, creates a right in favour of the opposite party/defendant no.1. According to Mr. Sanyal Gopal Patra @ Netai Charan Patra had no right, title and interest, therefore, the claim of the plaintiff on the basis of deed executed by Gopal Patra is not at all maintainable. He submitted that in view of the provisions under the West Bengal Estate Acquisition Act, 1953, the opposite party no.1/defendant became a direct tenant under the State of West Bengal in respect of the suit plot situated within Mouza-Bally under district Howrah and for proper adjudication of right, title over and in respect of the property, the amendment is necessary. He submitted that the amendment sought for in no way change the nature and character of the suit rather the amendment sought for is necessary to determine the issue involved. He submitted that the appeal is continuation of the original suit. According to him, amendment could be allowed in the appellate stage for determining the issue involved in the controversy. He also submits the plea of limitation is of no effect in the facts and circumstances of the present case. He submitted that the document was in the custody of the petitioner/plaintiff. However, due to ignorance of the opposite party/defendant he could not make a prayer for amendment. He submitted that the amendment sought for in no way prejudice the petitioner since the document is already on record. There would be no difficulty to dispose of the appeal after amendment. He submitted that there was no illegality and/or irrationality in the order passed by the learned Court below by allowing the application for amendment filed by the opposite party no.1/defendant no.1. He also cited two decisions in support of his submissions. The First decision reported in AIR (2007) SC 2511 [Andhra Bank v. ABN Amro Bank N.V. & Ors.] and the other one is an unreported judgment delivered by the Hon''ble Apex Court in case of Appeal (civil) 2019 of 2007 [Usha Balashaheb

11. Considered the submissions made by the learned Counsel appearing for the parties.

12. Fact revealed that the document being the patta was disclosed by the petitioner/plaintiff at the time of trial. It was alleged in the application for amendment that all documents were kept in the custody of the mother of the plaintiff/petitioner. Naturally the opposite party/defendant no.1 would not have any access to those documents. Only after disclosure the document has come in records but as it appears from the statements made by the opposite party no.1 that due to his ignorance, he could not aver such fact in the written statement. It was his further statement that he wanted to incorporate the facts, which transpires on perusal of the documents.

13. It is common knowledge and experience that once a document is produced before the Court of law and tendered by a party for making the same as exhibit, thereafter marked as exhibit, the documents come in the Court's custody, it would be very difficult for the other party to apply his mind about the contents. However, fact remains that the property in question against which a patta was issued is already on record. The opposite party no.1 is praying for amendment on the basis of that document and claiming his right on that basis.

14. It may be that a decree was passed by the Trial Court but when the patta is already on record and the defendant is claiming a right, on that basis, it would not be proper to refuse the prayer for amendment to arrive at a proper conclusion about the right, title and interest of the parties in the proceedings. It is for the interest of justice and also for proper disposal of the issue involved the learned Court below have come to a conclusion that the prayer for amendment would be very relevant and necessary in the facts and circumstances of this case.

15. Here in the instant case the Court is to come to a conclusion about the ownership of the property after proper adjudication. If it is found by the Court that the amendment is necessary for such conclusion even if the prayer for amendment made at a belated stage, the delay would not be a bar to allow such amendment for the interest of justice. It is no doubt true that there is delay in filing the amendment application. But it is a specific contention of the defendant no.1/opposite party herein that due to ignorance he could not bring the facts by way of amendment earlier than the present application moved by him. The learned Court below having considered the rival contentions made by the respective parties through their learned Counsel is of the view that the amendment sought for is formal in nature and will not change the nature and character of the suit and for proper adjudication of the suit, the amendment ought to be allowed.

16. In the facts and circumstances of this case, this Court is of the view that the document is on record. Therefore, there would be no difficulty to adjudicate the issue after allowing such amendment. Moreover, the appeal is in continuation of

the main suit. For the interest of justice and also for deciding the issue involved in the proceedings/suit, when the Court is of the opinion that for adjudication of the suit the amendment is to be allowed, there should be any hindrance and/or impediment to allow such amendment. Accordingly, the revisional application is dismissed. The learned Court below is directed to dispose of the appeal within six months from the date of communication of this order. However, the petitioner would be allowed to file their additional written statement against the amendment allowed by the appeal Court.

17. After the order is dictated Mr. Gupta submitted that the Appellate Court has power to take evidence in terms of provision under Section 107 of the C.P.C. Mr. Gupta prays that the Appellate Court may be directed to take evidence instead of remitting back the suit in the Trial Court since the petitioner's allegation is that the defendant's strategy is to delay the matter.

18. Considering the special facts and circumstances of this case, this Court direct the appellate Court to take evidence in the matter on the basis of the amendment allowed without remitting the suit back to the Trial Court. The prayer of Mr. Gupta for early disposal is thus allowed.

19. The Appellate Court is directed to hold trial on day to day basis if necessary and no time should be granted to any of the parties for any reason whatsoever. Both the learned Counsel agreed that the parties would not pray for adjournment.