

Jacob Cherian Vs Himanshu Kumar Mukherjee and Another

Court: Calcutta High Court

Date of Decision: Dec. 23, 1992

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 6 Rule 17
Transfer of Property Act, 1882 â€” 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 at the time of hearing of first appeal. Both the Courts below negated 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 Narsingh Prosad Paul Vs. Steel Products Ltd., amendment of a plaint and

amendment of a written statement are not necessarily governed by 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 that 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 ejection 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 is 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 adduced 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.