

(1992) 12 CAL CK 0017
Calcutta High Court
Case No: S.A. No. 430 1989

Jacob Cherian

APPELLANT

Vs

Himanshu Kumar Mukherjee and
Another

RESPONDENT

Date of Decision: Dec. 23, 1992

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17
- Transfer of Property Act, 1882 - Section 106, 53A

Citation: 97 CWN 730

Hon'ble Judges: J.N. Hore, J

Bench: Single Bench

Advocate: S.P. Roychowdhury, Bhaskar Bhattacharjee and Pradyumna Sinha, for the Appellant; Bhaskar Ghosh and Bimal Chatterjee, for the Respondent

Final Decision: Allowed

Judgement

J.N. Hore, J.

This appeal is directed against the judgement and decree dated 26th June, 1988 passed by the learned Additional District Judge. 7th Court, Alipore, in Title Appeal No. 197/87 affirming those dated 27th January. 1987 passed by the learned Munsif. 2nd Court, Baruipur in Title Suit No. 223/86. The plaintiff-respondents instituted the said suit against the tenant-defendant for eviction upon determination of the tenancy by a notice to quit u/s 106 of the Transfer of Property Act. The tenancy was governed by the Transfer of Property Act and not by the West Bengal Premises Tenancy Act. The defendant was a monthly tenant in respect of the suit premises at a monthly rate of Rs. 80 payable according to English Calendar month. Though redundant, the plaintiff pleaded default in payment of rent since January, 1974, unauthorised construction by way of addition or alteration in the suit premises without knowledge and consent of the plaintiffs and reasonable requirement of the suit premises for their own use and occupation as grounds of ejection.

2. The defendant contested the suit by filing a written statement. The defence case was that on 27.9.84 S.D. Mukherjee received a sum of Rs. 10,251 /- by way of advance for sale of the suit premises at the agreed price of Rs. 30,000/- and he executed an agreement for sale of the suit property. In the said agreement for sale it was stipulated that the purchaser would continue to enjoy the possession and raise kitchen garden and take the yield from the trees already there pending registration of the sale deed. Late S.D. Mukherjee died without the conveyance being completed. Though specific plea u/s 53A of the Transfer of Property Act was not taken In the written statement, it appears that this plea was raised both at the time of trial and a the time of hearing of first appeal. Both the Courts below negatived the plea and the decree passed by the Trial Court was upheld by the lower Appellate Court.

3. Mr. Roy Choudhury, learned Advocate for the appellant has strongly contended that the petition of amendment of the written statement dated 26.7.85 containing specific plea of part performance u/s 53A of the Transfer of Property Act was wrongly rejected by the Trial Court. It has further been contended that the lower Appellate Court was wrong in rejecting another application under Order 6 Rule 17 C.P.C. dated 17.3.88 praying for the amendment of the written statement on the ground that defendant could not be permitted to change his defence by way of amendment of the written statement as sought for. It has been contended that though the plea u/s 53A is not specifically taken in so many words in the written statement there is clear foundation of such a plea in the written statement and the lower Appellate Court was wrong in holding that by the amendment the defendant wanted to put up altogether a new defence. It has been contended that in the absence of the amendment and specific issue the defendant could not adduce evidence on all the ingredients of Section 53A of the Transfer of Property Act and the lower Appellate Court was unfair In observing that the defendant could not adduce evidence to show that he was all along ready and willing to perform his part of the contract.

4. The contention of Mr. Roy Choudhury has substance and must be accepted. With regard to the scope of amendment of a written statement I may refer to the observations of P.B. Mukherjee J as he then was in [Nrisingh Prosad Paul Vs. Steel Products Ltd.](#), amendment of a plaint and amendment of a written statement are not necessarily governed be exactly the same principles. Some important general principles are certainly common to both, such as the application for amendment whether of a plaint or a written statement must be bona fide and must also be for the purpose of determining "the real controversy" between the parties and where it is just. But the rule that the plaintiff cannot be allowed to amend his plaint so as to alter materially or substitute his cause of action or the nature of his plaint has necessarily no counter part in the law relating to amendment of the defence or the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new

cause of action. Hence, the Courts are inclined to be more liberal in allowing amendment of defence than of plaintiff and questions of prejudice are less likely to operate with same rigour in the former than in the latter case. But nevertheless no amendment of a defence or written statement should be allowed which is no answer to the plaintiff and the cause of action pleaded therein. An immaterial or useless amendment should not be permitted by the Court, Nor does the Court allow amendment by introduction in the written statement of a stale and untenable set-off. These conclusions follow naturally from the "real controversy" rule in Order 6 Rule 17. The governing consideration in an application to amend the written statement should be how far, if at all, the proposed amendment of a defence is necessary to determine the real controversy between the parties. If that test is not satisfied then the amendment should not be allowed even on the ground that there can be no real prejudice by the amendment and that the costs awarded against the amending party will act as the panacea for any possible inconvenience occasioned by the amendment. There is always legal prejudice when irrelevant matters are allowed to be introduced by the amendment.

5. In an action for ejectment the plea of part performance u/s 53A of the Transfer of Property Act may be taken up as a weapon of defence. This plea must be specifically taken up as a weapon of defence. This plea must be specifically taken in the written statement. Though foundation of this plea was laid in the written statement there is no averment that the defendant was all along ready and willing to perform his part of the contract and performed his part of the contract and that his continuation of possession was on the basis of the agreement for transfer as a purchaser and not as tenant and that the defendant is entitled to protection u/s 53A of the Transfer of Property Act. As there was no specific plea u/s 53A of the Transfer of Property Act no issue was framed. The defendant, however, filed an application for amendment specifically incorporating the plea of part performance u/s 53A on 26.7.85 but the said amendment was not allowed. The lower Appellate Court also disallowed another petition for amendment on the ground of proposed amendment sought to introduce a new case of defence. Though the amendment was not allowed and still both the Courts below considered the question of part performance and held that the defendant did not perform his part of the contract and was not entitled to protection u/s 53A of T.P. Act. In my opinion the defendant's application for amendment of the written statement ought to have been allowed. The foundation of the defence u/s 53A of the Transfer of Property Act was laid in the written statement though the plea of part performance was not taken in so many words pleading all the ingredients of Section 53A. In an action for ejectment plea u/s 53A of the T.P. Act may be taken as defence. It is not a defence unconnected with the claim of the plaintiff. The proposed amendment cannot be said to be immaterial or useless.

6. It has been contended on behalf of the respondent that in a suit for eviction against a tenant on the allegation that the latter was a monthly tenant at will and the plaintiff was entitled to (sic) for eviction a counter-claim by the defendant for

specific performance of the contract for sale cannot be maintained. In support of this contention he has referred to the decision of this Court in [Manick Lal Seal and Another Vs. K.P. Chowdhury](#), The decision is clearly distinguishable. By the proposed amendment the defendant does not put forward a counter-claim of specific performance of contract for sale but he puts forward a plea of part performance u/s 53A of the Transfer of Property Act as defence against delivery of possession. The fact that the defendant has since instituted a suit for specific performance of contract for sale also does not stand in the way of the proposed amendment. In the result, the appeal is allowed and the judgements and decrees of both the Courts below are set aside. The case is sent back to the Trial Court for a decision afresh after allowing the defendant's application for amendment dated 26.7.85. An additional issue as to whether the defendant is entitled to the benefit of Section 53A of the Transfer of Property Act is to be framed and the parties would be allowed to adduce evidence on the same issue. The Trial Court would dispose of the suit according to law on the evidence already on record and on the fresh evidence that may be adduce by the parties. The plaintiff-respondent will get costs of Rs. 300/- for the said amendment. The said costs are to be deposited in the Trial Court within 2 months from the date of receipt of the records. Let the lower Court records be sent down to the court below at once with a copy of the judgement. I make no order as to costs in this appeal.