

Civil Revision**Present: THE HON'BLE MR JUSTICE KALIDAS MUKHERJEE**

Judgment on: 29.01.2010

C.O. NO. 3503 OF 2008**Prabir Kumar Basu****Vs.****Bipul Chandra Basu & Anr.****Point:**

AMENDMENT OF PLAINT: Amendment of plaint filed at belated stage- Amendment is formal in nature and does not change the nature and character of the suit-Whether amendment should be allowed- Civil Procedure Code,1908 O. 6, R. 17.

Fact: The petitioner filed the instant application under article 227 of the Constitution of India assailing an order passed by Ld. Civil Judge, 1st Court (Jr. Division) at Sealdah in connection with an application under order 6 rule 17 of the Code of Civil Procedure arising out of a Title Suit. The learned Court below allowed the application for amendment of the plaint holding that the proposed amendment was formal in nature and will not change the nature and character of the suit and the same was required for proper adjudication of the suit. It was urged on behalf of the petitioner/defendant that the proposed amendment of the plaint was sought for at a belated stage and unless the plaintiff succeeds in establishing that even after exercise of due diligence it could not be filed earlier, the said amendment ought not to have been allowed by the learned Court below.

Held: In the proposed amendment, the circumstances for filing the petition for amendment at a belated stage have been stated. The prayer for cancellation of the probate has been incorporated in the proposed amendment as the learned Court while refusing the prayer for temporary injunction made such observation in this regard. On perusal of the pleadings and having regard to the

submission made by the learned Counsel for the parties, this Court find that the learned Court was justified in allowing the prayer for amendment and there is no ground to interfere with the order passed by the learned Trial Court. (Paragraph – 8)

For the petitioner: Mr. Probal Mukherjee,
Mr. Soumen Das

For the O.P. No. 1: Mr. Sakya Sen
Mr. S. P. Tewary
Mr. Saha

The Court:

1. This is an application under article 227 of the Constitution of India assailing the impugned order No. 40 dated 23.07.08 passed by Learned Civil Judge, 1st Court (Jr. Division) at Sealdah in connection with an application under order 6 rule 17 of the Code of Civil Procedure arising out of Title Suit No. 84 of 2004 allowing thereby the application for amendment of the plaint.
2. The case of the plaintiff, in short, is that Smt. Nihar Bala Dasi, since deceased, was the absolute owner of the suit property. Nihar Bala Dasi during her lifetime executed and registered a deed of settlement on 04.02.1950 in respect of the suit property for the benefit of her two grandsons, namely, Bipul Chandra Bose (Plaintiff) and Mukul Chandra Bose (Pro-defendant No. 7) and in the said deed Nihar Bala Dasi appointed herself as the first trustee and her nephew Purnendra Nath Basu and Laxminarayan Paul were appointed as next trustee and it was clearly written in the said deed of settlement that it was created for the benefit of the grand sons Mukul Chandra Bose and Bipul Chandra Bose till they attain the age of 21 years and after attaining the majority, the trust shall come to an end. It was

further stipulated that the said Mukul Chandra Bose and Bipul Chandra Bose shall be the absolute owners of the property having undivided half share. Nihar Bala Dasi died on 08.09.1958 and after her death the trustee Purnendra Nath Basu took charge of the said property as per the terms of the deed of settlement. Purnendra Nath Basu knew very well that he had no right title and interest in the property after attaining majority of the two sons of the first wife, but, a will was executed and registered by him on 13.09.94 wherein after his death, the entire property was bequeathed to all his legal heirs in equal shares. The said will was probated by the Learned District Delegate at Sealdah vide Case No. 45/2002 (P) and by virtue of the said probate, the defendant 1 to 4 are claiming the ownership in the suit property. It is contended in the plaint that the said probate granted is infructuous and has got no legal force in the eye of law, in as much as, Purnendra Nath Bose had no right title and interest in the said property and he was a mere trustee.

3. The learned Court below after considering the respective contentions of the parties allowed the application for amendment of the plaint holding that the proposed amendment was formal in nature and will not change the nature and character of the suit. Learned Court further observed that the proposed amendment was required for proper adjudication of the suit.
4. The learned Counsel appearing for the petitioner/defendant submits that the proposed amendment of the plaint was sought for at a belated stage and unless the plaintiff succeeds in establishing that even after exercise of due diligence it could not be filed earlier, the said amendment ought not to have been allowed by the learned Court below. It is further contended that the suit was filed in 2004 and issues have been framed in the suit by the

learned Court below, and the amendment petition was filed on 07.12.2007 after obtaining the copy of the deed of settlement on 29.3.2004.

5. The learned Counsel for the petitioner further submits that in view of the provision of Section 263 of the Indian Succession Act the prayer for cancellation of the deed of settlement cannot be allowed by the learned Court below as it is beyond the competence of the learned Trial Court. The learned Counsel for the petitioner contends that the proposed amendment would change the nature and character of the suit and would introduce the new case which is not permissible under the law. The learned Counsel further contends that the impugned order should be set aside.
6. The learned Counsel appearing for the O.P. No. 1/plaintiff submits that in para 2 of the plaint it has been averred that the testator had no interest in the property as he was a mere trustee. The learned Counsel further contends that the prayer for cancellation was made in the proposed amendment, in as much as, the learned Court observed while refusing the prayer for temporary injunction that there was no prayer for cancellation of the probate. The learned Counsel contends that the prayer for cancellation would not come within the purview of the grounds as mentioned in Section 263 of the Indian Succession Act and, as such, the separate suit was filed for cancellation of the probate, contending, inter alia, that the testator had no right, title and interest in the property. The learned Counsel further contends that the probate Court cannot go into the question of title and, as such, a separate suit was instituted. The learned Counsel contends that the amendment sought for does not introduce any new case as it is consistent with the averments made in the plaint.
7. It is true that the probate Court has no jurisdiction to go into the question of title and the question whether the learned Trial Court is competent or not in granting the prayer for

cancellation of probate, is left to be decided by the learned Trial Court at the time of final hearing of the suit.

8. From the averments made in the plaint it is clear that the plaintiff has contended therein that the property belonged to Nihar Bala Dasi and she executed and registered a deed of settlement wherein Purnendra Narayan Basu was appointed as trustee. In the proposed amendment, the circumstances for filing the petition for amendment at a belated stage have been stated. The prayer for cancellation of the probate has been incorporated in the proposed amendment as the learned Court while refusing the prayer for temporary injunction made such observation in this regard. On perusal of the pleadings and having regard to the submission made by the learned Counsel for the parties, I find that the learned Court was justified in allowing the prayer for amendment and there is no ground to interfere with the order passed by the learned Trial Court. In the result, the application fails.
9. The application under Article 227 of the Constitution of India is dismissed. There will be no order as to costs. Interim order granted on 15.01.2010 staying the operation of the impugned order till the disposal of the revisional application is vacated.
10. Let a copy of this order be sent to the learned Court below immediately.
11. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(**Kalidas Mukherjee, J.**)