

(1998) 08 CAL CK 0025

Calcutta High Court

Case No: C.O. No. 642 of 1998

Sudhangshu Bimal Ghosh

APPELLANT

Vs

Ranjit Kr. Das and Others

RESPONDENT

Date of Decision: Aug. 13, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115

Citation: 1 CWN 87

Hon'ble Judges: P.K. Samanta, J

Bench: Single Bench

Advocate: S.P. Roy Choudhury, Subal Maitra and Abhijit Kumar Ghosh, for the Appellant; Sudhis Dasgupta, Subhra Kamal Mukherjee and Sabyasachi Bhattacharjee, for the Respondent

Final Decision: Dismissed

Judgement

P.K. Samanta, J.

This revisional application is by the defendant/ petitioners and directed against Order No. 88 dated 4.12.97 passed in Title Suit No. 76 of 1991 allowing the petition filed by the defendants for amendment of their written statement under Order 6 Rule 17 of CPC in part. The plaintiff/O.P. instituted the aforesaid suit in the 7th Court of Additional District Judge at Alipore against the petitioners for declaration that the registered Deed of Gift executed by the Alongo Bala Dhar on 12.6.85 in favour of the defendant No. 1 is forged and therefore void and is not binding upon the plaintiff and also for a decree for partition and separate possession in respect of 1/4th share of the plaintiff/O.P. in the suit property in preliminary and therefore in final form and for other consequential reliefs. It is the specific case of the plaintiff that he is the son and defendant No. 2 is the daughter of said Alongo Bala Dhar. Defendant No. 1 is the husband of the defendant No. 2 and accordingly son-in-law of said Alongo Bala Dhar. The case made out in the plaint is that the suit property was purchased Jointly by the defendant No. 1 and said Alongo Bala Dhar. On the death of the said

Alongo Bala Dhar on 6.2.89 her half share in the suit property devolved upon the plaintiff and the defendant No. 2 being the son and the daughter respectively in equal shares. The defendant No. 1 openly denied any claim of the plaintiff in the suit property by virtue of a registered deed of gift dated 12.6.85 executed by said Alongo Bala Dhar in his favour in respect of her half share in the suit property. The plaintiff accordingly alleged that the said registered deed of gift is a forged and fraudulent document and the defendant No. 1 did not acquire any interest in the property held in half share by said Alongo Bala Dhar by virtue of the deed of gift which again was not executed by said Alongo Bala Dhar herself but by her husband as power of attorney holder for said Alongo Bala Dhar.

2. The defendant appeared in suit and filed their written statement. Joint purchase of the suit property by the defendant No. 1 and Alongo Bala Dhar was not disputed. In paragraph 8 of the written statement it was denied that the plaintiff inherited a share in the suit property but at the same time statements were made as if the plaintiff was claiming a share in the suit property as an adopted son of said Alongo Bala Dhar and her husband. However, in paragraphs 11 and 12 of the said written statement the plaintiff was specifically described as the adopted son of Alongo Bala Dhar and her husband. It may further be noted that in respect of the properties, other than in the suit, left by said Alongo Bala Dhar and her husband it was stated in the written statement that the plaintiff is the adopted son and therefore admitted that the defendant No. 2 and the plaintiff inherited moiety shares in the said properties.

3. With these pleadings parties went to trial and plaintiff deposed in the suit It appears that in his deposition he also asserted that he is the adopted son. In course of hearing of the suit the defendant sought for an amendment of the written statement by making application under Order 6 Rule 17 Civil Procedure Code. The amendments proposed which are relevant for the present revisional application are in respect of paragraphs 8, 11 and 12 of the written statements. In paragraph 8 of the written statement amendments were sought for by making addition of the statements that plaintiff is neither the son nor the adopted son of the said deceased Alongo Bala Dhar and accordingly the plaintiff did not inherit any share in the suit property. So far in respect of paragraphs 11 and 12 of the written statement the amendments were sought for be-only deleting the words "adopted son" used against the plaintiff.

4. The petition for amendment of the written statement was allowed except for the paragraphs 11 and 12 of the written statement which has been impugned in this revisional application by the defendants.

5. Before going into the merits of this revisional application it may be stated that because of the amendment allowed in paragraph 8 of the written statement as above the defendants will have the full benefit of putting forward his case in the trial that the plaintiff is neither the son nor the adopted son of the deceased. In such

circumstances, refusal of the amendments in paragraph 11 and 12 of the written statement, by deleting the words "adopted son" used against the plaintiff, whether was in illegal exercise of jurisdiction or with material irregularity or not, is the question which falls of determination in this revisional application.

6. Mr. S. P. Roy Chowdhury, learned senior advocate appearing on behalf of the defendants/petitioners contended that the learned court below acted illegally and with material irregularity in its exercise of jurisdiction as it failed to appreciate the substance of the original pleading at paragraph 8 of the written statement where there was no admission by the defendants that the plaintiff is the adopted son of the deceased except for mere statement that the plaintiff asserted himself as the adopted son. Accordingly it was contended that by the aforesaid amendment the defendants did not withdraw any admission made in their written statement. Mr. Roychowdhury therefore argued that the trial court purely upon misconception of facts relied on the decision of the Supreme Court reported in [Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Latha Ram and Co.](#), Mr. Roychowdhury further upon reference to the decisions of the Supreme Court reported in [Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another](#), and [Akshaya Restaurant Vs. P. Anjanappa and Another](#), contended that inconsistent pleas absolutely contrary to the statements already pleaded in the written statement can be taken by way of amendment. Mr. Roychowdhury however sought to distinguish the recent Supreme Court decision reported in [Heeralal Vs. Kalyan Mal and Others](#), in the facts of the present case that the defendants did not categorically admit the plaintiff as the adopted son and therefore" contended the proposed amendment was by way of explanation of the statements already made in the written statement and not by way of withdrawal of any admission.

7. Mr. Sudhis Dasgupta, learned senior advocate appearing on behalf of the plaintiff/O.P. upon reference to the original pleadings at paragraphs 11 and 12 of the written statements contended that in substance the defendants made out a clear case by describing the plaintiff as the adopted son while the plaintiff asserted his interest in the suit property as an heir to the deceased as a son. In particular Mr. Dasgupta referred to the various statements made in the written statement where the defendants upon reference to the properties other than in the suit made out a specific case that on the death of Alongo Bala Dhar and her husband. the defendant No. 2 being the daughter was entitled to half share as the plaintiff being entitled to the other half as the adopted son and therefore contended that proposed amendments in paragraphs 11 and 12 of the written statement for deleting the words "adopted son" used against plaintiff are in the nature of displacing the plaintiff from his case altogether. My Dasgupta thus placing his reliance in the case of Heeralal (supra), which took into consideration all the earlier decisions of the Supreme Court in this regard and held that when the amendment sought in the written statement was of such a nature as to displace the plaintiff's case it could not be allowed; contended that the proposed amendments in paragraphs 11 and 12 of

the written statement were rightly refused by the learned trial court

8. It is no doubt true that the written statement has to be read as a whole. Against the case of the plaintiff that he and the defendant No. 2 being the son and daughter of the deceased Alongo Bala Dhar the defendants did never state specifically in their written statement that defendant No. 2 is the sole heir of the deceased or there is no other heir of the deceased beside the defendant No. 2. On the other hand, defendants pleaded that on the death of Alongo Bala Dhar and her husband the defendant No. 2 Inherited only the half share in the properties left by them leaving open the other half. At the same time plaintiff was described as the adopted son in paragraphs 11 and 12 of the written statement and it was further pleaded that upon death of Alongo Bala Dhar and her husband, plaintiff was denying the rightful half share of the defendant No. 2 in the properties left by them. Thus in substance semblance of share of the plaintiff in the properties of the deceased was not disputed by the defendants.

9. The foundation of the case of the plaintiff was as an heir to the as a son. Such foundation is not altered even if the plaintiff is held to be the adoptive son. Knowing fully well such foundation of the case the defendants put forward their defence by recognising the semblance of a share of the plaintiff in the estate of the deceased by inheritance. Thus in substance there was an admission to the status of the plaintiff as an heir to the deceased.

10. In his perspective the recent Supreme Court decision in the case of Heeralal (supra) is of much importance. In the said decision the principle of law laid down to [Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.](#), that an inconsistent plea which would displace the plaintiff completely from the admission made by the defendants in the written statement cannot be allowed was confirmed. It was further held that the said decision is a clear authority for the proposition that at once the written statement contains an admission to favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be -withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. In laying down the aforesaid principle of law it not only observed that the decision of the Supreme Court reported to 1995 Suppl. (2) SCC 303 was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member bench of the Supreme Court in [Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.](#), taking a diametrical opposite view, but the said case [1995 Suppl. (2) SCC 303] was further explained on its facts by observing that by way of an amendment the defendant did not seek to go beyond his admission that there was an agreement on 25th January, 1991 between the parties but the nature of agreement was sought to be explained by stating that it was not an agreement for a sale as such but it was an agreement for development of land.

11. It also took into consideration the decision of the Supreme Court reported to [Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another](#), It held that by amendment the plaintiff wanted to plead that the defendant was his brother by deleting the words "uterine" used against him to the original pleading and thereby the main case put forward by the plaintiff did not get changed as the plaintiff wanted to submit that the defendant was his brother. Whether he was uterine brother or real brother was a question of degree and depend on the nature of evidence that may be led before the court.

12. Unfortunately such is not the "case in hand. Here the defendants in paragraphs 11 and 12 of the written statement used the words "adopted son" in describing the plaintiff. By amendment the defendants wanted to delete the said words "adopted son" used in describing the plaintiff which would leave the plaintiff as an individual without any relationship whatsoever with said Alongo Bala Dhar and her husband and without any semblance of inheritance in the properties of the deceased which is the basic foundation of the plaintiffs case. Such amendment if allowed would completely displace the plaintiff from his case as he would be denied the opportunity of extracting the admissions from the defendants.

13. The decision of the Supreme Court reported in 1995 Suppl. (3) SCC 179, (Basaven Jaggu Dhobi vs. Sukhchandam Ram Das Chowdhury) is not a departure from the aforesaid principle of law. In that case the defendant was sought to be evicted as a licensee. The defence was of joint tenancy with others under the plaintiff. By amendment defendant submitted that he was a licensee for monetary consideration who should be deemed to be a tenant as per provisions of Section 15A of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947. Such amendment was upheld by the Supreme Court. Thus it is evident that the defendant though introduced an alternative plea of defence, but such plea, as the Supreme Court observed, did not seek to displace any admission on the part of the defendant in favour of the plaintiff.

14. Therefore, in all, the decision of the Supreme Court reported in [Heeralal Vs. Kalyan Mal and Others](#), holds the field of amendment of written statement and the principle deducible therefrom are that by way of an amendment in the written statement an inconsistent plea though could be taken and an admission made by the defendant may be explained but nevertheless such an inconsistent plea which will completely displace the plaintiff from his case or will seek to displace any admission on the part of the defendant in favour of the plaintiff and will cause him irretrievable prejudice will not be allowed by way of an amendment

15. If the law as above, deducible from the aforesaid decisions of the Supreme Court, is applied in the facts and circumstances of the present case it is clear that against the specific case of the plaintiff that he is the son of Alongo Bala Dhar, defendants alleged in paragraph 8 of the written statement that the plaintiff based his claim as an adopted son which is not correct. Because of amendment of

paragraph 8, which has been allowed, the pleadings have been made that the plaintiff is neither the son nor the adopted son of the deceased Alongo Bala Dhar. Therefore, in the first place in paragraph 8 of the written statement there was no clear admission by the defendants that the plaintiff is the adopted son of Alongo Bala Dhar and her husband. Now in view of the amendment allowed in paragraph 8 of the written statement the question will be wide open as to whether the plaintiff is at all the son or not of the deceased by taking into account the admissions made by the defendants that the plaintiff is the adopted son of the deceased in other parts of the written statement including paragraphs 11 and 12 thereof. But once the amendments as sought for are allowed in the written statement by deleting the words "adopted son" from paragraphs 11 and 12 of the written statement, the plaintiff will certainly be displaced from the admission made by the defendants which will leave the plaintiff no scope of extracting the admission from the defendants for the purpose of adjudication of the issue as to the inheritance of a share in the suit property by the plaintiff as an heir to the deceased. The prejudice to the plaintiff will be irretrievable. For all these reasons the impugned order refusing the amendment of the written statement by deleting the words "adopted son" used against the plaintiff in paragraphs 11 and 12 of the written statement does not suffer from any illegality and/or material irregularity in exercise of jurisdiction by the court and therefore the same does not call for any interference in exercise of the power u/s 115 of the Code of Civil Procedure. Hence, the revisional application is dismissed.