

IN THE HIGH COURT AT CALCUTTA  
CIVIL REVISIONAL JURISDICTION  
APPELLATE SIDE

Present:  
Hon'ble Justice Shampa Sarkar

**C.O. 2858 of 2022**

***Smt. Basanti Das and ors.***  
***Vs.***  
***Sri Susanta Kumar Das***

For the petitioners : Mr. Subhrendu Halder,  
Mr. Abhirup Halder.  
For the opposite party : Mr. Surya Prasad Chattopadhyay,  
Mr. Arjun Samanta,  
Mr. Ankit Chatterjee.

Hearing concluded on: 20.07.2023  
Judgment on: 17.10.2023

**Shampa Sarkar, J.:-**

- 1.** This revisional application arises out of an order dated June 9, 2022 passed by the learned Civil Judge (Junior Division), 4<sup>th</sup> Court at Alipore in Title Suit No.05 of 2015.
- 2.** By the order impugned, an application filed by the plaintiff under Order 6 Rule 17 of the Code of Civil Procedure was allowed, upon payment of cost of Rs.1000/-.
- 3.** The opposite party as plaintiff filed a suit for declaration, recovery of possession and permanent injunction against the petitioner. The plaintiff prayed for declaration of title in respect of schedule-A property, recovery of khas possession of the schedule-B property upon demolition of the wall

standing thereon, as also for permanent injunction restraining the defendants and their men and agents from making any further construction of the suit property or from disturbing the peaceful possession of the plaintiff in respect of schedule-A property.

**4.** The plaint case was that one Hamchandra Das was the absolute owner in respect of 1 bigha 2 cottahs 10 chittaks of land along with building and common passage standing thereon, situated at Mouza- Dihi Panchan Gramh, previously known as Chakraberia, thereafter Bakulbagan and ultimately numbered as premises No.3, Bakul Bagan Raod, Police Station – Bhawanipore in the records of Kolkata Municipal Corporation.

**5.** Hamchandra Das died intestate leaving behind three sons, namely, Probodh Chandra Das, Surendra Nath Das and Narendranath Das. Upon death of Hamchandra, his three sons became joint owners in respect of the property having undivided  $1/3^{\text{rd}}$  share. Probodh died intestate leaving behind his widow and his only son Sisir Kumar Das. Probodh's widow died thereafter, leaving behind Sisir Kumar Das as the only legal heir. Surendra nath Das died intestate leaving behind his four sons. Sisir, the four sons of Surendra and Narendranath, became owners of the joint property. Surendra's sons, namely, Tarit Kumar Das and others filed a suit for partition against Sisir Kumar Das and Narendranath before the Court of learned First Sub-Judge at Alipore being Title Suit No.51 of 1938. The suit was decreed finally on July 30, 1938 on the basis of a compromise. As per the final decree, Sisir got Lot C and C1 which was mentioned as 'Kha' schedule in the compromise petition measuring about 2 cottahs 14 chittaks of land.

**6.** Sisir Kumar Das got his name mutated in the records of the Kolkata Municipal Corporation and raised a structure from his own funds. The allocated portion as per the decree was situated on the northern portion of 3 Bakul Bagan Road, subsequently renumbered as 1/1B, Mullick Lane, Kolkata. Premises no.1/1B, Mullick Lane measuring about 2 cottahs, 14 chittaks with the pucca structure and all easement and common rights was transferred to the plaintiff, by a deed of gift dated August 30, 1967 by Sisir. Such portion of the plaintiff was indicated as schedule-A of the plaint. Thereafter, by virtue of a deed of settlement dated October, 18, 1982, Sisir Kumar Das made an arrangement in favour of Prasanta Kumar Das in respect of south-eastern portion of 3 Bakul Bagan Road, subsequently known as 3B Bakul Bagan Road. 3B Bakul Bagan Road measured about 2 cottahs, 13 chittaks and consisted of old building and structure standing thereon, with common easementary right attached thereto. Land measuring about 2 cottahs, 14 chittaks more or less together with old building thereon bearing K.M.C. premises no.3C Bakul Bagan Road was also given to Prasanta on the basis of such settlement.

**7.** The said deed of settlement was registered. Prasanta died intestate. The defendants, as legal heirs and successors of Prasanta, enjoyed the said property left behind by Prasanta. That the plaintiffs and the predecessor of the defendants were peacefully enjoying and occupying their respective portions without any obstruction and hindrance, keeping the strip of land between 3C Bakul Bagan Road and 1/1B Mullick Road, free for common use. The old sewerage connection ran underneath the said strip of land. The defendants wrongfully encroached upon the strip of land and tried to

encroach into the plaintiff's property by erection of a wall and by raising further construction. Plaintiff wrote a letter through her advocate, inter alia, asking the defendant no.1/the petitioner no.1 to refrain from exercising any claim over the strip of land which belonged to the plaintiff. An advocate commissioner was also appointed by the plaintiff to measure the premises. Upon inspection and measurement of the plaintiff's premises the commissioner gave a report along with a sketch map, showing the measurements of the plaintiff's property. The plaintiff's property was found to measure about 2 cottahs, 12 chittaks, 13 sq. ft. indicating that 1 chittak 32 sq. ft. of the plaintiff's land had been encroached wrongfully by the defendants. The land which had been allegedly encroached, was described as Schedule B in the plaint. Plaintiff contended that the defendants neither had any right to encroach the plaintiff's land described as Schedule B nor did they have any right, title and interest over the Schedule B property. They could not erect a boundary wall. The defendants were constantly threatening the plaintiff and they were trying to make further construction over the encroached area. The cause of action arose on March, 04, 2014 and continued up to November, 19, 2014 at premises no.1/1B Mullick Lane, Police Station Bhawanipore. Thus, finding no other alternative the suit was filed with reliefs as discussed herein above.

**8.** The defendants/petitioners filed a written statement denying the allegation of encroachment. According to the defendants, the vacant strip of land was to the north of the building appertaining to 3B Bakul Bagan Road. By a registered deed of gift dated August, 30, 1967, premises no.1/1B Mullick Lane was gifted to Sushanta, younger son of Sisir. The vacant strip

of land was not between 1/1B Mullick Lane and 3B Bakul Bagan Raod. The strip of land was a part and parcel of premises no.3B Bakul Bagan Road. The structure standing on the premises no.3B Bakul Bagan Road was attached to the building standing on the premises no.3C Bakul Bagan Road. The access between the 3B and 3C Bakul Bagan Road was through the vacant strip of land. Premises no.3C Bakul Bagan Road was accessible through a common passage situated on the western side of the premises no.3A Bakul Bagan Road. On the western side of the defendants' building, appertaining to premises no.3B Bakul Bagan Road, there was an iron gate which was fixed long ago and which had been locked by the defendants. The said gate was used by the defendants to clear out the garbage and wastes. The plaintiff did not have any right to enter Bakul Bagan Road through the southern portion, leading to the northern side of the land of the defendants. Plaintiff had his own passage on the eastern side of his two storeyed building along with a tin shed structure. The tin shed structure had been illegally constructed by the plaintiff. The Kolkata Municipal Corporation had issued an order of demolition. By the registered deed of settlement dated October 21, 1982, Sisir Kumar Das exclusively settled 2 cottahs, 13 chittaks, 10 sq. ft. of land in favour of Prasanta Kr. Das, being premises no.3B Bakul Bagan Road with structure thereon and along with a piece of land measuring 2 cottahs, 14 chittaks appertaining to premises no.3C Bakul Bagan Road with an old and dilapidated structure. Prasanta died intestate on December 14, 2004 leaving behind 3B and 3C Bakul Bagan Road to the defendants.

**9.** The contention of the plaintiff that the strip of land between premises no. 3C Bakul Bagan Road and 1/1B Mullick Lane was kept aside for common use of the plaintiff and predecessor of the defendants was incorrect. Allegation of encroachment and erection of a boundary wall was incorrect. That no part of the plaintiff's land had ever encroached towards the northern side of premises no.3C Bakul Bagan Road. There was a small wall between premises no. 3B Bakul Bagan Road and 1/1B Mullick Lane. The defendants had every right to raise the wall to close the gap on the southern side of the plaintiff's passage meeting with Mullick Lane, for protection of their property.

**10.** An order of temporary injunction was passed restraining the defendants/petitioners and their men and agents from making any construction on the schedule B property and further restraining the defendants from changing the nature and character of the suit property and also from disturbing the peaceful enjoyment of the plaintiff in respect of the A schedule property.

**11.** Thereafter, the plaintiff filed an application for amendment of the plaint and wanted to incorporate some new facts. According to the plaintiff, while the survey passed commissioner was holding a commission, certain discoveries were made. Such facts were necessary to be brought on record. A partition plan and the deed of family settlement registered on October, 21, 1982, were traced. From the said deed of settlement, it transpired that before settling premises no.3C Bakul Bagan Road in favour of Prasanta (the predecessor-in-interest of the defendants), the said property had been transferred in favour of Sushanta, i.e. the plaintiff/opposite party. It further

revealed that about 3 cottahs, 2 chittak 15 sq. ft. along with pucca building was bequeathed to the plaintiff by his father Sisir and Sisir had purchased the property in 1947 from Lot-A as depicted in the partition plan of the partition suit which was compromised between Sisir, Narendra and heirs of Surendra. The said property was a part of the south-easter portion of premises no.1/1B Mullick Lane. On the basis of such transfer, Sushanta became the absolute owner of 1/1B Mullick Lane, which was subsequently renumbered as 3C Bakul Bagan Road. Thus, the plaintiff became absolute owner of the entire property on the basis of a deed of gift and the defendants were unauthorizedly and illegally occupying the property no.3C Bakul Bagan Road, without having any right, title and interest. Such fact came to the knowledge of the plaintiff, when the certified copy of the deed of settlement was actually perused.

**12.** The defendants filed their written objection and stated that the contention of the petitioners that they had become the owners in respect of the entire premises 3C Bakul Bagan Road by virtue of a deed of gift of 1967 was incorrect, misconceived and unfounded. The nature and character of the suit would be changed. The pleas were inconsistent and the new facts sought to be introduced would amount to withdrawal of admission.

**13.** The learned court below, upon considering the rival contentions of the parties, came to the conclusion that merits of the application for amendment were not required to be gone into. The correctness of the statement sought to be incorporated by way of an amendment would be adjudicated at the stage of trial. On a bare perusal of the plaint, it appeared that the plaintiff had already mentioned about the deed of settlement for the

year 1982, but the facts with regard to the said deed were not within his knowledge. Hence, so the amendment should be allowed for the ends of justice.

**14.** The issue is, whether in the present case, the amendment ought to be allowed, even if the general law was that an application for amendment should be allowed liberally and for proper adjudication of the dispute between the parties. Multiplicity of proceedings should also be avoided.

**15.** The plaint case is that Sisir Kumar Das got plots C and C1 on the basis of a compromise decree. Sisir gifted 1/1B Mullick Lane to the petitioner by virtue of a registered deed of gift dated August 30, 1967. Paragraphs 6 and 7 of the plaint indicate such fact and also mentions that 1/1B Mullick Lane was on the northern portion of the 3 Bakul Bagan Road measuring about 2 cottahs 14 chittaks more fully described in schedule A of the plaint. Schedule A of the plaint is quoted below:-

**“SCHEDULE-A”**

**All THAT** the premises being no. 1/1B, Mallick Lane, Police Station – Bhawanipore, Kolkata – 700025 morefully described in the Schedule-A below, measuring about 2(two) Cottahs 14 (fourteen) Chittaks together with pucca structure standing thereon along with common rights, easement right attached thereto.”

**16.** The plaintiff prayed for the following reliefs:-

“a) For declaration of title of in respect of Schedule- 'A' land described below;

b) Recovery of khas possession of the Schedule-'B' land by demolishing the wall standing thereon. and necessary direction would be imposed upon the defendants to remove the wall standing on the suit land by his own cost within particular date fixed by the Court and if the defendants do not comply the Court's order the Plaintiff would be directed to demolish the wall/ structure in the Schedule-'B' land at the costs of the defendants;

c) Permanent injunction restraining the defendants and their men and agents from making any further construction in the suit property and not in any way disturb the peaceful enjoyment of the plaintiff's property described in Schedule-'A' property;

d) Cost of the suit;

e) Any other relief or relief or reliefs the plaintiff is entitled to law and equity.”

**17.** According to the plaintiff, by deed of settlement dated October 18, 1982, an arrangement was made in favour of Prasanta in respect of south-eastern portion of plot no.3 Bakul Bagan Road, presently known as 3B Bakul Bagan Road, Kolkata, measuring about 2 cottahs, 13 chittak with a building and common easementary right along with another piece of land measuring 2 cottahs, 14 chittaks more or less together with old building standing on premises no.3C Bakul Bagan Road. Prasanta died intestate leaving behind the defendant, who claimed right, title and interest in respect of southern-eastern portion of 3 Bakul Bagan Road, known as 3B Bakul Bagan Road measuring 2 cottahs 13 chittaks along with building and common easementary right standing thereon as also in respect of another piece of land measuring about 2 cottahs 14 chittaks together with building standing thereon known as premises no.3C Bakul Bagan Road. The further plaint case was that the predecessor of the plaintiff and the predecessor of the defendant, namely, Prasanta were peacefully occupying their respective portions without any obstruction and hindrance. The strip of land between 3C Bakul Bagan Road and 1/1B Mullick Lane, was kept aside for common use. Underneath the said strip of land, there was old sewerage connection running from north to south. The defendants encroached upon the strip of

land of schedule-B property and the plaintiff issued a letter through the learned Advocate, calling upon the defendant to refrain from creating any disturbance in respect of Schedule A and from causing any encroachment by raising a boundary wall over the strip of land. The land over which encroachment had been made by the defendant was delineated as Schedule B in the plaint.

**“SCHEDULE - 'B'**

**ALL THAT** piece and parcel of land measuring about 1 (one) chittak 32 (thirty two) sq. ft. a little more or less (North-South 2'-7", East-West 29'-41/2") of land lying within Premises No. 1/1B, Mallick Lane, Police Station - Bhowanipore, Kolkata - 700025 show in RED boarder in the sketch plan annexed herewith, the wall illegally constructed shown in dotted line therein.”

**18.** The plaintiff’s further contention was that an Advocate Commissioner made a survey, took measurements, and filed a report with a sketch map, which indicated that there was wrongful erection of a wall on a part of the plaintiff’s portion measuring about 2 cottahs 12 chittak 13 sq. ft. (Schedule-A) The report indicated that 1 chittak 32 sq. ft. of the land of the plaintiff had been encroached wrongfully by the defendants, delineated as schedule-B property in the plaint. Thus, it was the positive case of the plaintiff that Schedule A i.e. 1/1B Mullick Lane was transferred to the plaintiff by Sisir by a registered deed of gift dated August 30, 1967. Paragraphs 6 and 7 of the plaint indicates that premises No. 1/1B Mullick Lane was situated in the northern portion of holding No.3 Bakul Bagan Road and measured around 2 cottahs 14 chittaks. Paragraph 8 of the plaint clearly indicates that the land settled in favour of Prasanta by virtue of deed of settlement was premises No. 3B Bakul Bagan Road (South-eastern part of 3 Bakul Bagan

Road) measuring about 2 cottahs 13 chittaks together with land, structure and easementary right etc. as also land measuring about 2 cottahs 14 chittaks known as premises No.3C Bakul Bagan Road.

**19.** In paragraphs 6, 7, 8 and 10 of the plaint, there are clear admissions that the plaintiff was in possession and was enjoying his respective share in respect of 1/1B Mullick Lane which is schedule-A property and the Prasanta enjoyed premises No.3B and 3C Bakul Bagan Road, by virtue of a deed of settlement. The plaint case is that between the schedule-A property, i.e., the property which was enjoyed by the plaintiff and 3C Bakul Bagan Road (property enjoyed by Prasanta) there was strip of land underneath which there was a sewerage connection running from north to south, kept aside for common use. The defendant allegedly encroached upon the said strip of land raised a wall and also encroached a portion of the plaintiff's land measuring about 1 chittak 32 sq. ft. which has been depicted as schedule-B in the plaint. By the amendment not only contrary pleas are being set up but a claim has been made with regard to the entire premises No.3C Bakul Bagan Road. In the application for amendment, the plaintiff claimed that 1/1B Mullick Lane included 3C Bakul Bagan Road. The plaintiff claimed not only the property which was gifted to him as mentioned in paragraphs 6 and 7 of the plaint but the also the property which in as per the plaintiff's own admission in paragraphs 8 and 10 of the plaint, was being enjoyed by the defendant's predecessor, Prasanta, on the basis of the deed of settlement. Such clear admissions were sought to be withdrawn.

**20.** This Court finds that the averments and the statements contained sought to be incorporated by the amendment resulted in withdrawal of

admissions made in paragraphs 8 and 10 of the plaint. Paragraph 8 and 10 of the plaint are quoted below:-

**“8.** That said Sisir Kumar Das by virtue of a Deed of Settlement, dated 18.10.1982 make and arrangement as mentioned therein in favour of Prasanta Kumar Das in respect of the then South-Eastern portion of 3 No. Bakul Bagan Road, presently known as 3B, Bakul Bagan Road, Kolkata, of the land measuring about 2 (two) Cottahs 13 (thirteen) Chittaks together with old building standing thereon along with common, easementary right attached thereto along with another piece of land measuring about 2 (two) Cottahs 14 (fourteen) Chittaks more or less together with old building standing thereon, at K.M.C. Premises No. 3C, Bakulbagan Road, Kolkata. The said Deed was registered before the Additional District Sub-Registrar at Alipore and recorded in Book No. I, Volume No. 372, Pages 184 to 191, Being No. 14525 for the Year 1982.

**10.** That the plaintiff and the predecessor of the defendants were peacefully enjoying and occupying their respective portions without any obstructions and hindrance keeping a strip of land between 3C, Bakulbagan Road and 1/1B Mallick Lane for common use underneath the old sewerage connection runs from North to South is are existed.”

**21.** The suit was for alleged encroachment over the said strip of land by erection of a wall and further encroachment of the plaintiff's share in 1/1B Mullick Lane. Thus, declaration of right, title and interest in respect of 1/1B Mullick Lane measuring about 2 cottahs 14 chittaks along with pucca structure standing thereon, common rights, easementary rights etc. was prayed for. A prayer for permanent injunction and recovery of khas possession of schedule-B property measuring about 1 chittak 32 sq. ft. lying within premises No. 1/1B Mullick Lane, was also made. By the amendment, the plaintiff withdrawn the admission in the plaint quoted above to the effect that Prasanta, the predecessor of the defendants was occupying 3C Bakul Bagan Road. Premises No. 1/1B Mullick Lane and 3C Bakul Bagan Road were one and the same premises and measured about 3 cottahs 2 chittaks 15 sq. ft., was sought to be incorporated. The plaint case was that the

premises No. 1/1B Mullick Lane and 3C Bakulbagan Road were separate and distinct property and between these two properties there was a strip of land which was being encroached by the defendant. Further, by construction of boundary wall the defendants entered into a portion of premises No. 1/1B Mullick Lane measuring about 1 chittak 32 sq. ft. lying within premises No. 1/1B Mullick Lane (Schedule B).

**22.** The amendment sought to incorporate the following schedule:-

**“SCHEDULE A1**

ALL THAT piece and parcel of South East portion of premises no. 1/1B, Mallick Lane measuring about 3 Cottahs 2 Chittaks 15 sq. ft. more or less along with pucca structure standing thereon with common easement rights attached thereto which is known and renumbered as 3C, Bakulbagan Road.

**SCHEDULE B1**

ALL THAT piece and parcel of South East portion of premises no. 1/1B, Mallick Lane measuring about 3 Cottahs 2 Chittaks 15 sq. ft. more or less along with pucca structure standing thereon with common easement rights attached thereto which is known and renumbered as 3C, Bakul Bagan Road.

**23.** In my opinion, the admissions in the plaint had created a right in favour of the defendant to the extent that the occupation of the defendant through their predecessor, Prasanta, in respect of premises No.3B and 3C Bakul Bagan Road, was admitted by the plaintiff. The admission that plaintiff as Prasanta had been peacefully occupying their respective portion being 1/1B Mullick Lane (schedule-A) and 3B and 3C Bakul Bagan Road was sought to be withdrawn by raising a contrary plea that premises No. 1/1B Mullick Lane was premises No. 3C Bakul Bagan Road. The plaint case was with regard to encroachment of a strip of land between the two lands

and alleged encroachment over 1 chittak 32 sq. ft. of premises No. 1/1B Mullick Lane. Such cause of action was altered and the scope of suit changed completely.

**24.** The law on the point is well settled that in case of amendment of a plaint, the plaintiff cannot be allowed to raise contrary pleas or to withdraw admissions, thereby, causing serious injustice to the defendant.

**25.** The principles laid down by the Hon'ble Apex Court, time and again, do not support such kind of amendment. In the decision of ***Life Insurance Corporation of India vs Sanjeev Builders Private Limited & Anr.*** decided in ***Civil Appeal No. 5909 of 2022***, the Hon'ble Apex Court laid down the principles governing amendment, in paragraph 70 of the decision.

The relevant portion is quoted below:-

(iii) The prayer for amendment is to be allowed:-

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

**26.** Reliance is placed on ***Revajeetu Builders and Develpers vs. Narayanaswamy and Sons and ors.*** reported in ***(2009) 10 SCC 84.***

Paragraph 26, of which is quoted below:-

“26. In the same judgment of Usha Balashaheb Swami [(2007) 5 SCC 602] , the Court dealt with a number of judgments of this Court and

laid down that the prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of claim applies to amendments to the plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable”

**27.** The revisional application is allowed. The order impugned is set aside.

The amended plaint, if filed, be expunged from the records.

**28.** Parties are to act on the server copy of this judgment.

**(SHAMPA SARKAR, J.)**