IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side

Present:-
The Hon'ble Justice Biswaroop Chowdhury

C.O. 3072 of 2018
With
CAN 1 of 2023

Debobrata Mondal & Ors.

Vs.

Pijush Banerjee and Ors.

For the petitioners	:	Mr. Supratim Laha Mr. Sumanta Biswas Mr. Bikash Shaw
For the opposite party	:	Mr. Amal Kumar Mukherjee Ms. Tithi Majumdar Ms. Anindita Banejee Mr. Sankrito Roy Mr. Washim Akhtar Dafadar Mr. Palash Kanti Chakraborty
Last Heard on	:	08.09.2023
Delivered on	:	06.10.2023

Biswaroop Chowdhury, J:

The petitioners before this Court are defendants in a suit for declaration of title permanent injunction and cancellation of sale deed and are aggrieved by the Order dated 31.07.2018 passed by

Learned 2nd Civil Judge Senior Division at Baruipur, South 24 Parganas being Title Suit No. 124 of 2017.

The case of the petitioners/defendants may be summed up thus: The plaintiffs/opposite parties filed a suit for declaration of title, permanent injunction and cancellation of sale deed against the defendants/petitioners before the Learned 2nd Civil Judge Senior Division at Baruipur, South 24 Parganas being Title Suit No.124 of 2017 praying *inter alia* for the following reliefs:-

a) On declaration of the plaintiffs' absolute right, title interest in respect of the suit property decree for permanent injunction restraining the defendants from disturbing with the plaintiff's peaceful possession in respect of the same in any manner whatsoever.
b) Decree for cancellation of the sale deed dated 28.03.2012 being Deed No. 2492 of 2012.
c) Cost.
d) Such other relief/reliefs to which the plaintiffs are entitled.

The petitioners/Defendants filed written statement to the plant. The plaintiff in connection with the suit filed an application under Order XXXIX Rule 1 and 2 read with Section 151 of the Code of Civil Procedure praying for an Order of Temporary injunction

restraining the defendants from dispossessing the plaintiffs from the suit property and from changing nature and character of the suit property and also restraining the defendants from disturbing the plaintiff's possession of the suit property till disposal of the suit. The petitioners duly filed their written objection against the application under Order XXXIX, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. By an Order dated 2nd December, 2014, the Learned Court below was *inter alia*, pleased to direct the parties to the suit to maintain *status quo* of the suit property with respect of the nature, character and possession of the suit property till 16.01.2015. Subsequently, the said ad-interim Order of *status quo* was extended from time to time and ultimately on 6th January, 2016 the Learned Court below was *inter alia*, pleased to direct the parties of the suit to maintain *status quo* in respect of nature and character and possession of suit property till disposal of the suit. The defendants/petitioners were busy in contesting the injunction application and they could not file their written statement in time hence on 29.04.2015, the Learned Court below was pleased to pass an Order to the effect that the suit will proceed ex-parte against the defendants. Subsequently, on 25.05.2016, the defendants/petitioners filed an application praying for vacating the Order for ex-parte proceedings of the suit and the same was allowed with costs. On 21.08.2015 the petitioners/

defendants filed written statement in the suit denying the material allegations made in the plaint. The petitioners/defendants thereafter made application for amendment of the written statement before the Learned Court below to which the plaintiffs/opposite parties filed objection against such proposed amendment to the written statement filed by the defendants/petitioners.

By Order dated 31.07.2018 passed by Learned 2nd Civil Judge Senior Division at Baruipur, South 24 Parganas in Title Suit No. 124 of 2017 the application for amendment filed by petitioners/defendants was rejected.

The petitioners being aggrieved by the Order of Learned Trial Judge in rejecting the prayer for amendment of written statement has came up with the instant application under Article 227 of the Constitution of India. It is the contention of the petitioners that the Learned Court below has erred on facts and/or in law by holding that the plaintiffs' case has been admitted by the defendants in paragraph 8 of the written statement. It is further contended by the petitioner that the Learned Court below has erred in holding that by way of amendment, the petitioners are trying to deny their admission which has already been admitted in written statement. It is also contended that the Learned Court below has failed to

appreciate that in their written statement all along the defendants have denied and disputed all the claims made by the plaintiffs and there was no admission on the part of the defendants/petitioners.

Heard Learned Advocate for the petitioner and learned Advocate for the opposite parties perused the petition filed and materials on record. Learned Advocate for the petitioners submits that the learned Judge failed to appreciate that nowhere in the written statement the defendant/petitioner admitted the claim of the plaintiff. Learned Advocate further submits that the written statement if read as a whole will not go to reflect that the defendant has admitted that claim of the plaintiff. Learned Advocate for the petitioner relies upon the following decision of the Hon'ble Supreme Court.

Baldev Singh & Other.
Vs.
Monahar Singh & Anr.
Reported in (2006) 6 SCC 498

Learned Advocate for the opposite parties/plaintiffs submits that the defendants/petitioners by amendment have tried to introduce a new case. Learned Advocate further submits that conduct of the parties should be considered in this case. Learned Advocate also submits that the Learned Trial Court was justified in rejecting the prayer for amendment.

Before considering the merits of the case and validity of the order passed by Learned Court below first and foremost it is necessary to consider the relevant provisions about amendment as provided in Order VI Rule 17 of the Code of Civil Procedure.

Order VI Rule 17 of the Code of Civil Procedure provides as follows:-

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

Provided that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial."

In the instant case it is an admitted position that trial did not commence when the prayer for amendment was made. However as a plea is raised by the opposite party that by such amendment the petitioners/defendants have been trying to deny their admission which is already made in para-8 of the written statement, it is necessary to consider para-8 as well as the amendment proposed to be made and some judicial decisions.

Para-8 of the written statement provides as follows:-

"*8.* With regard to the statements made in paragraphs 3 of the plaint your petitioner states that the statements made therein are not correct except by the sale deed dated 02.03.1959 said Pacha Halder and Anukul Kayal transferred the suit property in favour of Anita Devi who was the benamdar of Suprova Banerjee. Your petitioner states that at the time of purchase of the suit property, the defendant collected some information along with documents from Anita Devi and the legal heirs i.e. Vendor herein. It will appear from the certified copy of Judgment that Smt. Suprova Banerjee i.e. the mother of the plaintiff Nos. 1 to 5 previously had filed a suit against the said Madan Chandra Halder and Ratan Chandra Halder both are the legal heirs of the original owner Pacha Halder seeking relief for declaration of Title and permanent injunction and other reliefs. That the suit being Title Suit No.352 of 1992 dismissed on contest on 30.11.1993 before the 2nd Munsiff at Baruipur and thereafter Smt. Suprova Banerjee i.e. mother of the plaintiff Nos. 1 to 5 also preferred appeal being aggrieved by and dissatisfied with the Judgment and decree passed on 30.11.1993 before the Hon'ble High Court at Calcutta being S.A. No.107 of 1999 and the said appeal also dismissed. Hon'ble High Court hold the learned Lower Court had decided correctly that the suit is not maintainable and the suit is hit by Section 4 (1)

of Benami Transaction (Prohibition of right to recover property) Act, 1988. So it is clear that the Suprova Banerjee i.e. the mother of the plaintiff Nos. 1 to 5 was not an absolute owner of the suit property and the plaintiffs have no right title interest over the suit property to file the instant suit."

The proposed amendment sought to be made by the petitioners/defendants are as follows:-

Proposed Amendment in the Written Statement

"1. Paragraph No. 8 of the written statement of the defendant nos. 1, 2 and 3 shall be fully deleted and the same shall be replaced with the following paragraph and sub-paragraphs, which as a whole shall constitute Paragraph 8:-"

"With reference to the statements contained in paragraph 3 of the plaint, the defendants categorically deny and dispute each and every allegation made therein, save and except the fact that by a registered Deed of Conveyance dated 2nd March, 1959, the suit property was transferred by one Pacha Halder (since deceased) in favour of one Smt. Anita Devi (since deceased). It is denied and disputed that Anita Devi (since deceased) was the benamdar of Smt. Suprova Banerjee (since deceased), as alleged or at all. It is denied and disputed that the consideration money for the said sale deed was paid by Smt. Suprova Banerjee (since deceased), as

alleged or at all. It is denied and disputed that Smt. Suprova Banerjee (since deceased) took the delivery of possession of the suit property from the vendor of the said deed, as alleged or at all. It is denied and disputed that Smt. Anita Devi (since deceased) was the benamdar of the said suit property and Smt. Suprova Banerjee (since deceased) was the real owner, as alleged or at all. It is denied and disputed that since such purchase Smt. Suprova Banerjee (since deceased) was in exclusive possession of the suit property doing various acts of possession including payment of rent and doing the agricultural job, as alleged or at all. It is denied and disputed that subsequently, by registered release deed dated 10th February, 1976, executed by Smt. Anita Devi (since deceased) in favour of Smt. Suprova Banerjee (since deceased), Smt. Anita Devi (since deceased) admitted that Smt. Anita Devi (since deceased) was the benamdar of the suit property or the consideration money for the suit property was paid by Smt. Suprova Banerjee (since deceased) as alleged or at all. It is denied and disputed that Smt. Anita Devi (since deceased) admitted that Smt. Suprova Banerjee (since deceased) has been all along in possession of the suit property or Smt. Anita Devi (since deceased) was never in possession of the suit property, as alleged or at all. It is denied and disputed that Smt. Anita Devi (since deceased) admitted that Smt. Suprova Banerjee (since deceased) was the

absolute owner of the suit property, as alleged or at all. In this regard the following facts are submitted by the defendants, which are very much germane for proper adjudication of the instant suit:-

a) The present suit is undervalued as the plaintiffs have declared the suit value at Rs. 31,000/- only, whereas the Consideration value of the registered sale deed, made in favour of the defendants is Rs. 20,00,000/- only. Since, the plaintiffs have prayed for cancellation of the said deed, therefore the plaintiffs ought to have valued the suit at Rs. 20,00,000/- only and accordingly should have paid Court fees and has erred in not doing so.

b) That the plaintiffs are guilty of suppression of material facts and therefore they are not entitled to get any relief from this learned court.

c) The instant suit is also barred by the Principle of "*res judicata*" as all the above claims of the plaintiffs have already been decided on earlier occasion by Learned 2nd Court of Civil Judge (Junior Division), Baruipur in an earlier proceeding.

d) On earlier occasion, Smt. Suprova Banerjee (since deceased) filed a suit bearing Title Suit No. 352 of 1992 before the Learned 2nd Court of Civil Judge (Junior Division), Baruipur against one Sri Madan Chandra Halder and Sri Ratan Chandra Halder, both legal heirs of Sri Pacha Halder (since deceased), thereby praying for declaration of Title over the suit property and also for permanent injunction and other related reliefs.

e) That after considering necessary pleadings and documents submitted by the contesting parties and after evaluation the evidences adduced and arguments put forward by the contesting parties, Learned 2nd Court of Civil Judge (Junior Division), Baruipur was, *inter alia*, pleased to dismiss the suit by the Judgment and order dated 30.11.1993, thereby negating the claims made by the said Smt. Suprova Banerjee (since deceased).

f) Being aggrieved by the said Judgment and order dated 30.11.1993, passed by the Learned 2nd Court of Civil Judge (Junior Division), Baruipur, Smt. Suprova Banerjee (since deceased) filed First Appeal before The Learned Assistant District Judge, Baruipur, being Title Appeal No.122 of 1993.

g) However, The Learned Assistant District Judge, Baruipur, by his Judgment and Decree dated 01.10.1994, was *inter alia*, pleased to dismiss such appeal preferred by Smt. Suprova Banerjee (since deceased).

h) Therefore, Smt. Suprova Banerjee (since deceased) has preferred a Second Appeal before The Hon'ble High Court at Calcutta, being S.A.No. 107 of 1999, which is still pending for final adjudication.

i) That both Learned 2nd Court of Civil Judge (Junior Division), Baruipur, being the Trial Court as well as The Learned Assistant District Judge, Baruipur, being the First Appellate Court, has unanimously held and decided that the suit is not maintainable and the suit is hit by section 4(1) of Benami Transaction (Prohibition of right to recover property) Act, 1988. So it is clear that Suprova Banerjee i.e. the mother of the plaintiff nos. 1 to 5 was not an absolute owner of the suit property and the plaintiffs have no right, title interest over the suit property to file the instant suit.

j) The plaintiff's suit is not maintainable as per the prohibition of Benami property Transaction Act, 1988. The plaintiff's suit is not maintainable under the said Act. The Civil court has no jurisdiction to entertain this instant suit as the suit is not maintainable. The plaintiff No. 1 to 5 are claiming their title through alleged real owner Suprova Banerjee and defendant No. 5 to 9 claiming through Gita Rani Das. The plaintiff No. 1 to 9 have not acquired any right from the said Suprova Banerjee. The alleged Nadabi Deed neither created any right in favour of Suprova Banerjee non it extinguished any right to Anita Devi because the statute requires a Deed for conveying a title. The said Suprova Banerjee was not in possession of the suit property Anita Devi was in possession of the said land since her purchase as a purchaser. That Anita Devi has enforceable title in the said deed by virtue of her purchase. The said deed of relinquish does not create any title in favour of predecessor of the plaintiff. The plaintiffs case of purchase by Suprova Banerjee in the Benami of Anita Devi has got no legs to stand. No suit can be enforceable by claiming a Benami prior to amendment of Benami Transaction Prohibition Act, 1988 on 01.11.2016 and after

that the claim also is not maintainable. Previously the said suit also failed due to prohibition by the Act."

Now upon perusal of sub-paragraph a, b, c, d, e, f, g, h, i and j of paragraph 1 of the amendment petition it will appear that those paragraphs give details necessary for adjudication of the case. But upon considering original para-8 of written statement along with proposed amendment of para-8 there will appear inconsistency to some extent.

In original para-8, first five lines are as follows:-

"With regard to the statements made in paragraph 3 of the plaint, your petitioner states that the statements made therein are not correct except by the sale deed dated 02.03.1959 said Pacha Halder and Ankul Kayal transferred the suit property in favour of Anita Devi who was the benamdar of Suprova Banerjee."

The first five lines of the proposed written statement paragraph-8 are as follows:-

"With reference to the statements contained in paragraph 3 of the plaint, the defendants categorically deny and dispute each and every allegation made therein, save and except the fact that by a registered Deed of conveyance dated 2nd March, 1959, the suit

property was transferred by one Pacha Halder (since deceased) in favour of one Smt. Anita Devi (since deceased)."

Thus in the first five lines of proposed Amendment of paragraph 5 of written statement sale by Pacha Halder to Smt. Anita Devi is admitted and the earlier statement 'who was benamder of Smt. Suprova Banerjee' is sought to be deleted. In a separate sentence the defendants/petitioners have sought to deny that Anita Devi (since deceased) was the benamder of Smt. Suprova Banerjee (since deceased).

Now the point for consideration is whether petitioners/defendants should be permitted to withdraw the statement made in paragraph 8 of the original written statement contending that Smt. Anita Devi was benamder of Suprova Banerjee and further deny the same by amendment.

In order to decide the prayer of the defendants/ petitioners to delete some statements which according to the plaintiff is admission it is necessary to consider some judicial decisions. In the case of Baldev Singh and others vs. Manohar Singh and another reported in (2006) 6 SCC P-498, the Hon'ble Supreme Court observed as follows:

"14. As noted herein earlier, the case set up by the plaintiff-respondent 1 was that his parents had no money to purchase the suit

property and it was the plaintiff-respondent 1 who paid the consideration money. In the written statement, this fact was denied and further it was asserted in the written statement that the suit property was in fact purchased by their parents and they had sufficient income of their own. In the application for amendment of written statement it was stated that the plaintiff-respondent 1 did not have any income to pay the consideration money of the suit property and in fact the parents of the plaintiff-respondent 1 had sufficient income to pay the sale price. It was only pointed out in the application for amendment that after the death of their parents, the suit property was mutated in the joint names of the plaintiff-respondent 1 and the defendants in equal shares. Therefore, the question whether certain admissions made in the written statement were sought to be withdrawn is concerned, we find, as noted herein earlier, there was no admission in the written statement from which it could be said that by filing an application for amendment of the written statement, the appellants had sought to withdraw such admission. It is true that in the original written statement, a statement has been made that it is the defendant-appellant 1 who is the owner and is in continuous possession of the suit property, but in our view, the powers of the Court are wide enough to permit amendment of the written statement by incorporating an alternative plea of ownership in the application for amendment of the written statement. That apart, in our view, the facts stated in the application for amendment were in fact an elaboration of the defence case. Accordingly, we are of the view that the High Court as well as the Trial Court had erred in rejecting the application for amendment of the

written statement on the ground that in the event such amendment was allowed, it would take away some admissions made by the defendants-appellants in their written statement. That apart, in Estralla Rubber vs. Dass Estate (P) Ltd. this Court held that even if there were some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff-respondent 1 so as to take away any accrued right.

15. Let us now take up the last ground on which the application for amendment of the written statement was rejected by the High Court as well as the Trial Court. The rejection was made on the ground that inconsistent plea cannot be allowed to be taken. We are unable to appreciate the ground of rejection made by the High Court as well as the Trial Court. After going through the pleadings and also the statements made in the application for amendment of the written statement, we fail to understand how inconsistent plea could be said to have been taken by the appellants in their application for amendment of the written statement, excepting the plea taken by the appellants in the application for amendment of written statement regarding the joint

ownership of the suit property. Accordingly, on facts, we are not satisfied that the application for amendment of the written statement could be rejected also on this ground. That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of 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. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

16. This being the position, we are therefore of the view that inconsistent pleas can be raised by defendants in the written statement although the same may not be permissible in the case of plaint. In Modi Spg. and Wvg. Mills Co.Ltd. V. Ladha Ram & Co. this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be

made in the written statement. Accordingly, the High Court and the Trial Court had gone wrong in holding that defendant-appellants are not allowed to take inconsistent pleas in their defence."

In the case of Mathia vs. Premlal reported in 1992 22 ..... civil cases 424 (HP), the Hon'ble Himachal Pradesh High Court observed that introduction of a totally different case by an amendment is not permissible. When the defendant by a joint written statement admits a particular defendant to be a tenant by way of amendment, they cannot deny tenancy in favour of that particular defendant. When the proposed amendment has the effect of withdrawal of an admission in the original pleading the amendment is barred.

In the case of Ma Shwe Mya vs. Maung Mo Hnaung reported in AIR 1922 P.C. 249 it was observed by Privy Council as follows:

"All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be

substituted for another, nor to change, by means of amendment the subject matter of the suit."

In the case of Estralla Rubber vs. Dass Estate (P) Ltd. reported in 3(2001) 8 SCC P. 97 the Hon'ble Supreme court observed as follows:

"8. It is fairly settled in law that the amendment of pleadings under Order 6, Rule 17 is to be allowed if such an amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings, subject to certain conditions such as allowing amendment should not result in injustice to the other side; normally a clear admission made conferring certain right on a plaintiff is not allowed to be withdrawn by way of amendment by a defendant resulting in prejudice to such a right of plaintiff, depending on facts and circumstances of a given case. In certain situations a time barred claim cannot be allowed to be raised by proposing an amendment to take away the valuable accrued right of a party. However, mere delay in making an amendment application itself is not enough to refuse amendment, as the delay can be compensated in terms of money. Amendment is to be allowed when it does not cause serious prejudice to the opposite side.

In the case of A.K. Gupta and Sons Ltd. Vs. Damodar Valley Corporation reported in AIR 1967 SC 96 the Hon'ble Supreme Court observed as follows:

"The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred. Weldon v. Neal "But it is also well recognized that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: See Charan Das v. Amir Khan and L.J. Leach and Co. Ltd. V. Jardine Skinner and Co.

This Court in the same judgment further observed that the principles applicable to the amendment of the plaint are equally applicable to the amendment of the written statement and that the courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event. It is further stated that the defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should

not be subjected to serious injustice and that any admission made in favour of the plaintiff conferring right on him is not withdrawn."

Upon perusal of Para 3 of the plaint and para 8 of the written statement it will appear that the defendants in their written statement denied the allegations made in para 3 of the plaint other than the words 'except by the sale deed dated 02.03.1959 said Pacha Holder and Anukul Koyal transferred the suit property in favour of Anita Devi who was the benamder of Suprova Banerjee' and at the same time the said defendant stated at the end of Para 8 that it is clear that Suprova Banerjee i.e. the mother of the plaintiff Nos. 1 to 5 was not an absolute owner of the suit property and the plaintiffs have no right, title, interest over the suit property to file the instant suit. Thus from the reading of the statement made in paragraph 8 of the written statement filed it will appear that the defendants did not specifically admit that Anita Devi was benamder of Suprava Banerjee as the defendants have denied the ownership of Suprova Banerjee and the plaintiffs. Thus, the entire dispute on the point of law which is required to be decided now is whether the defendant should be permitted to remove the words 'who was a benamder of Suprova Banerjee' from the sentence 'with reference to the statements contained in paragraph 3 of the plaint the defendants categorically denied and disputed each and every allegation made therein, save and except the fact that by a

registered Deed of Conveyance dated 2nd March, 1959 the suit property was transferred by one Pacha Halder (since deceased) in favour of one Smt. Anita Devi (since deceased), who was benamder of Smt. Suprova Banerjee', and further permitted to deny Anita Devi as Benamder. In the application for amendment of written statement the defendants have contended that at the time of drafting and filing of written statement the defendant Nos. 1, 2 and 3 could not supply some important documents to their Ld. Advocate and they could not give proper instruction to their Ld. Advocate in respect of certain facts which are very much relevant for the proper adjudication of the matter in dispute and also could not detect those mistake or omission on earlier occasion. It is further contended by the defendant No. 1, 2 and 3 that only on 30.08.2017 at the time of consultation with their Ld. Advocate they detected those mistakes which was not detected prior to that. It is also contended that the said defect could not be determined on earlier occasion in spite of diligent efforts made by the defendant Nos. 1, 2 and 3.

Although it is held in different judicial pronouncements that admission once made cannot be permitted to be withdrawn but that does not mean that admission once made cannot be permitted to be withdrawn at all under any circumstance. It is the power and duty of the Court to ascertain as to whether the admission is made

spontaneously or by inadvertence secondly whether there was due diligence on the part of the party in detecting the error regarding admission and making bona- fide application for amendment, thirdly whether the opposite party against whom amendment is sought will suffer irreparable loss and injury without a just and reasonable cause. As admission is not conclusive proof and Court has discretion to require any fact so admitted to be proved otherwise than by such admission a prayer for withdrawal of admission made due to inadvertence and the party seeking amendment is not acting *mala-fide*, the Court may exercise discretion to allow such amendment.

Order 8. Rule 5(1) provides that every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under a disability, provided that the Court may in its discretion require any such fact to be proved otherwise than by such admission.

Sub Rule-2 provides where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability but the Court, may in its discretion require any such fact to be proved.

Thus upon plain reading of the provision contained in sub-Rule 1 and 2 of Rule 5 of Order-8 of the Code of Civil Procedure which confers upon Court discretionary power to require an admitted fact to be proved gives a ground to infer that Courts have power to permit amendment which has effect of withdrawing admission provided that such admission is made due to inadvertence and not spontaneous or by necessary implication. While considering such prayer the Courts should see that the party seeking amendment has acted with due diligence and is not acting *mala-fide* to delay the proceedings. In the instant matter the main dispute lies as to whether the defendants/ petitioners should be permitted to withdraw the pleadings that Anita Devi was benamdar of Suprova Banerjee. In order to decide this dispute first of all it is necessary to peruse the allegation contained in paragraph 3 of the plaint, the plaintiff has alleged that Anita Devi was the benamdar of Suprova Banerjee and thus there is no allegation of benamder against any of the defendants. When defendant No. 1, 2 and 3 purchased suit property the defendants contended that they obtained some information along with documents from Anita Devi and the legal heirs i.e. vendor herein. Thus when the suit property is not transferred directly to the defendants Nos. 1, 2 and 3 by Pacha Halder but to Anita Devi who is alleged by the plaintiffs to be benamder of Suprova Banerjee and the defendants obtained the

suit property by purchase from Anita Devi it cannot be claimed that the statement Anita Devi being benamder was true to knowledge of the defendants when in the affidavit of written statement the said defendants did not specifically verify the statements made in paragraph 8 as true to knowledge rather the verification is general in nature stating entire written statement true to knowledge and belief. Thus if at all the defendants/ petitioners have contended that Anita Devi was the benamder of Suprova Banerjee it may be on the basis of information. A party to the proceedings have duty to speak the truth before Court of Law. Thus, whatever a party has within his knowledge about the facts of the case he has duty to disclose that. However, with regard to some information collected which is not supported by documents a party has the right to withdraw statement based on information which subsequent to the filing of the pleadings he does not believe to be true. Thus, when the pleadings is made by inadvertence the party by whom such pleadings is made may seek leave to withdraw the same. It is the basic right of a person to defend an action brought against him in a Court of Law or before any authority. Thus all persons should be given reasonable opportunity to defend their case. Hence, if a mistake in pleadings is committed due to inadvertence opportunity should be given to rectify the same. Whether an admission is made spontaneously or due to

inadvertence has to be decided firstly from the nature of pleadings made by the party upon taking the entire pleadings, secondly the grounds taken in the application for amendment and thirdly whether such admission is verified as true to knowledge or true to information and belief.

In the instant matter upon considering the nature of pleadings made by the defendants/ petitioners in the written statement the nature of dispute between the parties, and the application for amendment this Court is of the view that the pleadings 'who was benamder' is made due to inadvertence and the defendants/ petitioners should be permitted to amend the pleadings in the interest of justice as such amendment will not cause serious prejudice to the plaintiffs. However, with regard to other contentions mentioned in the schedule of proposed amendment those should also be allowed, as those are necessary to determine the real question in controversy between the parties.

In the facts and circumstances this Revisional Application stands allowed. Order dated 31.07.2018 passed by Learned 2nd Civil Judge (Senior Division) at Baruipur, South 24 Parganas being Title Suit No. 124 of 2017 is set aside. Petitioners/ defendants No. 1, 2 and 3 are permitted to carry out the proposed amendment within 2 weeks after puja vacation subject to payment of costs of

Rs. 3,000/- (Rupees three thousand) to the plaintiffs. It is however, made clear that this Court has not gone into the merits of the case and all points are left open before Trial Court.

This application stands disposed.

As the suit is pending for about six years Learned Trial Judge is requested to dispose the suit expeditiously.

[**Biswaroop Chowdhury, J**]