SUPREME COURT OF INDIA

Ram Niranjan Kajaria

Vs.

Sheo Prakash Kajaria & Ors.

SLP(Civil)No.31423-31424 /2010

(Anil R. Dave,J., Kurian Joseph and Amitava Roy,JJ.,)

18.09.2015

JUDGMENT

Kurian Joseph,J.,

1. Leave granted.

2. Whether a defendant in a suit for partition can be permitted to withdraw an admission made in the written statement after a pretty long period, is the issue arising for consideration in these cases.

3. Partition Suit No. 696 of 1978, filed in the High Court of Calcutta on Original Side, pertains to the partition of premises No.6, Russel Street, Calcutta, originally belonging to one Motilal Kajaria. Defendant Nos. 5 and 12 are the son and widow, respectively, of the predeceased son, viz., Mahabir Prasad of Motilal Kajaria. In the Partition Suit, Defendant Nos. 5 and 12 filed a joint written statement on 16.08.1979, inter alia, stating as under:

> "1. These defendants state that there is no cause of action against these defendants and these defendants are unnecessary parties and as such the suit against these defendants should be dismissed with costs,…
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> "a) xxx xxx xxx
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> b) In the year 1942, the said Mahabir Prasad Kajaria, since deceased separated from his father Motilal Kajaria since deceased and his brothers, namely the defendants No. 1 to 4 in food, estate and business. Since his separation from his father and brothers the said Mahabir Prasad Kajaria was carrying on his independent business and holding his own separate property. The said "Mahabir Prasad Kajaria" also renounced all his interests in all the properties and assets of his father the said Motilal Kajaria since deceased.

c) These defendants state that neither of them is a co-sharer for the Premises No. 6, Russel Street, Calcutta and nor they have any right title or interest whatsoever in the said premises. These defendants further state that after the death of Motilal Kajaria neither of these defendants had inherited his property nor business as the said Mahabir Prasad separated from his father and brothers in 1942 and renounced all his rights, title and interest in the properties of the said Motilal Kajaria." Prior to the filing of the written statement, they had also filed an affidavit dated 29.11.1978 while opposing an application for appointment of receiver in respect of the suit property stating that:

"I state that my late father Mahabir Prasad Kajaria was separated from my grand father late Motilal Kajaria in the year 1942 and severed all his connections with his father and brothers and since then my father was carrying independent business and holding separate property.

I further state neither I nor my mother is co – sharer of the Premises No. 6, Russel Street, Calcutta and we have no right, title and interest whatsoever in the said Premises No. 6, Russel Street, Calcutta nor we have inherited the shares of my grand father Late Motilal Kajaria and as such I state that we have been unnecessarily joined as defendants." In the Order dated 02.05.1979, while appointing a Court Receiver in respect of the suit property, the court recorded the following findings:

"… Mahabir Prasad Kajaria had no interest in the property as such respondent No. 5 (Sheo Prakash Kajaria) also can have no interest in the said property. The allegation that the co-owners have not received any money towards their shares is incorrect…" After Defendant Nos. 5 and 12 filed written statement on 14.09.1979, Smt. Bhagwani Devi Kajaria-Defendant No.16, who is the mother of late Mahabir Prasad Kajaria (Grand mother of Defendant No.5 and mother-in-law of Defendant No.12), filed a written statement clearly stating that late Mahabir Prasad had separated from his father and other brothers as early as in 1942 and had also renounced all his rights in the movable and immovable properties of his father Motilal Kajaria. The relevant portion of the written statement of the grand mother of Defendant No.5 reads as follows:

"b) The defendant Nos. 1, 2, 3 and 4 are the sons of this defendant and defendant No. 5 is the grandson of this defendant. This defendant's second son Mahabir Prasad Kajaria father of the defendant No. 5 Sheo Prakash Kajaria and husband of the defendant No. 12 Sm. Ginia Devi Kajaria was separated from his father and brothers in food, estate and business in 1942. He renounced all his right, title and interests in the moveable and immoveable properties of his father the said Motilal Kajaria. The said Mahabir Prasad died in 1949. Since Mahabir Prasad Kajaria separated from his father he was carrying on his independent business and also acquired properties." On 13.12.1979, the petitioner herein, who is Defendant No.4, had also filed his written statement on the same lines indicated above. On 02.07.1980, the learned Single Judge, on an application for perjury, had recorded the following findings:

> "Pannalal Kajaria had three sons Matilal, Jaharmal and Onkarmal Kajaria. Before the death of Motilal Kajaria on 5th June, 1952 his second son, Mahabir Prasad Kajaria was separated from him in 1942 in food and in estate and renounced all his claim over the properties of Motilal Kajaria.
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> … There was a declaration given by Smt. Ginia Devi Kajaria, widow of Mahabir Prasad Kajaria on 25th February, 1956 before the Joint Arbitrators stating that her husband Mahabir Kajaria separated himself from his father Matilal Kajaria and his brothers in food, estate and business renounced his right title and interest in the said joint immovable properties in favour of his brothers and father."

4. On 09.01.1989, Plaintiff No. 6, viz. Sulochna Devi had filed an application seeking leave for withdrawal of the suit wherein also there was a statement regarding relinquishment of the claims of Defendant Nos. 5 and 12. It is to be noted that Defendant No. 5 is a businessman, and going by his date of birth, he was 37 in 1978 when he filed the affidavit, 38 when he filed the written statement on behalf of his mother and in 1989, he was aged 49 years.

5. After about 15 years of the written statement, on 17.01.2004, Defendant Nos. 5 and 12 filed an application for amendment of the written statement mainly seeking to resile from the admissions regarding relinquishment of their right in the suit property.

6. After one year of the said application for amendment of the written statement, they also filed a civil suit (Civil Suit No.9 of 2005) on 19.01.2005, seeking a declaration attacking the arbitration award dated 13.09.1956 regarding the partition of the property and claiming right in the suit property.

7. On 13.09.2008, the learned Single Judge dismissed the application. However, the intra-court appeal filed by Defendant Nos. 5 and 12 was allowed by the Division Bench of the High Court and hence these appeals.

8. The Division Bench in the impugned judgment has taken the view that the rejection of the application for amendment would result in failure of justice and would cause irreparable injury to Defendant Nos. 5 and 12. According to the Division Bench, in the impugned Judgment:

> "In our view, there was no justification of denying such an opportunity to the appellants to prove the amended version on the ground of mere delay, the effect of which will be, to unjustly permit the opposing defendants to reap the benefit of an apparent admission, which is not conclusive proof of the fact contained in the pleading in accordance with the law of the land, and which may not be true. Moreover, for considering the question whether the amendment is a malafide one, we cannot lose sight of the fact it is not even the case of the opposing defendants that by way of relinquishing his interest, Mahabir got any property of the Coparcenary in lieu

of relinquishment. Thus, malafide on the part of the appellants cannot be inferred from the apparent facts of the present case. We, thus, find that the learned Single Judge, while rejecting the application for amendment of the written statement filed by the appellants, did not follow the well-accepted principles, which are required to be followed, while deciding this type of an application for amendment of the written statement. Thus, it was a case of improper exercise of discretion by the learned Trial Judge by not following the binding precedents, which justified interference by the appellate Court." We are afraid the view taken in the impugned judgment is not true to facts. Even according to Defendant Nos. 5 and 12, they had their separate property and they were doing independent business. In the affidavit filed on 29.11.1978 before the High Court (Annexure-P5), it is stated as follows:

"1. I am a respondent No. 5 herein and Smt. Giniya Devi Kajaria, respondent No. 12 is my mother and I am acquainted with the facts and circumstances of this case and as such I am competent to affirm this affidavit on behalf and on behalf of my mother Smt. Giniya Devi Kajaria the respondent No. 12. I have read a copy of the Notice of Motion taken out by the Advocate of the petitioner on 19th September, 1978 and a petition affirmed by Shreelall Kajaria on 19th September, 1978 to be intended to be used as grounds in support of the said Notice of Motion and I state that I have understood the meaning, intents and purposes thereof.

9. I state that my late father Mahabir Prasad Kajaria was separated from my grand father Late Motilal Kajaria in the year 1942 and severed all his connections with his father and brothers and since then my father was carrying on independent business and holding separate property.

10. I further state neither I nor my mother is a co-sharer of the Premises No. 6, Russel Street, Calcutta and we have no right, title and interest whatsoever in the said Premises No. 6, Russel Street, Calcutta nor we have inherited the shares of my grand father Late Motilal Kajaria and as such I state that we have been unnecessarily joined as defendants.

11. I state that my grand father Late Motilal Kajaria died on 5th June, 1952 and disputes and differences arose between the heirs and legal representatives of Late Motilal Kajaria in respect of immovable properties left by my said grand father which disputes were referred to an arbitration of Dulichand Kheria, Sheo Prasad Patodia and Ramnath Kanoria and in the said Arbitration Proceedings my mother Smt. Giniya Devi Kajaria defendant No. 12 herein made a declaration in writing on 25th February, 1956 before the Arbitrators stating that my Late father Mahabir Prasad Kajaria separated himself from father and his brothers in food, estate and business and renounced the right, title and interest in the joint immovable property in favour of his brothers and father. A copy of the said declaration dated 25th February, 1956 of my mother Smt. Giniya Devi Kajaria defendant No. 12 herein addressed to the Arbitrators is enclosed herewith and marked with letter "A".

12. I state and submit that the petition is not maintainable and should be dismissed with cost.

13. With reference to paragraph 20 of the said petition I deny that I have got 2.78% in the said premises No.6, Russel Street, Calcutta as alleged or at all which will also appear from the Registered Award dated 13th September, 1956 of the said Arbitrators. Save and except I have no knowledge in the allegations made in different paragraphs of the said petition and I do not admit the same.

14. I state that the petition No.1 Shreelall Kajaria after he was released from imprisonment he was serving as my employee in my firm M/s. Evergreen Industries at Sonepat Haryana at a monthly salary of Rs.400/- per month upto the year 1972 and was staying at Sonepat Haryana till he was under my service." The clear stand taken by Defendant No. 5 when he was aged 37 and when he was in active business is that his father had separated from the grandfather in the year 1942 and since then, he was carrying on independent business and holding separate property. It is crucially relevant to note that the declaration of Defendant No. 12 before the Arbitrators regarding the relinquishment was produced by them only.
Learned Counsel for Defendant Nos. 5 and 12, in the impugned order has placed heavy relevance on *Panchdeo Narain Srivastava v. Km. Jyoti Sahay and Another*[1]. It was a case where the plaintiff moved an application for amendment of the plaint regarding the relationship of the second defendant. It was stated in the plaint that he was the uterine brother of one R. Later, an application for amendment was moved for deletion of the word "uterine" from the plaint. The Trial Court allowed the application but in Revision, the High Court set aside the order. While restoring the order passed by the Trial Court, this Court held at Paragraph-3 of the Judgment as follows:

> "3. Even if the High Court was justified in holding that the deletion of the word 'Uterine' has some significance and may work in favour of either side to a very great extent yet that itself would not provide any justification for rejecting the amendment in exercise of its revisional jurisdiction. We may, in this connection, refer to Ganesh Trading Co. v. Moji Ram wherein this Court after a review of number of decisions speaking through Beg, C.J. observed that procedural law is intended to facilitate and not to obstruct the course of substantive justice. But the learned counsel for the respondents contended that by the device of amendment a very important admission is being withdrawn. An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amendment an admission of fact cannot be withdrawn. The learned Trial Judge, granting the application for amendment was satisfied that in order to effectively adjudicate upon the dispute between the parties, amendment of the pleading was necessary. The High Court in its revisional jurisdiction for a reason which is untenable ought not to have interfered with the order made by the trial court. The learned counsel for the respondents in this connection read one unreported decision of this Court in which this Court upheld the decision of the High Court setting aside the order granting amendment in exercise of its revisional jurisdiction. We have gone through the judgment. The decision does not lay down any particular principle of law and appears to be a decision on its own facts. And ordinarily, it is well settled that unless there is an error in exercise of jurisdiction by the trial court, the High Court would not interfere with the order in exercise of its revisional jurisdiction."

15. The above decision was followed in *Sushil Kumar Jain v. Manoj Kumar and another*[2]. The case pertained to eviction proceedings. The original stand taken by the tenant was that there were different tenancies. However, an application for amendment was moved stating that there are three different portions under one tenancy and not different portions under different tenancies. The Court, at Paragraph-12, held as follows:

> "12. In our view, having considered the averments made in the application for amendment of the written statement, it cannot be said that in fact neither any admission was made by the appellant in his original written statement nor had the appellant sought to withdraw such admission made by him in his written statement. That apart, after a careful reading of the application for amendment of the written statement, we are of the view that the appellant seeks to only elaborate and clarify the earlier inadvertence and confusion made in his written statement. Even assuming that there was admission made by the appellant in his original written statement, then also, such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his defence."

16. The learned Counsel appearing for the appellant mainly referred to three Judgments of this Court. *In Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram & Co.*[3], it was held as follows at Paragraph-10:

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

11. *MIn Gautam Sarup v. Leela Jetly and others*[4], after considering Panchdeo Narain Srivastava (supra) and Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram & Co. (supra) and several other decisions dealing with the amendment on withdrawal of admissions in the pleadings, it was held at Paragraph-28 as follows:

> "28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

12.On amendments generally, in the decision reported in *Revajeetu Builders and Developers v. Narayanaswamy and Sons and others*[5], after referring to Gautam Sarup (supra), the principles on amendment have been summarized at Paragraph-63. It has been held as follows:

> "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
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> (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
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> (2) whether the application for amendment is bona fide or mala fide; (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money; (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
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> (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive." In the case before us, we are afraid, many of the factors referred to above, have not been satisfied. It is significant to note that Defendant Nos. 5 and 12, after moving an application for amendment withdrawing the admissions made in the written statement, have filed a substantive suit attacking the alleged relinquishment of their claim in the family property and we are informed that the trial is in progress. In that view of the matter, we do not propose to deal with the matter any further lest it should affect the outcome of the suit filed by Defendant Nos. 5 and 12 since the declaration sought in the suit filed in 2005 is to take away the basis of the said relinquishment of the claim in the suit property. However, as far as amendment is concerned, the attempt to wholly resile from the admission made after twenty five years, we are afraid, cannot be permitted.

13. Delay in itself may not be crucial on an application for amendment in a written statement, be it for introduction of a new fact or for explanation or clarification of an admission or for taking an alternate position. It is seen that the issues have been framed in the case before us, only in 2009. The nature and character of the amendment and the other circumstances as in the instant case which we have referred to above, are relevant while considering the delay and its consequence on the application for amendment. But a party cannot be permitted to wholly withdraw the admission in the pleadings, as held by this Court in *Nagindas Ramdas v. Dalpatram Ichharamalias Brijram and others*[6]. To quote Paragraph-27:

> "27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in

the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong." (Emphasis supplied)

14. We agree with the position in Nagindas Ramdas (supra) and as endorsed in Gautam Sarup (supra) that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. To that extent, the proposition of law that even an admission can be withdrawn, as held in Panchdeo Narain Srivastava (supra), does not reflect the correct legal position and it is overruled.

15. However, the admission can be clarified or explained by way of amendment and the basis of admission can be attacked in a substantive proceedings. In this context, we are also mindful of the averment in the application for amendment that:

> "11. …. Mahabir Prasad Kajaria died at age of 24 years on 7th May, 1949 when the defendant No. 5 was only 2 years and the defendant No. 12 was only 21 years. Till the death of Mahabir and even thereafter, the petitioners had been getting benefits from income of the joint properties. The defendant No.5 and his two sisters, namely, Kusum and Bina were brought up and were maintained from the income of the joint family properties. The petitioners after the death of Mahabir, they continued to live in the joint family as members and till now members of the joint family. In the marriage of the two sisters of the defendant no.5 Kusum and Bina (now after marriage Smt. Kusum Tulsian and Smt. Bina Tulsian) the expenses were wholly borne out from the incomes of the joint family properties. The said facts are well known to all the family members and their relations."

16. In the counter affidavit filed before this Court, Defendant Nos. 5 and 12 have stated as follows:

> "The alleged letter of 1956 allegedly issued by the widow of Mahabir Prasad used in the arbitration proceedings where she was not a party admitting relinquishment of the share of her husband and thereafter admitting such letter in the original pleading is not what the answering respondents want to resile and/or withdraw from but by the present amendment had only ought to explain the circumstances in which such letter has been written."

17. In the above circumstances, we do not intend to make the suit filed in the year 2005 otherwise infructuous. The application for amendment withdrawing the admissions made in

the written statement on relinquishment of the claim to the suit property by Defendant Nos. 5 and 12 is rejected. However, we, in the facts and circumstances of the case, are of the view that Defendant Nos. 5 and 12 should be given an opportunity to explain/clarify the admissions made in the written statement. Accordingly, Defendant Nos. 5 and 12 are permitted to file an application within one month from today limiting their prayer only to the extent of explaining/clarifying the disputed admissions in the written statement which will be considered on its merits and in the light of the observations made herein above.

18. Though the learned Counsel for the appellant vehemently pressed for costs, we reluctantly refrain from passing any order in that regard. After all, it is a suit for partition of the family property. At any stage, the parties can have a change of heart and ignore the law or facts or other technicalities and reach an amicable settlement.

19. The appeals are partly allowed as above. The impugned Judgment will stand modified to the extent indicated herein above.

20. There shall be no order as to costs.

1(1984) Supp. SCC 0594
[2](2009) 14 SCC 0038
[3](1976) 4 SCC 0320
[4](2008) 7 SCC 0085
[5] (2009) 10 SCC 0084
[6] (1974) 1 SCC 0242