

Ajit Kumar Saha Vs. Ashit Kumar Saha

Ajit Kumar Saha Vs. Ashit Kumar Saha

SooperKanoon Citation : sooperkanoon.com/878556

Court : Kolkata

Decided On : Aug-22-2002

Reported in : AIR2003Cal148,(2002)3CALLT503(HC)

Judge : Arun Kumar Mitra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 151 - Order 4, Rule 1 - Order 6, Rule 17 - Order 20, Rule 3; ;[Indian Succession Act, 1925](#) - Section 276

Appeal No. : C.O. No. 1093 of 2002

Appellant : Ajit Kumar Saha

Respondent : Ashit Kumar Saha

Advocate for Def. : S.P. Roy Chowdhury, Dipak Kumar Ash and S.K. Dasgupta, Advs.

Advocate for Pet/Ap. : Jyotirmoy Bhattacharya and Sabnam Dey, Advs.

Judgement :

A.K. Mitra, J.

1. This revisional application has been preferred challenging Order No. 38 dated 6.3.02 passed by the learned Chief Judge in the City Civil Court at Calcutta in O.C. No. 5/1999. The basis of or the background on which this revisional application

has been preferred is inter alia as follows;

2. The opposite party herein filed an application under Section 276 of [Indian Succession Act, 1925](#) for grant of probate of the last will and testamen to the deceased Sudhir Chandra Saha, son of Late Nandalal Sana of 16A, Mondal Street, P.S. Jorabagan, Calcutta-700 006. The said application for probate has been registered as Probate Case No. 73/1998 before the learned Chief Judge, City Civil Court at Calcutta.

3. Coming to know about the said probate proceeding, the petitioner herein raised an objection in the said proceeding for which the said case No. 73/1998 was dropped and was transferred as O.C. No. 5/1999 that is the instant case.

4. The petitioner filed written objection on 21st May, 1999. According to the petitioner, the applicants of the will suppressed all material fact and filed this application for the grant of probate with a malafide intention to grab the property at the back of the petitioner. In the objection it was also stated that the deceased Sudhir Chandra Saha prior to the execution of the alleged will executed earlier two wills in the year 1990 and 30th July, 1994 which the opposite parties did not disclose in the said application.

5. According to the petitioner, the testator (presently deceased) was aged about 87 years and since December. 1999 till his death he was fully under the control or influence of the opposite parties who were the applicants in the probate proceedings. According to the petitioner prior to his death, Sudhir Chandra Saha was admitted in Marowari Relief Society Hospital in December, 1993 and all the medical expenses and shradha ceremony expenditure was borne by the petitioner. The petitioner performed the shradha ceremony function by giving fire to the deceased Sudhir Chandra Saha as per rites and customs of the Hindu Law.

6. Subsequently, the petitioner filed an application under Order 6 Rule 17 of the Code of Civil Procedure read with Section 151 to amend the original objection of the application for grant of probate of the Will. That the opposite parties, however, did not file any objection to the said application for amendment of the objection and, according to the petitioner, the opposite parties have not raised any objection

to the said application also as and when the learned Court allowed time for filing the same.

7. That the learned Chief Judge by order dated 6th March, 2002 dismissed the said application for amendment. Challenging the said order of dismissal of the application for amendment passed by the learned Chief Judge, City Civil Court at Calcutta by his order dated 6th March, 2002 in O.C. No. 5/1999, the petitioner has come up to this Court.

8. Appearing for the petitioner, Mr. Bhattacharya submits that the order impugned is bad in law and the learned trial Judge passed the order without appreciating the provisions of Order 6 Rule 17 of the Code of Civil Procedure. The impugned order suffers from material irregularity and the learned trial Judge failed to exercise his jurisdiction by not allowing the application for amendment. According to Mr. Bhattacharya, the learned trial Judge went on wrong when making observation 'want to add dimension which would change the character of this original case'. Mr. Bhattacharyay submits that amendment can be allowed by the Court at any stage of the proceeding and this amendment was necessary to resolve the controversy in the probate proceeding.

9. Mr. Roy Chowdhury, the learned senior counsel appearing for the opposite parties/executors submits that the learned trial Judge rightly rejected the amendment application at this belated stage when some right has accrued to the petitioner/executor by virtue of initiation of the trial and/or progress of the trial to a certain stage. Mr. Roy Chowdhury further submits that the plea taken out in the amendment application is inconsistent and the amendment has been sought to be made with a malafide intention to defeat the claim of the beneficiaries of the will. Mr. Roy Chowdhury submits that the proceeding was initiated in 1999. PW 1 Shri Prabir Bose was the identifier witness of the will who was examined on 8.8.01. PW 2 Ashit Kumar Saha the petitioner/executor No. 1 was examined as also cross-examined (in part) on 29.8.01 and the amendment application was verified on 6.12.01 and filed. According to Mr. Roy Chowdhury, when the PW 1 was examined and the examination-in-chief of the PW 2 was completed the objector/petitioner herein to improve their case changed the stand and submitted

this amendment application. Mr. Roy Chowdhury submits that at such a belated stage, after progress of the proceeding to some extent the amendment taking a contrary stand should not be allowed in the trial Court and the learned trial Judge rightly rejected the amendment application. In support of his contentions, Mr. Roy Chowdhury relies on a decision of the Hon'ble Apex Court reported in : [1977]1SCR728 (Modi Spinning & Waving Mills v. Ladha Ram & Company) and submits that the Hon'ble Apex Court observed in this decision that amendment introducing entirely different and new case which goes to prejudice the other side should not be permitted. According to Mr. Roy Chowdhury if such amendment is allowed the petitioner/executor of the probate proceeding will be highly prejudiced and the instant revisional application should be rejected.

10. In turn in his reply, Mr. Bhattacharya submits that amendment can be allowed at any stage of the proceeding and even if the stand is contradictory or inconsistent then also the amendment can be permitted if the purpose of the amendment is to settle the dispute or issue in question and to set the dispute at rest for ever. Mr. Bhattacharya relies on the decisions reported in AIR 1993 All 248 (Narendra Singh Sengar v. Smt. Malti Devi and Ors.), : (1994)2SCC29 (Arundhuty Mishra v. Ram Charitra Pandey), : AIR 2000 SC614 (B.K. Narayanan Pillai v. Parameshwar Pillai and Ors.), 2001(3) CHN SC suppl. 81 (Estraller Rubber v. Das Estate Put. Ltd.) and also on a decision of a learned single Judge of this Court reported in 1998 CWN 418 (Khantabala Biswas and Ors. v. Abinash Chandra Biswas and Ors.).

11. Mr. Bhattacharya relying on the aforesaid decision emphatically submitted that though the amendment sought for by his clients do not bring about contradictory stand but assumingly that is so and the pleas are inconsistent still then amendment can be or should be permitted inasmuch as in the instant case, the amendment which has been sought for if allowed would conclusively settle the dispute. The amendment application (copy), and the objection of the objectors have been annexed to this petition.

12. Heard the submissions of the learned counsel for the parties considered the averments made in the revisional application, the objection and the amendment

application.

13. For the sake of convenience Order 6 Rule 17 of the Code of Civil Procedure is quoted herein below:

'Amendment of Pleadings'

'The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments shall be as may be necessary for the purpose of determining the real question in controversy between the parties.'

14. Before coming to the discussions regarding the rival contentions of the learned counsel for the parties as well as the decisions cited and/or relied on by them, let us see what the plain reading of the provisions says. The terms of this provision 'at any stage of the proceedings', and 'for the purpose of determining the real question in controversy' are important. The whole object and purpose of introduction of Order 6 Rule 17 in the Code of Civil Procedure is to avoid multiplicity of proceeding and/or to shorten the litigation and to settle the entire dispute at rest, though, however, any amendment should not or must not jeopardize the case of the other side in such a manner which goes to non-suit the other side.

15. Now let us start from the decision cited by Mr. Roy Chowdhury reported in : [1977]1SCR728 (supra). In paragraph 10 of this decision in the perspective of that case it has been observed by the Hon'ble Supreme Court:

'It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admission made by the defendant in the written statement,'

16. The Hon'ble Apex Court, therefore, in this decision also observed and/or admitted that inconsistent pleas can also be made. Now whether this amendment intends to dislodge the petitioner/executor from his case or the amendment if allowed goes to non-suit the petitioner/executor or not is being discussed later on.

17. The decision of Hon'ble High Court at Madhya Pradesh in the case of Narendra Singh Sengar (supra) in paragraph 10 and 11 observes in the manner as follows:

This Court in Badri Prasads case (supra) while considering a case of rejection of an application for amendment by the trial Court, which placed reliance on Arjun Singh's case (supra) as the case was fixed for pronouncement of the judgment has taken the view that the expression 'at any stage of the proceedings' employed in Order 6, Rule 17 was not for interpretation before the Supreme Court, but the expression employed in Order 9, Rule 7 was considered, and as the two expressions i.e., expression 'at any state of the proceedings' used in Order 6, Rule 17, and expression of Order 9, Rule 7, CPC 'the Court has adjourned the hearing of the suit ex-parte and the defendant at or before such hearing appears and assigns good cause', are distinct expressions and no analogy can be drawn from the interpretation of one for the interpretation of the other. The net of the power of the Court so far as amendment is concerned is wider in view of the expression 'at any stage of proceedings' and not 'hearing'. Therefore, as the suit commences by presentation of the plaint under Order 4, Rule 1, CPC and it stands disposed of by the trial Court on the pronouncement of judgment under Order 20, Rule 3, CPC, the irresistible conclusion can safely be drawn, that delivery of judgment by the trial Court is a stage in the proceeding, and, therefore, because of the expression 'at any stage of the proceedings' employed in Order 6, Rule. 17, CPC, the Court is competent to deal with the application for amendment as it keeps seisin over the case till judgment is pronounced, and does not become functus officio.

Therefore, in the opinion of this Court, the upshot of the above discussion is that the trial Court was not right in holding that it had no jurisdiction to consider the application for amendment after the close of the case when it was reserved for judgment besides, the judgment so recorded violates Order 20, Rule 5, CPC. As a result of above now the case shall go back to the trial Court, the trial Court shall consider the two applications under Order 6, Rule 17, CPC and pass appropriate order thereon and then decide the same afresh in accordance with law.'

18. In the decision reported in : (1994)2SCC29 (supra) in paragraph 3 Hon'ble Apex Court observes in the manner as follows:

'It is settled law as laid down by this Court in Firm Srinivas Ram Kumar v. Mahabir Prasad that it is open to the parties to raise even mutually inconsistent pleas and if the relief could be founded on the alternative plea it could be granted. If the facts are admitted in the written statement, the relief could be granted to the plaintiff on the basis of the evidence though inconsistent pleas were raised. Amendment to written statement cannot be considered on the same principle as an amendment to the plaint. The pleas in the written statement may be alternative or on additional ground or to substitute the original plea. It is equally settled law that amendment of the pleadings could be made at any stage of the proceedings. Instances are not wanting that pleadings are permitted to be amended even when second appeal is pending. Equally it was refused. It is not necessary to burden the judgment by copious references thereof. But each case depends upon its own facts. The essential requisites are that the delay in making the application; the reason therefore should be given and considered; and there should be no prejudice caused to the other side. Bar of limitation which is available to the parties cannot be permitted to be defeated. It is also settled law that if the relief is found on the same cause of action, though different sets of facts are sought to be brought on record by appropriate pleadings, it cannot be refused. In those circumstances, permission to amend the pleadings could be granted.'

19. In the case of B.K. Narayanan Pillai (supra) the Hon'ble Apex Court again observes:

'The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice on the basis of guidelines laid down by various High Court and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other

side can be compensated with the costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation.'

20. In the later decision in the case of Estralla Rubber (*supra*) the Hon'ble Apex Court observes:

'We have considered the submissions made on behalf of either side. The High Court set aside the order passed by the learned District Judge stating that the proposed amendment will have the effect of displacing the plaintiff from admission made by the defendant in its petition filed under Sections 17(2) and 17(2A) of the Act and that such admission could not be permitted to be withdrawn. We have perused the relevant records including the original application and the proposed amendments. We are not able to see any admission made by the defendant as such, which was sought to be withdrawn. By the proposed amendment the defendant wanted to say that Ala Mohan as was permissive occupier instead of owner. The further amendment sought was based on the entries made in the revenue records. It is not shown how the proposed amendment prejudiced the case of the plaintiff. It is also not the case of the plaintiff that any accrued right to it was tried to be taken away by the proposed amendment. The proposed amendment is to elaborate the defence and to take additional plea in support of its case. Assuming that there was some admission indirectly, it is open to the defendant to explain the same. Looking to the proposed amendments it is clear that they are required for proper adjudication of the controversy between the parties and to avoid multiplicity of judicial proceedings. The High Court also found fault with the defendant on the ground that there was delay of three years in seeking amendment to introduce new defence. From the records it cannot be said that any new defence was sought to be introduced. Even otherwise, it was open for the defendant to take alternative or additional defence. Merely because there was delay in making the amendment application when no such serious prejudice is shown to have been caused to the plaintiff so as to take away any accrued right, the application could not be rejected. At any rate, it cannot be said that allowing amendment caused irretrievable prejudice to the plaintiff. Further, the plaintiff can

file his reply to the amended written statement and fight the case on merits. The impugned order passed by the High Court exercising jurisdiction under Article 227 of the Constitution to set aside the order passed by the learned District Judge in revision under Section 115A of the CPC allowing the amendment application filed by the defendant, is patently erroneous and unsustainable. In the impugned order the High Court observed that the order of the learned District Judge was apparently wrong but in our view it is otherwise.'

21. In case of Khantabala Biswas (supra) one Hon'ble single Judge of this Court also adopted the same view and observed:

'The law relating to the amendment on pleadings is now well settled. It is well settled that the Court should be more lenient in the matter of granting an application for amendment of written statement. It is settled that in the written statement defendant is entitled to take inconsistent or contradictory plea.'

22. In the probate proceeding pending before the learned Court below it is necessarily and conclusively to be concluded as to whether the will in question was executed under coercion or undue influence or the same was executed voluntarily and at the free will of the testator at his good and proper sense or not. In such a situation, I must respectfully disagree with the submissions of Mr. Roy Chowdhury that the intention of the amendment as it appears is malafide or it totally extinguishes the case of the petitioner/ executor. I, however, agree with the submissions made by Mr. Roy Chowdhury that the application or amendment has been made at a belated stage. But as discussed earlier from various decisions or from plain reading of the section it comes out that the Court may allow an amendment at any stage of the procedure and even if on inconsistent or contradictory plea if no prejudice is caused to the other side. As observed earlier since the fate of the will is to be conclusively decided no question of prejudice by the amendment does not arise.

23. In view of the discussions made above I, therefore, set aside the impugned order passed by the learned trial Judge being Order No. 38 dated 6.3.02 in O.C. No. 5/1999 and allow the amendment sought for herein to be made subject to however payment of cost assessed at Rs. 1080/- to be paid by the

objector/petitioner herein to executor/opposite parties (petitioner in the probate proceeding).

24. This revisional application, is, thus, disposed of.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com