

Calcutta High Court

HON'BLE JUDGE(S): SOUMEN SEN, UDAY
KUMAR , JJ

MONORAMA ROY V. NILOTPAL ROY

FA 134 of 2007, decided on 25/04/2023

Civil P.C. (5 of 1908) , O.8 R.1, O.41 R.27— Specific Relief Act (47 of 1963) , S.34— Amendment of written statement - At appellate stage - Permissibility - Suit for declaration of title for property in question was decreed and no share was declared in favour of appellants - During pendency of appeal, appellants filed application for amendment of written statement seeking to place on record additional evidence they wished to rely upon - It was unbelievable that predecessors of appellants were unaware of existence of documents in question - By declaration of share in favour of erstwhile owner on 10.07.1957, documents sought to be relied upon lost their efficacy - Such declaration was never challenged and she continued to be owner of 1/4th share in suit property - Court cannot mechanically allow an application for additional evidence when such documents are not found to be relevant or necessary for deciding dispute between parties - Explanation for delayed disclosure of documents in question was also unacceptable and rather gave an impression that appellants wanted to delay final decree proceedings - Application for amendment of written statement, rejected - Preliminary decree of Trial Court, affirmed.

(Para 29, 30, 31, 34, 35, 36, 37, 38)

Case Referred :

AIR 2008 SC 2139 : 2008 AIR SCW 3159

AIR 2007 SC 1663 : 2007 AIR SCW 2545

AIROnline 1992 CAL 5

Chronological Paras

Para No.(24)

Para No.(24)

Para No.(24)

Name of Advocates

Saptanshu Basu, Sa, Manali Biswas, Pritam Banerjee, for Petitioner; Bhaskar Ghosh, Priyanka Jannas, for Respondent.

1. **SOUMEN SEN, J.:-**The appeal was heard along with the application for amendment of the written statement. The appeal and the said application are disposed of by this common judgment.
2. Briefly stated, the appellants are the legal heirs of one Sambhu Nath Roy. The respondents are the legal heirs and representatives of one Kamalakshya Roy, since deceased. The relationship between the parties would appear from the following genealogical table:

Genealogical Table

3. Prasanna, Jogesh and Nibaran took settlement (Bandabosto) of the suit property on 8 January, 1907 from from the Government of India. The The Pattas were disclosed and marked as Exhibit 5. Prasanna was having 8 Annas share whereas Jogesh and Nibaran both sons of Tarini have 4 annas share each.

4. On the death of Prasanna his two sons Ramchand Roy and Kalachand Roy inherited 8 annas share of their father each having 4 annas share and recorded their names in C.S.R.O.R. The

C.S.R.O.R published during 1928-1930 would show their names.

5. Jogesh also died in the mean time and his 4 Annas share was inherited by his only son Kamalakshya and he recorded his name in C.S.R.O.R. The name of Nibaran was also recorded in C.S.R.O.R.

6. During 1931 and 1940 Ramchand Roy died as bachelor and his 4 annas share devolved upon his brother Kalachand who became 8 annas owners of the suit property.

7. Nibaran Roy died by this time and his 4 annas share was inherited by his widow Jyotindra Mohini Roy. Nibaran was issueless. In or about 1941 due to non-payment of Khajna (rent) a certificate case was initiated by the government being No.73 of 1941-42 against Kalachand Roy representing 8 Annas share and Kamalakshya Roy representing 4 annas share. The said property was put to auction. The State purchased the property in the said auction sale. The sale was confirmed in favour of the State in 1941. The State subsequently on 20 April, 1942 took symbolic possession of the whole property through court including the share of Jyotindra Mohini. Kalachand died thereafter leaving his two sons Kashinath Roy and Shambhu Nath Roy. In 1952 Jyotindra Mohini Roy and Shambhu instituted a Title Suit Being T.S. No.60 of 1954 against the State of West Bengal and Kamalakshya Roy, praying inter alia, for cancellation of certificate of sale and taking over possession by the State of the property as the sale was allegedly vitiated by fraud. The State only contested the said suit. The said suit was decreed on 10 July, 1957. Only the share of Jytindra Mohini to the extent of 1/4th share of the suit property was declared not affected by the sale as she was not served with the notice of the certificate case. However, the claim of the plaintiffs No.2 and 3 being Kashinath and Shambhu Nath was dismissed. Kashinath and Sambu Nath thereafter preferred a Title Appeal being Title Appeal No.131 of 1957.

8. The appellate court by a judgment dated 7 May, 1960 dismissed the Title Appeal and thereafter no second appeal was preferred and the judgment and decree in the title suit being TS No.6 of 1954 attained finality.

9. In 1962 Jyotindra Mohini died issueless. On the basis of the aforesaid declaration that she became the owner of 4 Annas share of the property, the said share devolved upon Kamalakshya Roy the only son of Jogesh Chandra Roy as Nibaran and Jyotindra Mohini died issueless. Jogesh was the brother of Nibaran. In view thereof Kamalakshya became in the owner of 4 Annas share of the suit property while the State remained the owner of 12 Annas share in terms of the certificate sale.

10. On 3 January, 1980 Kamalakhya died leaving behind Nilotpall Roy, Jagannath and Shibani. The original plaintiffs of the present partition suit being Partition Suit No.296 of 1998 (renumbered as partition suit No.141 of 2002) claimed to have inherited 4 annas share jointly in the suit property with Kamalakhya. The suit was originally filed against the State of West Bengal only inter alia, claiming their 1/4th share in the suit property.

11. During the pendency of the suit on 23 July, 2002 Shambhu Nath Roy predecessor in interest in the present appellants was impleaded as the defendant No.2 by the learned Trial Court pursuant to an application filed on his behalf. On 29 October, 2003 on the death of Shambhu the present appellants were substituted as defendants in place of Shambhu by the Trial Court. The partition suit was decreed on contest in preliminary form on 17 November, 2006. The learned Trial Court declared plaintiffs' 4 Annas share in the suit property and 12 Annas share in favour of the Government.

12. The appellants did not get any share.

13. This has resulted in the present appeal.

14. During the pendency of the appeal the appellants filed an application for amendment of written statement and a supplementary affidavit disclosing the documents on which the appellants want to rely. In the application for amendment of the written statement the appellants prayed for insertion of paragraph 9A and 9B, after paragraph 9. The proposed amendments are:

"9A. That Prasannas Chandra Ray, Nibaran Chandra Ray and Kamalakshya Ray took loan of Rs. Five hundred from Harilal Sen son of Late Paresh Nath Sen and Brojendra Nath Sen, son of Late Sri Khanda Sen, both of Police Station-Berhampore, Berhampore Sub-registry, District- Murshidabad. by putting their landed properties which includes the suit properties in mortgage. The said Prasannas Chandra Ray and Kamalakshya Ray could not repay the said loan as such the said Harilal Sen and Brojendra Nath Sen filed a Mortgage Suit for realization of Rupees one thousand three hundred forty nine only and two annas six

pai. The said Suit was decreed in preliminary form on July 8, 1918. However, in the final decree proceeding of the said Mortgage Suit when Kamalakshyay Ray raised objection against the sale of his four annass share in the properties in the said suit, a decree of sale was passed on the said Mortgage Suit on July 12, 1920 whereby the said Harilal Sen and Brojendra Nath Sen purchased the twelve annass share of said Nibaran Chandra Roy in the properties involved in the said Mortgage Suit which includes the present Suit properties. Thus, the said Harilal Sen and Brojendra Nath Sen became the absolute owner of said twelve annass share of suit property.

9B. Thus, the said Harilal Sen and Brojendra Nath Sen in turn sold their said twelve annass share to Sailabala Chaoudhurani vide registered deed dated 21ST Magh, 1328 B.S. The said Sailabal Choudhurani while in possession and enjoyment in the said landed properties as the absolute owner thereof bequeathed the same in favour of Kalachand Ray, the predecessor-in-interest of the Defendant Nos. 2(Ka) to 2(Uma) by a registered deed of gift dated May 20, 1929. Thus, the said Kalachanda Ray became the absolute owner of twelve annass share of the suit properties."

15. The delay in filing the application for amendment of the written statement and disclosure of documents to be treated as additional evidence was explained in paragraph 8 of the supplementary affidavit. It reads:

"8. That after the death of said Shambhunath Roy, the Defendant No. 2, and during course of trial, we were in great financial crisis as such we had to take help from our relatives financially. During that time one uncle of our distant relation through our father who used to help ourselves financially, had a talk in the month of February, 2005 in connection with the partition suit in respect of our residential house between ourselves and the Respondents/Opposite Parties. The said uncle expressed his surprise contending, inter-alia, why the partition suit amongst yourselves' when the property has already been transferred by the sister of her grandfather, namely, Sailabala Choudhurani by executing a deed of gift in favour of said deceased Kalachand Roy. The said uncle also intimated us the approximate year of the execution of the said deed. The said uncle at that point of time for the first time intimated us that the sister of our grandfather, namely, Sailabala Choudhurani had transferred the suit property by a registered deed of gift in favour of said deceased Kalachnda Roy and also intimated us the approximate year of the said gift deed. We thereafter on the basis of his verbal statement contacted the concerned Department of the office of the Berhampore Registry in the month of

May, 2005, the said Department advised us to supply the particulars of the said deed as no particulars of the deed as stated by our uncle we are unable to supply the proper particulars of the said deed of gift and accordingly we are unable to lay our hand to the said deed of gift. We, accordingly time to time, contacted the said department. We ultimately, at the end of the year 2006 were intimated by the said department that similar type of deed in the name of said Sailabala Choudhurani of the year 1929 was detected. We accordingly contacted the said department and applied for certified copy of the said deed. We, however, in the month of May, 2007 collected the certified copy of the said deed dated May 20, 1929. We thereafter contacted the Learned Advocate before the Learned Trial Court and handed over the said certified copy of the deed dated May 20, 1929 who, in turn, advised us to collect the previous deed executed by Sri Harilal Sen and Brajendra Sen in favour of Sailabala Choudhurani and we ultimately obtained the certified copy of the said purchased deed in the month of May, 2008." (emphasis supplied)

16. Mr. Saptangshu Basu the learned Senior Advocate appearing on behalf of the appellants submits that it would appear from the recital of the sale deed that the Sen brothers purchased the property in a mortgage suit against Prasannas, Nibaran and Kamalakshya who apparently mortgaged their shares but could not repay the mortgage loan and accordingly the mortgage suit was filed in the year 1918 being Mortgaged Suit No.173 of 1918 and the said suit was decreed on 12 July, 1920.

17. Mr. Basu submits that Kamalakshya raised objection against sale of his 4 annas share and such objection was sustained. Accordingly, Kamalakshya continued to become the owner of 4 annas share.

18. By virtue of such sale the Sen brothers became the owner of 12 annas share, thereafter the Sen brothers sold their shares in favour of Sailobala by st a registered deed on 21 March, 1328 B.S. and thereafter Sailobala by another deed of gift dated 20 May, 1929 transferred her share in favour of Kalachand Roy.

19. Mr. Basu submits that these facts for the reasons stated above could not be brought on record and an opportunity should be given to the appellants to bring on record such materials and lead evidence to establish their rights.

20. Mr. Basu submits that in the event the appellants are able to establish the existence of the deed of sale by the Sen brothers in favour of Sailobala and the deed of gift by Sailobala in favour of her brother Kalacand then the present plaintiffs are not entitled to any declaration of share from Jyotindra Mohini. It is submitted that once the mortgage suit was decreed and the property was sold in execution of the mortgage decree Nibaran's interest in the property stands extinguished. If

Nibaran had not interest in the property then Jyotindra cannot claim any interest in the property.

21. It is submitted that both the documents are registered documents and it carries a high presumptive value. They are of more than 30 years old.

22. It is submitted that at the stage by considering application for amendment of their written statement and for additional evidence the court cannot decide on the evidentiary value of the said documents and if the court is of the opinion that such amendment is necessary and the additional evidence is required to be brought on record the matter should be left to the discretion of the trial court with regard to the relevancy and evidentiary value of the said documents on which the appellants are now seeking to rely.

23. It is submitted that the appellants have made a definite statement in the unamended written statement that Jyotindra had no interest in the suit property, although not based on the aforesaid two documents. Now that the documents are available which would show that Nibaran lost his share in the property by virtue of mortgage sale the appellants may be allowed to rely on the said two documents.

24. It is submitted that the amendment is required to be allowed as it goes to the very root of the matter and it is not a defence which is unconnected with the claim of the defendants in this written statement. The said amendment is material and relevant and are required for fair and proper adjudication of the disputes. Mr. Basu, in this regard, has relied upon the following decisions:

i) Mr. Jacob Cherian v. Himanshu Kumr Mukherjee and Anr. reported in 1993(1) CHN 21: :(AIROnline 1992 CAL 5)

ii) Usha Balashaheb Swami and Ors. v. Kiran Appaso Swami and Ors., reported in 2007(5) SCC602 : (**AIR 2007 SC 1663**):

iii) North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) By L.Rs., reported in 2008(8) SCC 511 : (**AIR 2008 SC 2139**).

25. Mr. Bhaskar Ghosh Senior Advocate appearing on behalf of the decree holder has submitted that the application for amendment of the written statement accompanied by a supplementary affidavit disclosing additional evidence are misconceived and not in accordance with provisions of Order 41 Rule 23 of the Code of Civil Procedure. It is submitted that the appellant has to establish that in spite of due diligence such evidence was not within his knowledge or could not after the exercise of due diligence the said documents could be produced. It is submitted

that the appellants have failed to comply with the pre-requisites for accepting additional evidence.

26. Mr. Ghosh relying upon the explanation offered in the application for additional evidence has submitted that it was alleged by the appellants that they came to know of the existence of the said two documents from an uncle whose name was never disclosed and if such statement is even accepted they could have taken out an appropriate application before the trial court bringing such facts on record. The suit was decreed much after such alleged date of knowledge with regard to the existence of the said two documents. Moreover, in 1941 the predecessors of the appellants along with Jyotindra Mohini filed a suit being Title Suit No.60 of 1954 against the State of West Bengal for cancellation of the certificate sale and in the said proceeding while Jyotindra Mohini succeeded in restoring her 1/4 share in the suit property the predecessors of the appellants have lost the suit and the decree was not disturbed in the appeal.

27. Mr. Ghosh submits that if there were any genuine attempt to establish their rights the appellants could have disclosed in the plaint in the mortgage suit and the decree passed therein as the deed of sale or the deed of gift by themselves cannot prove that Nibaran had lost his interest in the suit property in view of the decree passed on 10 July, 1957 declaring 1/4th share in favour of Jyotindra Mohini.

28. It is submitted that in the event this amendment is allowed at this stage, it would completely unsettle the judgments passed earlier and the shares of the parties and would cause serious prejudice to the plaintiffs/decreed holders.

29. The issue we are now required to decide is whether we should allow this application for amendment of the written statement by allowing additional evidence. There cannot be any doubt that in the event this application for amendment is not allowed with the additional evidence the judgment passed by the trial court is perfect and conclusive.

30. The material and evidence on record show that the appellants were aware of the existence of the suit filed by Kashinath, Shambhu Nath and Jyotindra Mohini against the State of West Bengal and Kamakhya if not earlier by the time when the decree passed in T.S No. 60 of 1954 was disclosed and marked as Exbt.1. The decree was passed on 10 July, 1957 declaring 1/4 share of Jyotindra Mohini which would remain unaffected by the certificate sale. The decree of the appellate court dated 7 May, 1960 dismissing the appeal filed by the State was disclosed. The appellate decree dated 7 May, 1960 was marked as Exbt. 6. On such disclosures being made the appellants were immediately put to notice.

31. It is unbelievable that the predecessors of the present appellants were

unaware of the existence of the said documents, if they were at all material, by virtue whereof Kalachand the father of Kashinath and Shambhu claimed to become the owner. Jyotindra continued to remain owner of 4 annas share and after her death the plaintiffs are now entitled to claim her share.

32. Mr. Basu has submitted that Kamalakshya had 4 annas share as he had objected to the mortgage sale. We presume that it is a certificate sale but there is nothing on record to show Kamalakshya had 4 annas share in the property as according to Mr. Bose the mortgage suit was filed against Prasanna, Nibaran and Kamalakshya in which a decree was passed on 12 July, 2020. If we assume that the share of Prasanna and Nibaran were sold then Kamalakshya had 4 annas share. He may still continue to have 4 annas share. In view of the decree passed in title suit No.60 of 1954 the present plaintiffs as legal heirs of Nibaran are entitled exclusively to the share of Jyotindra Mohini who died issueless.

33. Mr. Basu wants us to believe and accept that the suit filed by the predecessors of the appellants along with Jyotindra Mohini was a collusive suit.

34. There was no evidence on record to show that the suit filed by their predecessors with Jyotindra Mohini was collusive. In fact, by reason of declaration of share in favour of Jyotindra Mohini on 10 July, 1957 the two documents on which reliance are now intended to be placed by way of additional evidence lost its efficacy. The declaration of share in favour of Jyotindra Mohini was never challenged in any subsequent proceeding. She continued to remain the owner of 1/4th share in the suit property. The Court cannot allow mechanically an application for additional evidence when the court does not find such documents to be necessary or relevant in deciding the dispute between the parties.

35. The acts and conduct of the predecessors of the appellants are binding on the appellants and they cannot turn around and contend at this stage that the said suit of 1954 was collusive in which their predecessors lost, however, Jyotindra Mohini's right was declared. Since the appellants have filed an application for additional evidence the court would have expected them to disclose the plaint in the mortgage suit or the mortgage decree as the court cannot mechanically allow the application for additional evidence without forming at least a prima facie view that the said documents are necessary for proper adjudication of the disputes between the parties.

36. The power under Order 41 Rule 23 is discretionary and is required to be exercised judicially and with circumspection and only on satisfaction that the prerequisite conditions provided under Rule 27 are fulfilled. The applicants have themselves admitted that they came to know of the

existence of documents in February, 2005 whereas the suit was ultimately decreed on 7 November,

2006. With due diligence the appellants could have produced the said documents, if they were sure that such documents, are necessary and relevant in deciding the suit in their favour. The explanation for delayed disclosure as stated in paragraph 8 of the petition is difficult to believe and accept. The name of the uncle has been conveniently kept undisclosed. On the contrary, it gives an impression that they want to delay the final decree proceeding.

37. On such considerations we do not find any reason to interfere with the order passed of the learned Trial Court. The preliminary decree is affirmed.

38. The application for amendment of the written statement is dismissed. However, there shall be no order as to costs.

39. I agree.

UDAY KUMAR, J.

Appeal Dismissed