Civil Revision

Present: **The Hon'ble Justice Jyotirmay Bhattacharya**

C.O. No.3736 of 2009

Judgment On: 16-04-2010.

Smt. Namita Roy & Ors
-Vs-
M/S. Bengal Greenfield Housing Development Company Ltd.

POINTS:

AMENDMENT, FRAUD-No mention of fraud in original pleading-Fraud, if can be allowed to be pleaded for the first time by way of amendment which is directly linked with the plaintiffs' prayer for declaration of his title - Code of Civil Procedure, 1908 O 6 R 17- Constitution of India, Art.227

FACTS:

The plaintiffs' application was rejected by the learned Trial Judge by holding that the relief which the plaintiffs are now seeking to introduce in the plaint by way of amendment is barred by limitation as the plaintiffs have not brought any suit seeking appropriate relief within the prescribed period of limitation and neither have they given any satisfactory explanation for such long delay in applying for amendment before the learned Trial Judge.Hence this application under Article 227 of the Constitution of India.

HELD:

There cannot be any hard and fast rule that allegation of fraud cannot be introduced by amendment under any circumstances when slightest indication of fraud is not given in the original plaint. Say for example, if the fraud is discovered subsequent to the filing of the suit, can it be said that the

plaintiffs are debarred from pleading fraud by way of amendment. If such a principle is introduced then trial will be frustrated to the benefit of the person who is guilty of commission of fraud.

Para-39

Since fraud vitiates everything, fraudulent activity can be challenged at any stage of the said proceeding and even in any collateral proceeding when such fraud is detected. In the instant case, the allegation of fraud is of such nature, which if can be proved, will make the deed of 1944 void and as such, the proposed amendment has a direct impact on the disputed question of rights of the parties. Such amendment cannot be refused. Para-40

If the plaintiffs do not come forward to challenge any fraudulent activity of the defendants within the period limitation, then their prayer for amendment may be refused. But in the instant case, the plaintiffs have filed the said application for amendment to challenge the deed of 1944, within the period of limitation i.e. within three years from the date of discovery of such fraud. As such, the plaintiffs' prayer cannot be rejected, particularly for the reason that the proposed amendment is directly linked with the plaintiffs' prayer for declaration of his title. Para-41

CASES CITED:

1) Kanailal Das & Anr –Vs- Jiban Kanai Das & Anr AIR 1977 Cal. Page 189

2) Leach Company Ltd. –Vs- Jardiny Skinner & Co. AIR 1957 SC page 357

3) Ragu Tilak D. John -Vs- S. Rayappan & Ors. (2001)2 SCC page 472

4) Jai Jai Ram Mahohar Lal –Vs- National Building Material Supply, Gurgaon AIR 1969 SC page 1267

5) Sampat Kumar –Vs- Ayyakannu & Anr. (2002)7 SCC page 559

6) Surendra Kr. Sharma –Vs- Makhan Singh (2010)1 CLJ (SC) page 89

7) Rajesh Kr. Agarwal –Vs- K.K. Modi & Ors. AIR 2006 SC page 1647

8) Collector of 24-Partganas –Vs- LIC of India 74 CWN page 166.

9) Binod Behari Ghosal –Vs- Shew Kamal Singh & Ors (1983)2 CHN page 98

10) Monoranjon Belthoria & Anr –Vs- Deputy Commissioner of Purulia (1979)1 CLJ page 557.

11) State of West Bengal –Vs- Pijush Kanti Roy 79 CWN page 5556.

12) The Corporation of Calcutta –Vs- Radhakrishna Dev & Ors in AIR 1952 Calcutta page 222.

13) M.B. Sarkar & Sons –Vs- Powell & Co. 60 CWN page 840

14) Charan Das & Ors. –Vs- Amir Khan & Ors. XLVII Indian Appeals page 255.

15) Shib Gopal Sah –Vs- Sitaram Saraugi & Ors. (2007)14 SCC page 120.

16) Municipal Corporation of the Greater Bombay –Vs- Lala Pancham & Ors. AIR 1965 SC page 1008

17) Smt. Katya Bala Dasi & Anr. –Vs- Nilmoni Pakhira & Ors. (1986)2 CLJ page

18) Ayab Ali Sardar & Anr. –Vs- Derajuddin Mallick & Ors. (1975)2 CLJ page 305.

19) Satish Chandra Maity –Vs- Saila Bala Dasi 82 CWN page 991

For the Petitioners : Mr. S.P. Roy Chowdhury,
Mr. Jayanta Mitra,
Mr. Arunava Ghosh,
Mr. Jiban Ratan Chatterjee,
Mr. Arya Kr. Dutta,
Mr. S. Bhattacharya,
Mr. Dwaipayan Sengup
Ms. Sonalee Roy.

For the Opposite Party No 1 : Mr. Sakti Nath Mukherjee,
Mr. Amiya Narayan Mukherjee.

For the Opposite Party No 2 : Mr. Balai Chandra Roy,
Mr. Bhaskar Mukherjee.

THE COURT:

1) This application under Article 227 of the Constitution of India is directed against an order being No.29 dated 17th November, 2009 passed by the learned Civil Judge, Senor Division, 1st court at Barasat, North 24 Parganas in Title Suit No.290 of 2008 whereby the plaintiffs' application for amendment of plaint was rejected by the learned Trial Judge by holding inter alia that the relief which the plaintiffs are now seeking to introduce in the suit by way of amendment of plaint is not only time barred but also no satisfactory explanation is given for such long delay in applying for such amendment.

2) The plaintiffs are aggrieved by the said order. Hence, they have come before this Court with this application under Article 227 of the Constitution of India.

3) Heard Mr. Roy Chowdhury, learned Senior Counsel appearing for the petitioner, Mr. Mukherjee, learned Senior Counsel appearing for the opposite party no.1 and the learned Advocate General appearing for the opposite party no.2 Considered the materials on record including the impugned order.

4) Let me now give a short background of this case leading to the filing of this revisional application before this Court.

5) The plaintiffs filed a suit for declaration of their right, title and interest in the suit property with a further declaration that all transactions in favour of the defendant no.2 in respect of the suit property are void and not binding on the plaintiffs. A decree for recovery of possession of the suit property was also prayed for in the said suit with a direction upon the defendants for removal of all structures constructed thereon. An injunction was also sought for restraining the defendants, their men and agents from ousting the plaintiffs illegally and forcefully from their legally owned premises without due process of law and/or from carrying on any illegal construction on the suit plot forcefully and/or from changing the nature and character of the suit property.

6) Admittedly Sanatan Mondal was the absolute owner of the suit property. In fact, both the parties are tracing their title through the said Sanatan Mondal. As such, this Court does not feel it necessity to give further details as to how Sanatan Mondal acquired absolute title in the suit property herein.

7) It was stated by the plaintiffs in their plaint that Sanatan Mondal who was in possession of the suit land prior to the date of vesting retained the suit land in khas and his other lands under occupation of the under-raiyat were vested to the Government meaning thereby that the rent receiving rights of Sanatan from his tenant in respect of vested land got abolished. It was further stated by them that while in actual physical possession of the suit land, the said Sanatan Mondal transferred the suit land measuring about 5.95 decimals appurtaining to Dag No.2874/3011 of Khatian No.315 in Mouza Ghuni, J.L. No.23, P.S. Rajarhat, Dist. 24-Parganas by registered deed dated 30th December, 1960 in favour of Bipin Behari Sana and Bijon Behari Bain and delivered peaceful possession of the same to the said purchasers. One of such purchasers namely Bijon

Behari Bain, while in possession of the said land by exercising various activities therein, died intestate leaving behind him the plaintiff no.1, as his widow, the plaintiff nos.2, 3 and 4 as his sons and plaintiffs nos.5 and 6 as his daughters. In similar way, on the death of the other purchaser namely Bipin Behari Sana his eight anna share in the suit property devolved upon his only son the defendant no.7. It was further stated therein that taking advantage of the absence of the plaintiffs and their predecessors-in-interest at the time of recording in the revisional settlement, the names of the plaintiffs and/or their predecessors-in-interest were not recorded as owners in the revisional record of rights. On the contrary, the name of some other persons was recorded as owners in respect of the suit property in the revisional record of rights though they have no semblance of right, title and interest in the suit property. After coming to know of such erroneous recording in the revisional settlement records, the plaintiffs drew the attention of the concerned authority and time and again requested the Assistant Settlement Officer to initiate a suo motu proceeding under 44(2A) of the West Bengal Estates Acquisition Act for correction of the record of rights since 1981. Ultimately such proceeding was initiated on 11th June, 2007 and the same was finally disposed of on 7th September, 2007 by recording the names of the plaintiffs as raiyat in respect of the suit property after correcting the erroneous entries earlier recorded in the record of rights. In course of hearing of the said 44(2A) proceeding some documents were produced before the Revenue Officer wherefrom it revealed that Sanatan Mondal transferred his right in the suit property in favour of one Badsha Ali by a registered deed dated 7th July, 1944 and the name of the said purchaser was recorded in the R.S. record of rights. Subsequently, the said Badsa Ali transferred his interest in the suit property in favour of Rai Bahadur Kanailal Nandy who also got his name recorded in the revenue records. The said Nandy again transferred his interest in favour of Jitendra Nath Mondal by an Amalnama and the said Jiten babu subsequently transferred his

interest in favour of his purchaser in 1956. The plaintiffs claim that they were kept in total darkness as to how their land could be purchased by West Bengal Housing Board without even intimating the plaintiffs who are the recorded owners of the said property. Since the defendant no.1 started carrying on construction on the suit property by taking possession thereof forcefully, the plaintiffs filed the said suit by challenging the transfers in favour of the defendant no.2 who, according to the plaintiffs, have not acquired any title in the suit property by way of entering into clandestine and fraudulent deal in respect to the suit property with the persons fraudulently posed themselves to be the owners thereof though they had no title in the suit property. In these set of facts the plaintiffs filed the said suit claiming the aforesaid reliefs.

8) Subsequently, the plaintiffs filed an application for amendment of the plaint for introducing a challenge with regard to the validity and legality of the sale deed dated 7th July, 1994 through which the suit property was allegedly transferred by the said Sanatan Mondal in favour of Badsha Ali. The plaintiffs wanted to introduce a further relief by way of declaration that the said deed dated 7th July, 1994 is illegal, void, forged deed and the same having not been acted upon is of no value. Such relief was sought to be introduced by challenging the validity of the said deed on the ground that the said deed was never executed by Sanatan Mondal and the said deed was procured by Badsha Ali from a fictitious person who might have executed and registered the said deed by posing himself as Sanatan before the Registering Authority.

9) In the application for amendment, the plaintiffs stated that those facts could not be pleaded in the original plaint by mistake as the plaint was drafted hurriedly and as such, amendment of plaint is necessary for introducing the aforesaid facts in the plaint.

10) The plaintiffs' said application was rejected by the learned Trial Judge by holding inter alia that the relief which the plaintiffs are now seeking to introduce in the plaint by way of amendment is barred by limitation as the plaintiffs, in spite of having the knowledge of such wrong recording of the name of the raiyat in the revisional record of rights in 1981, have not brought any suit seeking appropriate reliefs within the prescribed period of limitation. The learned Trial Judge further held that even no satisfactory explanation was given by the plaintiffs for such long delay in applying for such amendment before the learned Trial Judge.

11) These are the two grounds on which the plaintiffs' application for amendment of plaint was rejected by the learned Trial Judge. The propriety of the said order is under challenge before this Court at the instance of the plaintiffs.

12) Mr. Roy Chowdhury, learned Senior Counsel appearing for the petitioners challenged the propriety of the impugned order by submitting that the learned Trial Judge erred in holding that satisfactory explanation for the delay was not given by the petitioners in the application for amendment. By drawing my attention to the averment made in the said application Mr. Roy Chowdhury pointed out that his clients gave a reasonable explanation for the delay in applying for such amendment in the said application. The petitioners stated therein that due to hurriedness of drafting on the face of urgency, some mistakes and some important omissions were cropped up and as such, the petitioners could not pray for any relief concerning the said void deed of 1944 though reference was made about the said deed in the original plaint.

13) Mr. Roy Chowdhury further contended that the learned Trial Judge erred in holding that the relief which the petitioners are now seeking to introduce by way of amendment has now become barred by limitation. According to Mr. Roy Chowdhury, the learned Trial Judge misconstrued the provision of Article 58 of the Limitation Act which provides three years time for filing a suit for declaration from the date when the right to sue first accrued. According to Mr. Roy Chowdhury his client's right to seek such declaration regarding voidness of the said deed of 1944 accrued in June, 2007 when the said deed dated 7th July, 1944 was produced before the Revenue Officer in course of hearing of the said 44(2A) proceeding to support their claim for title in the suit property. Mr. Roy Chowdhury contended that in 1981 his clients had no knowledge about the said deed. He further pointed out from the pleadings in the plaint that the plaintiffs stated therein that the said deed of 1944 was produced before the Revenue Officer for the first time in course of hearing of the said 44(2A) proceeding which was initiated on 11th June, 2007 and as such, his clients came to know about the said deed on the said date. Thus, the starting point of limitation will be counted from the date when the defendants tried to establish their title by disclosing the said deed dated 7th July, 1944 and/or by denying the title of the vendors of the plaintiffs' predecessors-in-interest in the suit property. Since the plaintiffs have filed the said application for amendment for introducing the said challenge on 1st July, 2009, the plaintiffs' claim for such relief with regard to the voidness of the said deed cannot be held to be barred by limitation. In support of such submission Mr. Roy Chowdhury relied upon a decision of this Hon'ble Court in the case of Kanailal Das & Anr. –Vs- Jiban Kanai Das & Anr. reported in AIR 1977 Cal. Page 189 wherein it was held that the right to sue for declaration under Article 58 which is the residuary article in suits relating to declaration, accrues only when a right is asserted by his adversaries by denying the plaintiffs' right or at least a clear and unequivocal threat is given by the defendants against whom the suit is instituted.

14) By relying upon a decision of the Hon'ble Supreme Court in the case of Leach Company Ltd. –Vs- Jardiny Skinner & Co. reported in AIR 1957 SC page 357. Mr. Roy Chowdhury further contended that even amendment for inclusion of a time barred claim cannot be refused when such amendment is required in the interest of justice.

15) By relying upon another decision of the Hon'ble Supreme Court in the case of Ragu Tilak D. John -Vs- S. Rayappan & Ors. reported in (2001)2 SCC page 472 Mr. Roy Chowdhury contended that when bar of limitation of any relief sought to be introduced by way of amendment is an arguable case, then also amendment should be allowed and the disputed matter should be made a subject matter of an issue in the suit. Mr. Roy Chowdhury relied upon another decision of the Hon'ble Supreme Court in the case of Jai Jai Ram Mahohar Lal –Vs- National Building Material Supply, Gurgaon reported in AIR 1969 SC page 1267 wherein it was held that rules of procedure are intended to be a handmade to the administration of justice. It was further held therein that a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. It was also held therein that the Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent which may not be compensated by an order of cost. It was further held therein that, however, negligent or careless may have been the first omission and, however late the proposed amendment may be, the amendment may be allowed if it can be made without causing injustice to the other side. He also referred to another decision of the Hon'ble Supreme Court in the case of Sampat Kumar –Vs- Ayyakannu & Anr. reported in (2002)7 SCC page 559 wherein the Hon'ble Supreme Court held that the prayer for amendment

cannot be disallowed on the ground of delay when the basic structure of the suit is not altered by the proposed amendment.

16) In fact, the Hon'ble Supreme Court in the said decision allowed the plaintiffs' prayer for amendment of plaint for inclusion of a relief which was sought to be introduced eleven years after the institution of the suit.

17) He also relied upon a very recent Special Bench decision of the Hon'ble Supreme Court in the case of Surendra Kr. Sharma –Vs- Makhan Singh reported in (2010)1 CLJ (SC) page 89 wherein it was held that even if an application for amendment of plaint is filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties such amendment is necessary. The Hon'ble Supreme Court held therein that mere delay and/or laches in making the application for amendment cannot be a ground to refuse amendment. Mr. Roy Chowdhury further referred to another decision of the Hon'ble Supreme Court in the case of Rajesh Kr. Agarwal –Vs- K.K. Modi & Ors. reported in AIR 2006 SC page 1647 wherein it was also held that the real test that governs the issue of amendment is the real controversy test.

18) By referring to the aforesaid decisions of the Hon'ble Supreme Court Mr. Roy Chowdhury submitted that if the principles laid down in those decisions are accepted as the law of the land operating in the field then no reasonable man can come to a conclusion that the amendment which is sought for herein is not necessary for adjudication of the dispute involved in the suit. He contended that the plaintiffs not only claimed declaration of their title in the suit property but also challenged all the deeds in favour of the defendant no.2 as fraudulent and inoperative.

19) In fact, the rival claims of the parties as to their title in the suit property depends upon the validity and/or legality of the title deed dated 7th July, 1944 allegedly executed by Sanatan Mondal in favour of Badsha Ali. As such, according to Mr. Roy Chowdhury, the learned Trial Judge committed a mistake not only by holding that the relief which the plaintiffs are now seeking to introduce by amendment is barred by limitation but also by holding that such an application for amendment cannot allowed on the ground of delay as no satisfactory explanation has been given by the plaintiffs for such delay.

20) Mr. Roy Chowdhury, thus, invited this Court to interfere with the impugned order.

21) Mr. Mukherjee, learned Senior Counsel, appearing for the opposite party no.1 refuted such submission of Mr. Roy Chowdhury by scanning each line of the plaint to show that the suit itself is meritless and as such, the plaintiffs' prayer for amendment was rightly rejected by the learned Trial Judge.

22) Mr. Mukherjee submitted that since Sanatan's name was neither recorded in the record of rights prepared under the Estate Acquisition Act nor his possession in the suit land in khas was recognized therein, Sanatan could not have retained the said land in khas under the said Act. Mr. Mukherjee further submitted that Sanatan never challenged the correctness of the entries in the record of rights wherein the name of his transferees viz. Badshi Ali who purchased his interest in the suit property by virtue of the registered sale deed dated 7th July, 1944 was recorded. He further pointed out that even the recording of the names of the subsequent transferees in the revenue

records from their respective vendors was also not challenged by Sanatan at any point of time. Thus, he contended that when the pleadings of the original plaint shows that Sanatan had no saleable interest in the said land after the Estate Acquisition Act came into operation, neither Bipin nor Bijon acquired any title in the suit property on the basis of their alleged purchase of the suit property from Sanatan by the registered sale deed dated 30th December, 1960 and consequently the plaintiffs have also not acquired any title in the suit property by inheritance on the death of their predecessors. Mr. Mukherjee, thus, submitted that if on reading the averment made in the plaint itself it is found that the suit is meritless, no useful purpose will be served by allowing such amendment. He further contended that even the proposed amendment which was sought to be introduced does not fit in the chain of circumstances constituting the cause of action of the said suit as the plaintiffs cannot support their claim for title in the suit property even by introducing such challenge, as Sanatan did not retain the said land in khas under the Estate Acquisition Act and consequently he had no saleable interest in the suit property after the Estate Acquisition Act came into operation.

23) Mr. Mukherjee relied upon several decisions of this Hon'ble Court to show as to who was entitled to retain his land under the Estate Acquisition Act. The following decisions were cited by Mr. Mukherjee on the above points:-

1. In the case of Collector of 24-Partganas –Vs- LIC of India reported in 74 CWN page 166.
2. In the case of Binod Behari Ghosal –Vs- Shew Kamal Singh & Ors. reported in (1983)2 CHN page 98.

3. In the case of Monoranjon Belthoria & Anr. –Vs- Deputy Commissioner of Purulia reported in (1979)1 CLJ page 557.

4. In the case of State of West Bengal –Vs- Pijush Kanti Roy reported in 79 CWN page 5556.

24) Mr. Mukherjee pointed out from those decisions that it was held therein that the record of rights was prepared under the Estate Acquisition Act for carrying out the purpose of the Act primarily and such recording was made with reference to the date of vesting which was the relevant date for judging the rights of the parties under the Act. The records, therefore, must have reference to the state of things as it existed at the said date of vesting. It was also held therein that an intermediary who was not in possession of the land as on 15th April, 1955, was not entitled to retain the same and if any person purchased any interest in the vested land from such intermediary, he cannot claim any title in the suit property. Even such purchasers are not entitled to any notice of any proceeding under Section 44(2A) of the Estate Acquisition Act.

25) Mr. Mukherjee also supported the findings of the learned Trial Judge on the point of limitation by submitting that a time barred claim cannot be allowed to be introduced by way of amendment. Mr. Mukherjee further contended that when the bar of limitation is an arguable case or the question of limitation cannot be decided without taking evidence in the suit, then prayer for such amendment cannot be rejected on the ground of bar of limitation. But when on plain reading of averment made in the plaint it can be held with all certainties that the plaintiffs' claim is barred by limitation, then such claim cannot be allowed to be introduced by way of amendment. Mr. Mukherjee pointed out from the pleadings made out from paragraph 9 of the plaint that the plaintiffs themselves admitted

in the said paragraph that they came to know about the erroneous entries in the record of right in 1981 and as such, they cannot be permitted to seek relief for challenging the validity of the deed of 1944 by amending their plaint in 2009. According to Mr. Mukherjee, in the instant case bar of limitation is neither an arguable issue in the suit nor any further evidence is necessary for deciding the issue regarding bar of limitation. He, thus, contended that under such circumstances, the learned Trial Judge was justified in holding that the relief which the petitioners are now seeking to introduce is barred by limitation. Mr. Mukherjee also relied upon the following decisions of the Hon'ble Supreme Court as well as this Hon'ble Court to support his submission that a time barred claim cannot be allowed to be introduced by way of amendment:-

1. In the case of The Corporation of Calcutta –Vs- Radhakrishna Dev & Ors. reported in AIR 1952 Calcutta page 222.
2. In the case of M.B. Sarkar & Sons –Vs- Powell & Co. reported in 60 CWN page 840.
3. In the case of Charan Das & Ors. –Vs- Amir Khan & Ors. reported in XLVII Indian Appeals page 255.
4. In the case of Shib Gopal Sah –Vs- Sitaram Saraugi & Ors. reported in (2007)14 SCC page 120.

26) Mr. Mukherjee also submitted that when the plaintiffs are trying to introduce a claim in the suit by way of amendment by making out a case of fraud, such prayer for amendment will not be allowed, if it is found that there was not the slightest basis of such fraud in the plaint as it stood originally. By referring to the pleadings made out in the plaint as a whole Mr. Mukherjee submitted that though the plaintiffs referred to the deed of 1944 in their original plaint but they

never made any attempt to challenge the said deed on the ground of fraud though they made out a case of fraud for challenging the title deed of the defendant no.2 in the plaint. Mr. Mukherjee, thus, contended that under such circumstances, the plaintiffs cannot be permitted to introduce a claim by making out a case of fraud for avoiding the deed of 1944, in 2009. In support of the aforesaid submission Mr. Mukherjee also relied upon a decision of the Hon'ble Supreme Court in the case of the Municipal Corporation of the Greater Bombay –Vs- Lala Pancham & Ors. reported in AIR 1965 SC page 1008.

27) Thus, Mr. Mukherjee supported the impugned order and prayed for the rejection of this revisional application.

28) Learned Advocate General appearing for the opposite party no.2 submitted that the application for amendment is not at all a bona fide one. Learned Advocate General contended that not only the plaintiffs were aware about the entries in the record of rights in 1981 but also they filed a suit for protecting their possession in the suit property earlier in 1999 by alleging that their right of possession in the suit property was threatened by the defendants therein some of whom were the vendors of the defendant no.2. By referring to the plaint of the said suit, the learned Advocate General submitted that when the plaintiffs' right in the suit property was admittedly threatened in 1999 and further when they filed a suit in 1999, they cannot say that their right to sue accrued for the first time in 2007. The learned Advocate General, thus, contended that since the plaintiffs have suppressed the said suit and/or the dismissal thereof for not taking step for service of summons upon some of the defendants in the plaint of the present suit and/or in the application for amendment, this application for amendment cannot be held to be a bona fide one. The learned

Advocate General further contended that when the plaintiffs' right in the suit property was invaded in 1999, the relief which the plaintiffs are now seeking to introduce by way of amendment is obviously barred by limitation. Thus, the learned Advocate General submitted that the learned Trial Judge did not commit any illegality in rejecting the petitioners' application for amendment in the facts of the instant case.

29) In reply to the aforesaid contention of Mr. Mukherjee and the learned Advocate General, Mr. Roy Chowdhury submitted that it is well settled that the record of right is not a document of title, as the record of rights neither creates any title in the person who has no title in the property nor it extinguishes the right of a person who has title in the property. Mr. Roy Chowdhury further contended that the entries in the record of rights simply carry presumption with regard to possession but such presumption is rebuttable by evidence and as such, it cannot be said that the plaintiffs' right to sue for challenging the validity of the title deed of 1944 accrued in 1981 when they came to know about the erroneous recording in the record of rights. He reiterated that the right to sue accrues only when the right of the plaintiffs is invaded and here in the instant case the plaintiffs' right was invaded when the defendants claimed title in the property by disclosing the title deed of 7th July, 1944 allegedly executed by Sanatan in favour of Badsha Ali, for the first time in 2008 in course of hearing of the proceeding under Section 44(2A) of the Estate Acquisition Act. Mr. Roy Chowdhury has also relied upon various decisions of this Hon'ble Court to show that the record of right is not a document of title and as such, even by erroneous recording of the names of Badsha Ali and/or the subsequent purchasers, the title of the plaintiffs was not affected and as such, the plaintiffs had no occasion to file the instant suit even on discovery of such erroneous recording

in the record of rights. These are the decisions which were referred to by Mr. Roy Chowdhury to support his aforesaid contention:-

1. In the case of Smt. Katya Bala Dasi & Anr. –Vs- Nilmoni Pakhira & Ors. reported in (1986)2 CLJ page 1.
2. In the case of Ayab Ali Sardar & Anr. –Vs- Derajuddin Mallick & Ors. reported in (1975)2 CLJ page 305.
3. In the case of Satish Chandra Maity –Vs- Saila Bala Dasi reported in 82 CWN page 991.

30) Let me now consider the merit of this revisional application in the light of the aforesaid submission of the learned Counsel of the parties.

31) On the point of limitation

On consideration of the decisions cited at the Bar on the point of limitation, this Court holds that the prayer for amendment for inclusion of even a time barred claim cannot be rejected outright, if such application for amendment is otherwise needed for complete adjudication of the dispute involved in the suit, provided, however, any valuable right accrued in favour of the defendants is not destroyed by allowing such amendment.

32) Normally, bar limitation is a mixed question of law and fact which is required to be decided after taking evidence in the suit but there is exception to this general rule i.e., when on reading the averments made in the pleadings, it can be shown that the relief claimed by the plaintiffs in the suit and/or in the proposed amendment is barred by limitation, such time barred claim cannot be

allowed to be brought on record by amendment. Under such circumstances, the Court is not required to decide the said issue regarding bar of limitation after taking evidence as, such decision can be taken from the pleadings in the plaint itself. But if an arguable issue is raised by amendment with regard to bar of limitation then, of course, amendment cannot be refused but after allowing amendment the said arguable point will be made an issue in the suit so that such issue can be decided after recording evidence in the suit.

33) By keeping in mind the aforesaid principles of law, let me now consider as to whether the claim which is sought to be raised by the plaintiffs by way of amendment is at all barred by limitation or not. Here in the instant case the plaintiffs stated that the plaintiffs came to know about the erroneous entries in the record of rights in 1981, but since by such recording in the record of rights, the title of the plaintiffs was not clouded, the plaintiffs' right to sue for the reliefs claimed in the suit did not mature as on 1981 when such erroneous recording in the record of right was discovered by the plaintiffs. The plaintiffs' right to sue for the reliefs claimed in the suit actually matured in 2007 when the plaintiffs' title in the suit property was clouded by disclosing the alleged transfer of the suit property by Sanatan in favour of Badsha Ali by a registered deed of sale dated 7th July, 1944. The instant suit was filed in 2008 within the prescribed period of limitation as per Article 58 of the Limitation Act. Even the relief which the plaintiffs are now seeking to introduce for challenging the validity of the said deed of 1944 by way of amendment in 2009 is also within the prescribed period of limitation as per Article 58 of the Limitation Act. In fact, if the plaintiffs filed an independent suit seeking the relief which they are now seeking to introduce by way of amendment of the plaint in 2009, such independent suit would not have been barred by limitation as per Article 58 of the Limitation Act in 2009. As such, this Court cannot agree with the learned

Trial Judge that the relief which the plaintiffs are now seeking to introduce by way of amendment became barred by limitation as on the date when such amendment was sought for.

34) Test of bona fidies

The deed of 1944 was referred to by the plaintiffs in the original plaint but the said deed was not assailed in the said suit by challenging the validity thereof. Since both the plaintiffs and the defendants are tracing out their title through the admitted owner namely Sanatan, the validity of the transfer by Sanatan in favour of Badsha Ali by registered deed dated 7th July, 1944 is a material consideration in the suit and in fact, the fate of the suit depends upon such consideration. As such, when the plaintiffs wanted to bring the said challenge in the suit by way of amendment of plaint, such an amendment cannot be held to be a mala fide amendment. In my view, such an amendment is not only bona fide but also is necessary for complete adjudication of the dispute involved in the suit.

35) It is rightly pointed out by learned Advocate General that the filing of the earlier suit by the plaintiffs in 1999 and the fate thereof was not referred to in the plaint. But since the cause of action of the said suit was different from the cause of action of the present suit, this Court cannot hold that the plaintiffs are guilty for suppression of any material fact in the plaint of the present suit. Though the opposite party no.2 claimed that most of the defendants in the earlier suit were the vendors of their predecessors-in-interest of the opposite party no.2 but the veracity of such contention cannot be verified at this stage as the petitioners in their reply denied such contention of the opposite party no.2. In any event for non-disclosure of those facts in the plaint of the present suit, this Court cannot hold conclusively at this stage that there was lack of bona fidies on the part of the plaintiffs

in filing the instant suit and/or for seeking the amendment in the said suit as contended by the learned Advocate General.

36) Whether fraud can be allowed to be pleaded for the first time by way of amendment if slightest challenge with reference to allegation of fraud was not mentioned in the original pleading.

37) Though it is true that the plaintiffs made certain allegations of fraud against the defendant no.2 in the process of acquiring title in the suit property but no case of fraud was made out so far as the deed of 1944 is concerned in the original plaint.

38) The plaintiffs in their application for amendment stated that due to hurriedness some relevant facts were omitted by mistake in the original plaint but whenever such mistake was detected, the plaintiffs immediately come forward with this application for amendment for challenging the said deed of 1944 on the ground of fraud.

39) Mr. Mukherjee, however, contended that since allegation of fraud in execution of the deed of 1944 is completely absent in the original pleading, the plaintiffs cannot be permitted to introduce such plea of fraud by amendment of plaint. He has also relied upon a decision of the Hon'ble Supreme court in the case of the municipal corporation of Greater Bombay –Vs- Lala Pancham & Ors. (supra) in support of his aforesaid contention. On consideration of the said decision, this Court is of the view that the principle laid down in the said decision has no application in the instant case as that was a case where an entirely new case was made out in amendment in the appeal stage and the plaintiffs did so at the suggestion of the Court, but in the instant case, neither

any new case was sought to be made out nor such amendment was prayed for at the suggestion of the Court. There cannot be any hard and fast rule that allegation of fraud cannot be introduced by amendment under any circumstances when slightest indication of fraud is not given in the original plaint. Say for example, if the fraud is discovered subsequent to the filing of the suit, can it be said that the plaintiffs are debarred from pleading fraud by way of amendment. If such a principle is introduced then trial will be frustrated to the benefit of the person who is guilty of commission of fraud.

40) Since fraud vitiates everything, fraudulent activity can be challenged at any stage of the said proceeding and even in any collateral proceeding when such fraud is detected. In the instant case, the allegation of fraud is of such nature, which if can be proved, will make the deed of 1944 void and as such, the proposed amendment has a direct impact on the disputed question of rights of the parties. Such amendment cannot be refused.

41) Of course, if the plaintiffs do not come forward to challenge any fraudulent activity of the defendants within the period limitation, then their prayer for amendment may be refused. But in the instant case, the plaintiffs have filed the said application for amendment to challenge the deed of 1944, within the period of limitation i.e. within three years from the date of discovery of such fraud. As such, the plaintiffs' prayer cannot be rejected, particularly for the reason that the proposed amendment is directly linked with the plaintiffs' prayer for declaration of his title.

42) Thus, relying upon the decision of the Hon'ble Supreme Court in the case of Jai Jai Ram Manoharlal –Vs- National Building Material Supply, Gurgaon (supra), this Court holds that the

proposed amendment cannot be rejected as the amendment is not only necessary for complete adjudication of the dispute involved in the suit, but also such amendment, if allowed, will not cause any injustice to the other side.

43) Delay

I have already indicated above that delay alone cannot be a ground for rejection of the prayer for amendment if the amendment is otherwise necessary as was held by the Special Bench of the Hon'ble Supreme Court in the case of Surendra Kr. Sharma –Vs- Makhan Singh (supra).

44) I have already held that the proposed amendment is necessary for complete adjudication of the dispute involved in the suit. As such, such amendment cannot be refused even if there is delay. In the instant case, however, this Court does not find any delay on the part of the plaintiffs in applying for such an amendment as the plaintiffs took steps for introducing those facts by way of amendment within the prescribed period of limitation. As such, this Court does not find any delay on the part of the plaintiffs in applying for such amendment.

45) How far the Court can assess the merit of the suit at the stage of considering the plaintiffs' prayer for amendment.

I have already held in an unreported decision in the case of C.O. No.1377 of 2008 Sri Ranjan Neogi -Vs- Sri Sauma Darshan Maitra that maintainability of the suit and/or merit of the suit is not a matter for consideration at the stage of considering the plaintiffs' prayer for amendment of plaint. As such, this Court holds that while considering the plaintiffs' application for amendment of plaint, this Court cannot scan each and every line of the plaint to find out the merit of the said suit. Thus,

whether Sanatan was in actual possession of the suit property as on 15th April, 1955 or not and further whether Sanatan, in fact, retained the suit property in khas or not and further whether Sanatan had any saleable interest in the suit land after the date of vesting under the Estate Acquisition Act or not and further the effect of not recording the name of Sanatan in the record of rights prepared under the Estate Acquisition Act, etc. are all matters for consideration in the suit itself and such consideration cannot be preempted by this Court at this stage of considering the plaintiffs' application for amendment of plaint.

46) Conclusion

The plaintiffs' prayer for amendment is, thus, allowed. The plaintiffs are thus permitted to carryout such amendment in the plaint within two weeks from date. The plaintiffs are directed to serve copy of the amended plaint upon the defendants and/or their learned Advocate on record in the Court below within a week thereafter. Leave is granted to the defendants to file written statement to the amended plaint within four weeks from the date of service of copy of amended plaint upon them.

47) The impugned order is, thus, set aside. The revisional application is, thus, allowed.

48) Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.

(Jyotirmay Bhattacharya, J.)