(2007) 08 CAL CK 0023

Calcutta High Court

Case No: C.O. No. 4680 of 2006

Sk. Abul Kalam and Others		APPELLANT
	Vs	
Umapada Maity and Others		RESPONDENT

Date of Decision: Aug. 31, 2007

Acts Referred:

- Constitution of India, 1950 - Article 227
- Specific Relief Act, 1963 - Section 34
- Waqf Act, 1995 - Section 107

Citation: (2007) 3 CALLT 648 : (2007) 4 CHN 962

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Sabyasachi Bhattacharya and S.T. Mina, for the Appellant; D.P. Adhikary and J.H. Mallick for the opposite parties Nos. 1 to 9, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.
This application under Article 227 of the Constitution of India is directed against an order being No. 47 dated 27th September, 2006 (Later) passed by the learned Presiding Officer, Wakf Tribunal, West Bengal, in Suit No. 8 of 2004 by which the petitioners'' prayer for amendment of plaint was rejected by the learned Tribunal.

2. The plaintiffs/ petitioners filed a suit for declaration and injunction against the opposite parties in the learned Court of the Wakf Tribunal.

3. In the said suit the plaintiffs/petitioners prayed for a declaration that various deed of conveyances executed by the defendant Nos. 10 to 18 in favour of Ram Krishna Jana, the predecessor of defendant Nos. 19 to 25 in respect of ''A'' and ''B'' schedule properties and the subsequent deed executed by the predecessor of the defendant Nos. 19 to 25, namely, Raj Krishna Jana dated 23rd August, 1960 in favour of the defendant Nos. 1 to 4 and the predecessors of defendant Nos. 5 to 9, namely, Narayan Chandra Jana, since deceased, are void ab initio with a further declaration

that the said deeds which were recorded in the relevant book and volume with the concerned registration office, stands cancelled.

4. A decree for permanent injunction for restraining the defendant Nos. 1 to 9 their men and agents from disturbing the plaintiffs in respect of the peaceful possession and enjoyment of ''A'' and ''B'' schedule property belonging to Sk. Jasimuddin and Sk. Kasimuddin Wakf Estate, was also prayed for in the said suit. Various other incidental reliefs were also claimed in the said suit.

5. The defendants/opposite party Nos. l to 9 are contesting the said suit by filing written statement denying the material allegations made out by the plaintiffs in the plaint. The said defendants claimed in their written statement that they are in possession of the suit property all through out since 1958.

6. The parties have already led their respective evidence in the said suit. After conclusion of evidence, hearing has commenced. At this stage, the plaintiffs/petitioners have filed an application for amendment of plaint for incorporating further reliefs by way of recovery of possession and for declaration that the impugned deed of conveyances are not binding upon the Wakf Estate with a further declaration that the ''A'' schedule property belongs to Wakf Estate being Wakf Liluah.

7. A relief by way of permanent injunction was also sought to be incorporated, inter alia, for restraining the defendant Nos. 1 to 9, their men and agents from constructing any pucca building or making any addition and alteration, changing in nature and character of the Wakf Estate, namely, Sk. Jasimuddin and Sk. Kasimuddin Wakf Estate.

8. In the proposed amendment, the plaintiffs wanted to incorporate those additional reliefs by alleging that during the pendency of the suit, the defendants No. 1 to 9 forcibly took possession of the ''A'' and ''B'' schedule property and tried to construct a pucca building thereon changing its nature and character but failed to do so due to vehement resistance. Incidental amendments regarding the valuation of the suit property as well as the description of the relief as made out in the concise statement of the plaint was sought for accordingly.

9. The defendants/opposite parties contested the petitioners'' prayed for amendment of the plaint by filing objection contending therein that such an application for amendment is a mala fide one. It was, further, stated therein that when plaintiffs themselves in their evidence admitted that the defendant Nos. l to 9 have been possessing the suit property since the date of their purchase, the amendment as sought for, cannot be allowed, as, if such amendment is allowed, the effect of admission made by the plaintiffs in their evidences will be nullified. Thus, the defendants/opposite parties prayed for rejection of the plaintiffs'' application for amendment of plaint. Such prayer of the plaintiffs/petitioners was ultimately rejected by the learned Tribunal by an order, being Order No. 47 dated 27th

September, 2006. The propriety of the said order, is under challenge in this revisional application.

10. While rejecting the plaintiffs'' application for amendment of the plaint, the learned Tribunal held that when the plaintiffs themselves by adducing evidence admitted that defendant Nos. l to 9 have been possessing the suit property since the date of their purchase, i.e. 1958, the proposed amendment cannot be allowed, as the plaintiffs are now trying to introduce a new case by making departure from their earlier admission in their evidence.

11. The learned Tribunal also held that the plaintiffs/petitioners are now trying to make out a new case altogether and if such amendment is allowed, then great injustice will be caused to the other side. It was further held by the learned Tribunal that amendment as sought for by the plaintiffs is not necessary for the purpose of determination of the real question in controversy between the parties.

12. Let me now consider as to how far the learned Trial Judge was justified in rejecting the plaintiffs'' application for amendment of plaint. I have already indicated the above reliefs which the plaintiffs claimed in their original plaint. In the original plaint, the plaintiffs claimed a declaration regarding the in validity of the impugned deeds as well as for cancellation of the recording of the contents of those deeds in book and volume of the concerned registration office. Injunction was also sought for to protect their possession in the ''A'' and ''B'' schedule property. Thus, in the original plaint, the plaintiffs/petitioners proceeded on the basis, as if, they were in possession in the suit property, right from their date of purchase.

13. In the proposed amendment, the plaintiffs/petitioners want to introduce that during the pendency of the suit the plaintiffs were dispossessed forcibly by the defendants from A and ''B'' schedule property. As such, the plaintiffs prayed for recovery of possession from the defendants in respect of ''A'' and "B'' schedule property.

14. Declaration of the plaintiffs'' right, title and interest in respect of the ''suit property was not initially prayed for in the original plaint. In the changed circumstances, the plaintiffs want to incorporate a prayer for declaring their right, title and interest in the said property, by the proposed amendment.

15. No declaration with regard to the binding effect of the impugned deed upon the plaintiffs was initially sought for in the original plaint. The plaintiffs now want to incorporate such a relief by way of additional prayer through such amendment. The other amendment which was sought for in the said application are practically incidental amendment which relates to either alteration of the valuation of the reliefs claimed in the suit or the jurisdiction of this Court to entertain such suit.

16. By relying upon a decision of the Hon''ble Supreme Court in the case of Andhra Bank Vs. ABN Amro Bank N.V. and Others, , Mr. Bhattacharya, learned Advocate,

appearing for the petitioners, submits that the effect of amendment cannot be considered before allowing the amendment.

17. Mr. Bhattacharya further submits that the Court while considering an application for amendment should confine itself to consider as to whether the proposed amendment is necessary or not for deciding the real controversy between the parties in the suit.

18. Mr. Bhattacharya, thus, contends that the learned Tribunal while considering the petitioner''s prayer for amendment of plaint ought to have restricted his consideration to the requirement of such amendment, but instead of doing so, the learned Tribunal considered the merit of such amendment which the Hon''ble Supreme Court has discarded in the aforesaid decision.

19. Mr. Bhattacharya, contends that amendment which is sought for herein is absolutely necessary for the purpose of resolving the dispute of the suit in its entirety. Mr. Bhattacharya further submits that the effect of disallowing the petitioners'' prayed for amendment is very serious, inasmuch as, if ultimately it is held by the Tribunal that the petitioners are out of possession, the suit will be dismissed because of the bar created under the provision of Section 34 of the Specific Relief Act.

20. Mr. D. P. Adhikary, learned Advocate, appearing for the opposite parties, submits that the learned Tribunal was absolutely justified in rejecting the petitioners'' prayer for amendment of plaint as the entire effect of cross-examination of the plaintiffs regarding possession of the parties in the suit property will be nullified if the amendment is allowed. Mr. Adhikary, further, submits that the plaintiffs amended their pleadings earlier at least on three occasions, but the factum of dispossession was never mentioned therein.

As such, Mr. Adhikary submits that the plaintiffs should not be allowed to amend their pleadings which they attempted only to prolong the litigation. Mr. Adhikary also submits that the relief for recovery of possession which is sought to be incorporated by the plaintiffs by way of amendment is barred by limitation in view of their admission in their evidence. According to Mr. Adhikary, such a time barred claim cannot be allowed to be incorporated by way of amendment.

21. In support of the aforesaid submissions, Mr. Adhikary relied upon the following decisions of the Hon''ble Supreme Court:

1. Heeralal Vs. Kalyan Mal and Others, (On the point of withdrawal of admission),

2. Mahant Prem Das Chela Mahant Bhola Dass v. Joti Pershad, reported in AIR 1971 SC page 282 (On the point of time barred claim).

Heard the learned Advocates of the parties. Considered the materials on record.

22. It is settled law that the Court should be very much liberal so far as the prayer for amendment is concerned, but at the same time there are certain yardsticks which the Court cannot ignore while considering the prayer for amendment of the parties.

23. It is equally settled by the Hon''ble Supreme Court in the case of Heeralal v. Kalyan Mal (supra) that admission made by a party either in their pleadings, cannot be allowed to be withdrawn by way of amendment. But explaining of admission by a party is not impermissible. Withdrawal of admission means deletion of statement relating to such admission and/or substitution of one set of fact in the place of the facts already stated in the pleadings or in the evidence.

24. Here, the Court finds that the plaintiffs have not made any admission regarding the defendants'' possession in the suit property in their pleadings. Admission regarding the defendants'' possession in the suit property since the date of their purchase, however, can be found in the evidence of the plaintiffs where the plaintiffs have stated that the defendant Nos. 1 to 9 have been in possession since the date of their purchase. This Court also holds that the admission which have already been made by plaintiffs in their evidence cannot be deemed to have been withdrawn, if such amendment is allowed. The admission made by the plaintiffs in their evidences will remain intact, even if, such amendment is allowed. As such, submission of Mr. Adhikary that the admission will be allowed to be withdrawn, if such amendment is allowed, cannot be accepted.

25. In the proposed amendment, the plaintiffs want to incorporate that they were dispossessed during the pendency of the suit. A dispute as to whether the plaintiffs were in fact dispossessed from the suit premises during the pendency of the suit or they were out of possession since 1958, cannot be a matter for consideration at the time of consideration of the plaintiffs'' application for amendment of plaint. Such a consideration may be relevant after the amendment of plaint is effected.

26. It is also settled law that while considering the prayer for amendment, the Court cannot consider the point of limitation. An objection regarding the bar of limitation of the plaintiffs'' claim may be a consideration in the suit provided the amendment is allowed. Such principle was laid down by the Hon''ble Supreme Court in the case of Raghu Thilak D. John v. S. Rayappan and Ors. reported in 2001(2) SCC 472.

27. Mr. Bhattacharya also points out from the Wakf Act, 1995 that Section 107 of the said Act provides that "nothing contained in the Limitation Act, 1963 which shall apply to any suit for possession of immovable property comprised in any Wakf property or for possession of any interest in such property".

28. Mr. Adhikary submits that since this Act has come into operation in 1997, the provisions of the said Act, cannot have any application with a retrospective effect. Since the plaintiffs/petitioners are admittedly out of possession since 1958, their claim for recovery of possession since 1958, their claim for recovery of possession

became barred long before the said Act came into operation.

29. In my view, the question of limitation cannot be considered at this stage. The applicability of the provision contained in Section 107 of the said Act will be a matter for consideration if the amendment is allowed. Furthermore, actual date of dispossession is yet to be ascertained. Effect of admission cannot be considered in isolation of the entire evidence. A particular line in the evidence, cannot be picked up to defeat the plaintiffs'' prayer for amendment.

That apart, this Court also cannot be unmindful that when the plaintiffs themselves now claim that they are out of possession, the relief which the plaintiffs claimed in the suit cannot be granted because of the bar of Section 34 of the Specific Relief Act unless the plaintiffs are allowed to amend their pleadings to incorporate further relief for recovery of possession. Under such circumstances, this Court holds that the amendment, as sought for herein, is necessary for complete adjudication of the dispute in the suit. This Court, thus, holds that the order impugned cannot be allowed to be retained. The impugned order stands set aside accordingly. The plaintiffs'' prayer for amendment of plaint is, thus, allowed.

30. The plaintiffs are directed to carry out the amendment in their plaint within two weeks from date. The plaintiffs are also directed to serve a copy of the amended plaint upon the defendants/opposite parties within two weeks thereafter. Leave is granted to the defendants/opposite parties to file additional written statement to the amended pleadings of the plaint within four weeks from the date of service of copy of the amended plaint upon them.

31. Since the plaintiffs applied for such amendment after the conclusion of recording of evidence of all the parties and at the stage of hearing of argument, this Court feels that such amendment should be allowed subject to payment of costs of Rs. 1,000/- to the contesting opposite parties viz., defendant Nos. 1 to 9. The payment of such costs is a condition precedent for allowing such amendment. Such payment should be made within two weeks from date.

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