

(2007) 12 CAL CK 0005

Calcutta High Court

Case No: C.O. No. 3878 of 2007

Durga Bala Biswas and Others

APPELLANT

Vs

Renuka Sarkar and Others

RESPONDENT

Date of Decision: Dec. 19, 2007**Acts Referred:**

- Constitution of India, 1950 - Article 227

Citation: (2008) 3 CHN 40**Hon'ble Judges:** Jyotirmay Bhattacharya, J**Bench:** Single Bench**Advocate:** Sudhakar Biswas, for the Appellant; Tapas Bhattacharya, for the Respondent**Final Decision:** Dismissed

Judgement

Jyotirmay Bhattacharya, J.

This revisional application under Article 227 of the Constitution of India is directed against an order being No. 32 dated 17th July, 2007 passed by the learned Civil Judge (Junior Division), 1st Court, Krishnanagar, Nadia in Title Suit No. 156 of 1995 by which the defendants' prayer for amendment of the written statement was rejected on contest.

2. The plaintiff/opposite party filed a suit for partition against the petitioners as well as the other opposite parties herein in the Court of the learned Civil Judge (Junior Division), 1st Court, Krishnanagar, Nadia.

3. The case as made out by the plaintiff in the said suit is as follows:

Arjun Mondal, Nagendra Nath Mondal and Debendra Nath Biswas were the owners of the suit property having 1/3rd share each therein. The said Arjun and Debendra sold their right, title and interest in the suit property to one Dhires Chandra Sarkar by two registered deed of kobalas dated 5th August, 1960 and 9th March, 1960. Thus, Dhires Chandra Sarkar became the owner of 2/3rd share in the suit property.

4. The said Dhiresh Chandra Sarkar subsequently sold his right, title and interest in the suit property in favour of the original defendant, viz., Harekrishna Biswas.
5. The remaining 1/3rd share which was held by Nagendra Nath Mondal was sold and transferred by Nagendra Nath Mondal to the plaintiff/opposite party. Thus, the plaintiff/opposite party became the owner of 1/3rd share in the suit property.
6. Since the defendants refused to partition the suit property amicably, the plaintiffs filed the said suit.
7. After entering appearance in the said suit, the original defendant filed written statement denying sale of 1/3rd share by Nagen to the plaintiff/opposite party.
8. The said defendant alleged that sale, even if there be any, cannot be made effective as the same was made by false personification. The sale of the interest of Arjun and Debendra in the suit property by them in favour of Dhiresh and the subsequent transfer by Dhiresh in favour of the defendant were not disputed.
9. The said defendant further claimed that after purchase of such interest of Arjun and Debendra in the suit property, the original defendant sold some portion of the suit property to different purchasers and retained the remaining unsold part and/or portion thereof with him.
10. The said defendant further claimed 16 annas ownership in the suit property by way of adverse possession. The said defendant also claimed that his name was also recorded as such in the L.R. record-of-rights as absolute owner thereof.
11. Thus, the original defendant prayed for dismissal of the said suit on the basis of the aforesaid pleading.
12. The original defendant died during the pendency of the suit and the petitioners herein were substituted as his heirs and/or legal representatives in the place of the original defendant in the said suit.
13. After being so substituted in the said suit, the original defendant filed written statement therein claiming title to the extent of 2/3rd share of Arjun and Debendra in the same line as was claimed by the original defendant in his written statement.
14. The said defendants, however, made a different case with regard to their claim of the share of Nagendra in the suit property. They not only challenged the sale of 1/3rd share in the suit property by Nagen in favour of the plaintiff but also claimed acquisition of Nagen's interest in the suit property by adverse possession by way of ouster of the said co-sharer by refusing his entry in the suit property for a period of more than the statutory period. Thus, the said defendants' claim absolute title in the suit property partly by virtue of purchase and partly by adverse possession.
15. After commencement of hearing of the suit and after discharge of P.W.1 after cross-examination, the defendants/petitioners filed an application for amendment

of the written statement not only for introducing a different story regarding acquisition of Nagen's interest by the original defendant but also for withdrawing their admission in the pleadings regarding acquisition of Nagen's interest by way of adverse possession and/or causing resistance to Nagen when he made an attempt to enter into the suit property and thereby ousting him from possession of the suit property.

16. In the proposed amendment, the defendants wanted to introduce that Nagen died intestate bachelor in 1959 leaving Arjun as his only heir. Thus, on the death of Nagen, Arjun inherited the share of Nagen. Arjun sold his entire interest in the land to Dhiresh on 5th August, 1960. Thus, by virtue of such purchase, Dhiresh became the owner of 2/3rd share in the suit property. Dhiresh also purchased the share of Debendra on 9th March, 1960. Thus, the petitioners wanted to introduce that Dhiresh became the absolute owner of the suit property entirely by purchase from the admitted owners and not partially by purchase and partially by adverse possession. The original defendant became the owner of the suit property by virtue of purchase of the interest of Dhiresh in the suit property.

17. The defendant also sought for permission for deletion of certain part of his pleading from the written statement. The portion of their pleadings wherein the defendants alleged that Nagen who was the owner of 1/3rd share in the suit property, made an attempt to enter in the suit land for taking possession thereof on 1st January, 1961, but ultimately he failed to take possession of the suit property due to resistance offered by the petitioners, was sought to be deleted from their pleadings.

18. The other part of the pleading wherein the defendants claimed to have acquired title by way of adverse possession by ousting Nagen from his possession in the suit property, was also sought to be deleted from the written statement.

19. Such prayer having been rejected by the learned Trial Judge, the defendants/petitioners have filed this revisional application.

20. The learned Trial Judge held that such a belated application for amendment cannot be allowed. The learned Trial Judge further held that the petitioners cannot be allowed to withdraw their admission from the pleadings causing prejudice to the plaintiff/opposite party.

21. Let me now consider as to how far the learned Trial Judge was justified in rejecting the petitioners said application for amendment in the manner as aforesaid.

22. Mr. Sudhakar Biswas, learned Advocate, appearing for the petitioners, challenged the propriety of the impugned order by placing strong reliance in the case of [Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.,](#) wherein it was held that even inconsistent defences can be raised in the written statement although the same may not be permissible in case of plaint.

23. As a matter of fact, nobody can quarrel with the above proposition of law which was enunciated by the Hon"ble Supreme Court in the aforesaid decision. On perusal of the said decision, this Court finds that in that particular case both the learned Trial Judge as well as the Hon"ble High Court rejected the defendant's application for amendment of written statement by holding that an inconsistent plea cannot be allowed to be taken by the defendant by way of amendment of written statement. But the Hon"ble Supreme Court found after scrutinizing the original pleading as well as the proposed amendment that no inconsistent plea was sought to be raised by the defendant by way of amendment of his written statement in the said suit. As such, the said SLP was allowed by granting leave to the defendant to amend his written statement.

24. While allowing the said Special Leave Petition, the Hon"ble Supreme Court, however, held that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It was further held therein that though 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 written statement. It was further held therein that in case of amendment of written statement, the Courts are inclined to be more liberal in allowing amendment of 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.

25. Though, Mr. Biswas strongly relied upon the said decision of the Hon"ble Apex Court to support his submission to the effect that the learned Trial Judge adopted a wrong approach in rejecting the petitioners' application for amendment of written statement, but in my view, the principle which was laid down in the said decision has no application in the facts of the instant case as it is not a case where inconsistent plea was sought to be raised by the defendants by way of amendment of their written statement, but it is a case where admission was sought to be withdrawn by the defendants by way of amendment of their written statement after discharge of the plaintiffs witness after cross-examination.

26. The defendants stated in their original pleadings that Nagen made an attempt to enter in the suit property on 1st January, 1961, but failed in his attempt due to resistance offered by the original defendant. On the basis of such pleading, the defendants claimed that the original defendant acquired title by way of adverse possession by ousting Nagen who was an admitted co-sharer from the suit property.

27. Thus, the defendants admitted that at least on 1st January, 1961, Nagen was alive. But, in the proposed amendment, they wanted to introduce that Nagen died sometime in 1959 and upon his death, Arjun inherited his share in the suit property and they by virtue of purchase from Arjun, acquired the title of Nagen also.

28. If the said part of the original pleading is allowed to be deleted and a new line of acquisition of title by way of purchase of Nagen's share through Arjun who, according to the defendants, inherited the share of Nagen upon his death, is allowed to be introduced, then the plaintiffs will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. Withdrawal of such admission seeking to displace the plaintiff completely from admission made by the defendant in the written statement, was held to be not permissible by the Hon"ble Supreme Court in the following cases:

(i) [Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Latha Ram and Co.,](#) .

(ii) [Heeralal Vs. Kalyan Mal and Others,](#) .

29. If the principles which are laid down by the Hon"ble Supreme Court in the aforesaid decisions, are applied in the instant case, this Court has no hesitation to hold that Court cannot allow such an amendment even by taking a very liberal approach as serious injustice or irreparable loss will be caused to the other side, if such amendment is allowed.

30. Accordingly, this Court holds that the learned Trial Judge did not commit any illegality in rejecting the defendants' prayer for amendment of their written statement.

31. The revisional application is, thus, devoid of any merit for consideration. Accordingly the revisional application stands rejected.

32. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.