
(2013) 08 CAL CK 0067

Calcutta High Court

Case No: S.A. No. 112 of 2006

Sri Phanindra Nath
Sardar and Others

APPELLANT

Vs

Budhiswar Poddar and
Others

RESPONDENT

Date of Decision: Aug. 30, 2013

Citation: (2014) 2 CHN 243 : (2014) 2 WBLR 215

Hon'ble Judges: Tapan Kumar Dutt, J

Bench: Single Bench

Judgement

Tapan Kumar Dutt, J.

This Court has heard the learned Advocates for the respective parties and has considered the relevant materials on record. The facts of the case, briefly, are as follows.

2. The plaintiffs/appellants filed a suit being title suit No. 54 of 1985 against the defendants/respondents and such suit was placed for hearing before the learned Second Munsif, Baruipore.

3. The plaintiffs' case was that 30 decimals of land being hal plot No. 490 of Mouza Ghasiara P.S. Sonarpur was recorded in the name of one Hriday Naskar to the extent of 8 annas share and in the balance of 8 annas share the names of Satish and Haran, 4 annas each, were recorded. The plaintiffs' case was that Friday's 8 annas share was purchased by one Jadunath Sardar through auction sale held on 22.10.1925 in connection with a certain title execution case, of the Court of learned First Munsif, Baruipore and the said Jadunath Sardar obtained physical possession of the purchased property. The plaintiffs' case was that the said Jadunath Sardar on 18.01.1928 purchased the share of the said Satish and Haran Naskar by registered deed of conveyance and, thus, the said Jadunath Sardar became the exclusive owner of the said 30 decimals of land. The plaintiffs' further case was that the suit property was erroneously recorded in the name of Hriday and others as the said Jadunath Sardar could

not remain present at the time of district settlement operation and such erroneously prepared record-of-right has been finally published. According to the plaintiffs, the suit property was again erroneously recorded in the name of Sitanath Poddar and others at the time of R.S. settlement operation and, according to the plaintiffs, the records of right have been also erroneously prepared subsequently. The plaintiffs' case was that the said Jadunath Sardar died and his son Dhanapati also died leaving behind his two sons, that is, Prasanna and Gajendra who made an amicable partition and occupied their respective allotments and, thus Gajendra became exclusive owner of the suit property and started possessing the same. According to the plaintiffs, the defendants on 05.01.1985 threatened to take forcible possession of the suit property which prompted the plaintiffs to file the aforesaid suit for declaration of their right, title and interest in the suit property and permanent injunction etc.

4. The defendant Nos. 1, 2, 4, 5, 6 and 7 contested the said suit by filing written statement denying the material allegations made in the plaint and contended that the plaintiffs have no right, title and interest including possession of the suit property. According to the defendants, one Krittiwas Poddar and Sitanath Poddar were owners and occupiers of the suit property and after their death their heirs came into possession of the suit property. According to the said defendants, neither Hriday nor Satish and Haran had any right to transfer and the allegation made by the plaintiffs regarding auction purchase and also purchase by Jadunath from Satish and Haran are not true. According to the defendants, they have been possessing the suit property openly and adversely and without any interruption to the knowledge of the plaintiffs for a period exceeding 12 years and the defendants have secured an indefeasible right in respect of the suit property.

5. The said suit came up for hearing and the learned trial Court by judgment and decree dated 21st March, 1997 dismissed the said suit after hearing the learned Advocates for both the sides. Challenging such judgment and decree of the learned trial Court the plaintiffs/appellants filed title appeal No. 48 of 1997 which was placed before the learned Civil Judge (Senior Division), Baruipore and the learned First Appellate Court by the impugned judgment and decree dated 19th December, 2001 dismissed the said title appeal.

6. Challenging the impugned judgment and decree passed by the learned First Appellate Court the plaintiffs/appellants have filed the present second appeal. It appears from the records that by order dated 23.09.2003 an Hon'ble Division Bench of this Court was pleased to permit the appellants to add three grounds and directed that the appeal will be heard on such added grounds. The added grounds in the memorandum of appeal are described as grounds (IX), (X) and (XI). Such added grounds are as follows:

(IX) Whether the learned Court below was justified in rejecting the Appellant's application under Order 41 Rule 27 of the CPC on the grounds that the material particulars of the deed of 1939 which was sought to be introduced by way of additional evidence is absent, though a copy of the said deed and the detailed particulars thereof was given in the said

petition itself as well as on the ground of introduction of a third case, though that is apparently contradictory to the materials on record or not?

(X) Whether the learned Court below was justified in rejecting the Appellant's application under Order 6 Rule 17 of the CPC without considering that the amendment as sought for is necessary for complete adjudication of the dispute or not?

(XI) Whether the learned Court below was justified in concurring with the findings of the learned trial Court on the issue of title of the Appellant in the suit property only by disbelieving oral partition between the erstwhile owners even though in the absence of such partition, the recorded owners through whom the Appellant are claiming interest admittedly had some share which devolved upon the Appellants by way of succession transfer or not?

Thus, it will appear from the said order dated 23.09.2003. that the aforesaid three grounds were treated to be the substantial questions of law on which the present second appeal should be heard.

It will appear from the impugned judgment itself that the appellants had filed an application under Order 6 Rule 17 of the CPC for the purpose of amending their plaint and they also filed a separate application under Order 41 Rule 27 of the CPC wherein the appellants contended that one certified copy of a certain document being a sale deed dated 31.03.1939 is required to be admitted in evidence and such document will establish the right, title and interest of the plaintiffs/appellants in the suit property. It will also appear that the defendants/respondents contested the said application by filing written objection.

7. The learned Senior Advocate for the plaintiffs/appellants submitted that the learned Courts below ought to have allowed the application under Order 6 Rule 17, C.P.C. and also the application under Order 41 Rule 27, C.P.C. The said learned Senior Advocate referred to Ext. 1 which happens to be a record-of-right and submitted that such record-of-right would indicate that the predecessor-in-interest of the plaintiffs had share in the property in dispute. He submitted that it will also appear from the said Ext. 1 that in respect of Dag No. 536 the name of Hriday and Ors. have been recorded in respect of 31 decimals of land which is the suit property. His further submission was that the records would indicate that there was some partition at one point of time in between the co-sharers. His submission was that in any event the fact that the plaintiffs' predecessor had some share in the suit property cannot be denied. He referred to the said Ext. 1 and submitted that there was oral partition previously in between the co-sharers as otherwise all the co-sharers should have been mentioned against each plot of land but the said Ext. 1 indicates that each set of co-sharers became exclusively owners in respect of each plot.

8. In the application under Order 6 Rule 17, C.P.C. which was filed by the plaintiffs in the title appeal a case was sought to be introduced to the effect that in the previous Khatian No. 124 (involved in the suit)-one group comprising of Hriday Naskar, Satish Naskar and

Haran Naskar had four annas share, two annas share and two annas share respectively. In another group comprising of Krittiwas Poddar and Sitanath Poddar had four annas share respectively. It was alleged in the said application that in between the co-sharers of the two groups there was previously an amicable partition. According to the plaintiffs, the group comprising of Hriday Naskar and Ors. occupied the said Dag No. 536 (suit plot) in Khatian No. 124 and Dag No. 532 (a non-suit property) in the said Khatian No. 124. It was further alleged in the said application that even though in Khatian No. 124 the non-suit plot No. 532 was recorded in the name of Hriday Naskar & Ors., actually, the said non-suit plot was exclusively occupied by Hriday and, similarly, even though the suit plot No. 536 was recorded in the name of Hriday Naskar & Ors., actually, the suit plot was in possession of Satish and Haran. It was further contended that in the said application for amendment of plaint that the said Jadunath Sardar purchased by auction sale the said non-suit plot No. 532 and took possession of the same. It was also contended in the said application for amendment of plaint and while Satish and Haran were the absolute owners of 16 annas share in the suit plot No. 536 the said Jadunath Sardar purchased the said plot No. 536 from Satish Naskar and Haran Naskar by sale deed dated 18.01.1928. It was further contended in the said application for amendment of plaint that the said Haran Naskar was a minor at the time of execution of the said sale deed and as such Haran's mother acted on behalf of the minor son.

9. It was further alleged in the said application for amendment of plaint that previously there was a partition and plot Nos. 531 and 535 were allotted to Krittiwas Poddar and Sitanath Poddar and in the record -of-right containing Khatian No. 124 the said Krittiwas Poddar & Ors. were shown in occupation in the said plot. It was also alleged in the "said application that the said Krittiwas Poddar & Ors. had admitted the amicable partition and sold the non-suit plot Nos. 531 and 535 by a registered deed of sale dated 21.12.1938 to one Kalicharan Chakraborty and delivered possession of the said property to the said Kalicharan Chakraborty and, thus, the said Krittiwas and Ors. are estopped from claiming right in respect of the suit plot of land and also from disputing the amicable partition which had taken place in between the co-sharers previously before the old settlement operations.

10. In the said title appeal No. 48 of 1997 the plaintiffs/appellants also filed an application under Order 41 C.P.C. Rule 27, C.P.C. contending, inter alia, that for the purpose of finding out whether any amicable partition took place between the co-sharers recorded in the C.S. Khatian No. 124 it is necessary to grant leave to the plaintiffs to adduce additional evidence by way of producing in evidence a sale deed of the year 1939 as mentioned in the said application.

11. The defendants contested both the applications by filing written objections. The learned Senior Advocate for the plaintiffs/appellants has contended that the defendants in their objection to the application under Order 41 Rule 27, C.P.C. have submitted that even if there was any amicable partition by and between the co-sharers recorded in C.S. Khatian No. 124 the said fact had happened many years ago and such fact cannot be

considered at this stage, that is, four years after filing of the title appeal.

12. The learned Senior Advocate for the plaintiffs/appellants has submitted that the First Appellate Court ought to have allowed both the applications, that is, for amendment of the plaint as well as for adducing additional evidence to decide the real dispute in between the parties.

13. The said learned Senior Advocate cited a decision reported at [K. Venkataramiah Vs. A. Seetharama Reddy and Others](#), and referred to Paragraph 16 of the said reports wherein it has been observed, inter alia, that the Appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other substantial cause. The Hon"ble Court was further pleased to observe, that there may be cases where even though the Court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence to enable it to pronounce judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner.

14. The said learned Senior Advocate cited a decision reported at (2005)13 SCC 89 (Sajjan Kumar v. Ram Kishan) in support of his contention that amendment of pleadings should be allowed to avoid future complications.

15. The said learned Senior Advocate cited another decision reported at [Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.](#), in support of his contention that when the proposed amendment is sought to elaborate the case already made out by a party such amendment should be allowed and some delay in the filing of such application for amendment of the pleadings cannot be a ground for rejection of such application when no serious prejudice is caused to the other side.

16. The said learned Senior Advocate cited another decision reported at [Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others](#), in support of his contention that the real controversy test is the basic or cardinal test while considering an application for amendment of pleadings and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties but while considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment.

17. The said learned Senior Advocate cited another decision reported at [Santosh Hazari Vs. Purushottam Tiwai \(Dead\) by Lrs.](#), in support of his contention that if the First Appellate Court has not functioned properly it may give rise to a substantial question of law, and the judgment of the First Appellate Court must display conscious application of mind and the findings made by the learned First Appellate Court must be supported by reasons on all issues and contentions and even if a doubt arises as to whether the First Appellate Court has carried out its functions correctly, such doubt itself may give rise a

substantial question of law. The said learned Senior Advocate for the appellant submitted that while upholding the view of the trial Court the learned First Appellate Court cannot avoid the duty cast upon it to apply its mind consciously when delivering the judgment.

18. The learned Senior Advocate for the plaintiffs/appellants submitted that the learned First Appellate Court was not correct in affirming the judgment of the learned trial Court by rejecting the appellants' application under Order 6 Rule 17, C.P.C. and the application under Order 41 Rule 27, C.P.C.

19. It was submitted on behalf of the appellants that description of shares as mentioned in Paragraph 2 of the plaint are not material and it is enough that the vendors' names have been mentioned and the amendment which was sought for by the plaintiffs was for the purpose of elucidation of the matter on behalf of the appellant. Reference was made to a decision reported [Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon](#), in support of his contention that an application for amendment of the pleadings should not be rejected unless it is mala fide or if such amendment if allowed it will cause an injury to the opponent which may not be compensated by an order of costs. It was also contended on behalf of the plaintiffs/appellants that even if there was no prayer for consequential relief for recovery of possession in the plaint the Court can mould the relief for ends of justice.

20. The learned Advocate for the defendants/respondents submitted that it has to be first seen as to whether or not the plaintiffs' application under Order 6 Rule 17 should have been allowed by the learned First Appellate Court. The said learned Advocate submitted that the learned First Appellate Court rightly rejected the application under Order 6 Rule 17, C.P.C. as it sought to introduce an absolutely new case by way of amendment of pleadings. The said learned Advocate submitted that Exts.3 and 4 did not specify any particular plot number and/or Dag No. and, therefore, the identity of the property could not be established by the plaintiffs, and if such identity of the property cannot be established then in that event the plaintiff is not entitled to place reliance on such exhibits. The said learned Advocate referred to the Commissioner's report (Ext.9) and submitted that the Commission work was held in the absence of the defendants. The said learned Advocate submitted that the learned Commissioner acted illegally by accepting the oral evidence for the purpose of identification of the boundary in question and the Commissioner did not do the required relayment work and as such no reliance can be placed on the Commissioner's report which is merely based on oral submissions of some persons. The said learned Advocate submitted that the sale deed of the year 1928 did not form the subject-matter of any relayment to see whether it really tallied with said C.S. Dag No. 536. The said learned Advocate also submitted that the plaintiffs did not pray for relayment of the auction certificate because it was concerned with plot No. 532. According to the said learned Advocate, the proposed amendment of the plaint sought to introduce an absolutely a new case based on different cause of action. The said learned Advocate compared the original pleadings in the plaint with the proposed amendment and submitted that such amendment should not be allowed as otherwise it will require

completely a new set of fresh evidence. The said learned Advocate submitted that in the proposed amendment it was sought to be alleged that the said C.S. Dag No. 536 did not belong to Hriday nor did it belong to Satish and Haran and the said plot No. 532, which is a non-suit plot, belongs to Hriday alone. The said learned Advocate submitted that in the original plaint it has been alleged that Jadunath made auction purchase through Court from Hriday in respect of the said C.S. Dag No. 536 but in the amendment application it has been alleged that the said Jadunath had purchased a non-suit plot No. 532 from Hriday through auction purchase which is totally a new case. The said learned Advocate further submitted that in the original plaint it has been alleged that Jadunath had purchased 8 annas share in the said C.S. Dag No. 536 from Satish and Haran but in the amendment application it has been alleged that Jadunath purchased 16 annas share from Satish and Haran and, therefore, there was no purchase from Hriday insofar as suit plot is concerned. The said learned Advocate, thus, submitted that such proposed amendment cannot be allowed. The said learned Advocate also submitted that the deed which was sought to be adduced as additional evidence is not in respect of the suit plot but such deed is in respect of other properties which are not the subject matter of the present suit. The said learned Advocate submitted that if the application for amendment is not allowed by Court then the question of granting leave to the plaintiffs/appellants to adduce additional evidence does not arise. The said learned Advocate further submitted that at such belated stage the learned Court below was right in rejecting the application for amendment of the plaint. The said learned Advocate also submitted that since the said deed of 1938 is a registered document it has to be presumed that the plaintiffs had a constructive knowledge of the same in terms of Section 3 of the Transfer of Property Act.

21. The said learned Advocate cited a decision reported at [Aktar Hossain Vs. Susama Rani Sahoo](#), in support of his contention that no amendment should be allowed which would involve a retrial of the whole case on a new footing at a later stage.

22. The said learned Advocate cited another decision reported at [Gulshan Bibi Vs. Hasmat Ali and Others](#), and referred to Paragraph 16 of the said reports wherein it has been observed that it is settled law that the defendant can be allowed to amend his written statement to raise an additional ground, but if the trial of the suit has to be reopened afresh as a result of such amendment, it should not be allowed. It has been further observed in the said paragraph that normally, no amendment should be allowed in appeals which raise fresh factual questions.

23. The said learned Advocate cited another decision reported at (2007) 2 CLJ (Cal) 182 [Smt. Santana Mukherjee (Nee Mohanta) v. Sri Sunil Kr. Saha & Ors.]. In paragraph 6 of the said reports it has been observed that all amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken and in a case where amendment sought for is entirely different one and not necessary for deciding the lis it cannot be allowed.

24. The said learned Advocate cited another decision reported at [Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai \(deceased\) Thr. LRs.](#), in support of his contention that if the proposed amendment seeks to alter the basic structure of the suit then in that event such amendment cannot be allowed.

25. The said learned Advocate cited another decision reported at [Shri Mundri Lal Vs. Smt. Sushila Rani and Another](#), in support of his contention that if the plaintiffs' application for adducing additional evidence is allowed then in that event it would involve further cross-examinations of witnesses and another round of litigation would have started and, therefore, the learned First Appellate Court was correct in rejecting the application under Order 41 Rule 27, C.P.C.

26. The said learned Advocate cited another decision reported at XXXIX CWN 322 (Arun Chandra Sinha v. Satyendra Chandra Ghose Moulick.) and relied upon the following paragraph in the said reports "The principles to be applied in determining an application for leave to call further evidence were stated by Lord Chelmsford in the case of Shedden v. Patrick (1) which was quoted with approval by Lord Justice Scrutton in the case of Nash v. Rochford Rural District Council (2), Lord Chelmsford said: "it is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial". Lord Justice Scrutton adds this comment: "That is the principle which was acted upon by this Court in the first application in the case of H.M.S. Hawke (3). I take the reason of it to be that in the interests of the State, litigation should come to an end at some time or other; and if you are to allow parties who have been beaten in a case to come to the Court and say, "Now let us have another try; we have found some more evidence," you will never finish litigation, and you will give great scope to the concoction of evidence".

27. The said learned Advocate submitted that since Jadunath had constructive notice regarding the title of the persons possessing the suit property at the material point of time there is no reason to allow such amendment at such belated stage.

28. The said learned Advocate cited a decision reported at [Lachhman Dass Vs. Jagat Ram and Others](#), in support of his contention that Jadunath had constructive notice of the title of the persons who are in possession of the said Dag No. 536 at the material point of time. The said learned Advocate referred to Paragraph 15 of the said reports. The said learned Advocate further submitted that according to the plaintiffs' story, plaintiffs have to rely on the sale deed dated 28.01.1928 but such deed does not contain any Dag Number and the Commissioner who was appointed in the suit for relayment did not do the proper repayment work and identified the suit property on the basis of verbal submissions made by some persons. The said learned Advocate submitted that the question as to whether the said Dag No. 536 is a subject-matter of the deed dated 28.01.1928 has not been

answered. The said deed dated 28.1.1928 had to be relayed which was not done and the learned Courts below have rightly refused the learned Commissioner's report.

29. The said learned Advocate cited a decision reported at AIR 1956 Calcutta 669 (Sm. Pankajini Debi & Others v. Sudhir Dutta & Others) and referred to Paragraph 19 of the said reports. The said Paragraph 19 is quoted below:

The settlement record is not a document of title. It does not create or extinguish title to land. At the most, it may be relevant as some evidence of title to the recorded Dags and may raise a presumption of title by virtue of the statutory presumption of correctness attaching to its entries under S. 103B(5), Bengal Tenancy Act. Such evidence, however, is rebuttable and so also the presumption and they may be effectively rebutted by production of contrary evidence. An admission by the party (in whose favour the settlement entry stands) declaring that he had or has no title or possession in the disputed property and that the settlement entry to the contrary effect in his favour is incorrect, save where such admission can be explained or shown to be wrong, usually binds him and it is normally the best evidence against him on the point: vide (1906) L.R. 34 I.A. 27 (Privy Council) , and it is certainly relevant and ordinarily quite sufficient to rebut the presumption of correctness of the record of rights. The so-called presumption of title which entirely rests upon the presumption of correctness of the settlement record would therefore go as a necessary consequence and the khatian entry as evidence of the party's title would be practically valueless as against his own contrary admission. There is no question of transfer or extinction of title which presupposes an existing title. The question is of proof or disproof of title and rebuttal of the evidence in that behalf, furnished by the Record of Rights. For that purpose the admission is certainly relevant and in the normal course of things it ought to prevail over the Record. Ex.D, therefore, would rebut the Settlement Khatian (Exhibit 2) in the present case.

30. The said learned Advocate for the defendants/respondents submitted that the learned trial Court has held that the plaintiffs were not in possession of the property in dispute but the defendants have been in possession of the property and this is a finding of fact. The said learned Advocate submitted that a right accrued to the defendants and in the absence of any prayer for recovery of possession the provisions of Section 34 of the Specific Relief Act is applicable and now by way of amendment such right cannot be taken away by the plaintiffs.

31. The said learned Advocate cited a decision reported at [Anila Bala Devi Vs. Madhabendu Narain Roy and Another](#), and also a decision reported at [Ram Saran and Another Vs. Smt. Ganga Devi](#), in support of his contention that in absence of the prayer for consequential relief the suit filed by the predecessor of the plaintiffs/appellants is not maintainable. The said learned Advocate further submitted that even in the proposed amendment no such prayer for recovery of possession has been sought for and, thus, the suit remains not maintainable.

32. The said learned Advocate cited a decision reported at 1979(2) CLJ 44 (Sri Bhabendranath Thakur v. Smt. Parul Bala Das & Ors.) in support of his contention that in case of a conflict between the records-of-right the later entry must prevail. He also referred to a decision reported at [Shri Raja Durga Singh of Solan Vs. Tholu](#), in support of his contention.

33. The said learned Advocate referred to Ext. 2 and submitted that in the R.S. Khatian No. 136 Dag No. 490 (which was C.S. Dag No. 536) has been recorded in the name of Sitanath Poddar & Ors. in respect of 30 decimals of land and the defendants/respondents are claiming through Sitanath Poddar and Krittiwas Poddar.

34. The said learned Advocate submitted that plaintiffs have also taken contradictory stand with regard to the story of oral partition and such fact would be borne out after a comparison is made between the original plaint and the proposed amendment of the plaint.

35. The said learned Advocate cited a decision reported at [T.A. Krishnaswamy Vs. State of Madras](#), in support of his contention that a party cannot be allowed to change his case at the appellate stage. The learned Advocate for the defendants/respondents submitted that the document which was sought to be adduced as additional evidence does not relate to the suit property but involves non-suit plots of land. The application under Order 6 Rule 17, C.P.C. by which pleadings regarding non-suit plot of lands were sought to be introduced is rejected then in that event the question of granting any leave to the plaintiffs to adduce additional evidence does not arise. The said learned Advocate submitted that both the learned Courts below have found on the basis of the materials on record that the defendants are in possession of the suit property.

36. The said learned Advocate referred to a decision reported at [Mst. Sugani Vs. Rameshwar Das and Another](#), in support of his contention that a second appeal should not be decided on merely equitable grounds and unless findings made by the learned Courts below are perverse, contrary to materials on record, there is no scope for interference with such findings in a second appeal. The said learned Advocate also submitted that reassessment of the evidence is also not permitted in a second appeal, and a second-appellate Court cannot substitute its opinion for the opinion of the First Appellate Court unless it is found that the conclusion drawn by the learned First Appellate Court is erroneous and contrary to the settled principles of law or based upon inadmissible evidence or were arrived at without evidence.

37. Having heard the learned Advocates for the respective parties this Court is of the view that it is important to decide as to whether the suit filed by the plaintiffs/appellants is maintainable. Both the Courts have found that the defendants are in possession of the property in dispute and the plaintiffs are not in possession of such property. This is a finding of fact which is based on the materials on record as would be evident from the records-of-right. There is no prayer for recovery of possession in the plaint. Even in the

application for amendment of the plaint the plaintiffs have not prayed for recovery of possession of the suit property. From the reported decisions cited on behalf of the defendants/respondents and the settled principles of law with regard to the question as to what would be the effect of there being no prayer for consequential relief in the plaint taking into consideration the provisions of Section 34 of the Specific Relief Act it can be held in the instant case that the suit filed by the plaintiffs/appellants is not maintainable. It cannot be said in the instant case that both the learned Courts below came to their findings with regard to the possession of the suit property without any basis or contrary to the materials on record. Thus, the plaintiffs not having made any prayer for consequential relief for recovery of possession cannot maintain the suit. The submission made on behalf of the plaintiffs/appellants that the Court can mould the prayers made in the plaint is unacceptable in the facts and circumstances of the present case inasmuch as on the face of the various exhibits on record particularly the records-of-right and the findings made by the learned trial Court, the plaintiffs, even in the First Appellate stage, did not think it proper to make a prayer for recovery of possession of the property in dispute by way of amending the pleadings. It cannot be said in the facts and circumstances of the instant case, that it was only an omission on the part of the plaintiffs. The plaintiffs have deliberately chosen not to make such prayer in the plaint and as such the question of the Court moulding the relief"s prayed for by the plaintiffs does not arise.

38. The amendment sought to be made by the plaintiffs in their plaint has already been discussed above. It will appear that the plaintiffs have tried to make out an absolutely new case in their application for amendment of the plaint. It is not necessary at all to go into the merits or the falsity of the case made out in the application for amendment of the plaint. The allegation made in the application for amendment of the plaint are quite contrary to the averment in the original plaint and if the proposed amendment is allowed then in that event an absolutely new case has to be started and, as rightly submitted by the learned Advocate for the defendants/respondents, a retrial would be necessary of a new set of facts which is not permissible under the law. The decision reported at [Aktar Hossain Vs. Susama Rani Sahoo](#), [Gulshan Bibi Vs. Hasmat Ali and Others](#), and [Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai \(deceased\) Thr. LRs.](#), as already noted above, may be referred to.

39. This Court is also of the view that the application for leave to adduce additional evidence made by the plaintiffs cannot also be allowed. The proposed additional evidence would not have any basis when the application under Order 6 Rule 17, C.P.C. stands dismissed. That apart, to allow such additional evidence would imply another round of litigation without any justifiable reason.

40. The submission made by the learned Advocate for the defendants/respondents that according to the plaintiffs, Hriday, Satish and Haran were possessing the suit property (in terms of the original plaint) or Satish and Haran were possessing the suit property (according to the proposed amendment) and, therefore, Jadunath must have had constructive notice with regard to the possessor"s title as this was much before the filing

of the suit and, thus, the amendment of the plaint cannot be allowed at such late stage, is of substance.

41. In view of the discussions made above, this Court does not find any reason to interfere with the conclusions arrived at by the learned Courts below. The instant second appeal is without any merit and it is accordingly dismissed.

42. There will, however, be no order as to costs.

43. Let the lower Court records be sent back to the learned Court concerned immediately. Urgent certified Xerox copy of this judgment, if applied for, shall be given to the parties on compliance of all usual formalities.