

GAHC010202722022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/236/2022

MD. ELAR HUSSAIN AND ANR
S/O- LATE ABDUL HAMID

2: MD. AKHTAR HUSSAIN
S/O - LATE ABDUL HAMID
BOTH ARE RESIDENTS OF ,GD ROAD
WARD NO-5, TEZPUR TOWN
P.O AND P.S- TEZPUR, DIST- SONITPUR
ASSAM, PIN-78400

VERSUS

MUSSTT WAHIDA RAHMAN AND 6 ORS
D/O- LATE ATAUR RAHMAN

2:MUSSTT SAZIDA RAHMAN, D/O- LATE ATAUR RAHMAN

3:MUSTT ALEYA RAHMAN
W/O LATE MUKIBUR RAHMAN

4:MD. ELTAF RAHMAN
S/O- LATE MUKIBUR RAHMAN

5:MD. IMTIAZ RAHMAN
S/O- LATE MUKIBUR RAHMAN

6:MD. HANISUR RAHMAN, S/O- LATE MUKIBUR RAHMAN

ALL ARE RESIDENTS OF G.D ROAD
WARD NO-5
TEZPUR TOWN
P.O AND P.S- TEZPUR
DIST- SONITPUR

ASSAM PIN-784001

7:MD. NAJIM AHMED
S/O- LATE KARIM AHMED
EX POLICE LINE
WARD NO-10
TEZPUR TOWN

P.O- TEZPUR
P.S- TEZPUR

DIST- SONITPUR
ASSAM
PIN-78400

Advocate for the Petitioner : MR B PUSHILAL

Advocate for the Respondent : MS S S ZIA (R1, R2, R4-R7)

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

Date of Hearing & date of
Order : 15.2.2023

JUDGMENT AND ORDER(ORAL)

Heard Mr. B. Pushilal, learned counsel for the petitioner. Also heard Ms. S.S. Zia, learned counsel for the respondent.

2. Present petition is filed assailing the order dated 27.7.2022 passed by learned Munsiff No.2, Sonitpur , Tezpur in Misc(J) Case No. 55/2022 arising out of T. S. No. 32/2011.

3. The aforesaid Misc.Case was registered on an application preferred by the plaintiffs in Title Suit No. 32/2011 under Order 6 Rule 17 of the CPC to amend

the plaint. The petitioner/plaintiff projected that during the pendency of the suit the plaintiff petitioners were evicted from the Schedule-B property and accordingly, sought for amendment to the following effect:

(i) That in page No. 3 in the right column line of 1 after the word "declaration" a new phrase "recovery of possession, cancelation of mutation order and kheraji patta and partition" needs to be inserted by way of amendment.

(ii) That in page No. 7 after paragraph 13 new paragraphs 13 A and 13 B needs to be inserted as under:

"13 A That on 5.8.2018 during pendency of the suit in a most illegal manner Opp. Parties/ Defendants with the help of their men, servants, agents etc., forcibly took possession of the Schedule B land mentioned in the plaint."

"13 B. That since the Defendants have taken forcible possession of the schedule B land as such the Hon'ble Court needs to restrain and prohibit the Defendants, their men, agents etc., from undertaking any types of constructions over the Schedule B land."

(iii) In page No. 7 in paragraph 14 after the words Proforma Defendants a new sentence "recovery of possession, cancelation of mutation order and Kheraji patta and partition" needs to be inserted by way of amendment.

(iv) That in page No. 8 in prayer section the following amendments are required:

In prayer No. I) after the Schedule B land new sentence " recovery of possession, cancelation of mutation order and kheraji patta and partition" needs to be inserted by way of amendment."

4. The respondents herein objected to such amendment basically on the ground that the amendment sought to be made is nothing but an afterthought

and that the amendments are sought at a very belated stage and at the stage of cross examination of PWs. It is the further objection that, the foundation that the petitioners are not in possession over the schedule- B is already available in the plaint as well as in the written statement filed by the defendant and admittedly the PW 1 during the cross examination in the year 2018. It was further re affirmed that the plaintiffs are not in possession over the suit land and thereafter the plaintiffs have become wiser and filed the amendment petition in the year 2021. Therefore such amendment has rightly been rejected by the learned Court below.

5. After hearing the parties the learned court below has rejected the prayer of amendment basically on the following counts:

- (i) It appeared to the learned trial court that the proposed amendment is not very much vital or highly required for proper adjudication of the main suit as the case was at the stage of PWs .
- (ii) The plaintiffs have failed to show that they are restrained to file the amendment petition because of such exceptional circumstances.
- (iii) Being an old pending case the prayer of amendment at the stage of cross examination of PWs cannot be allowed as the same will bring prejudic to the case of the opposite parties.

6. Mr. Pushilal, learned counsel for the petitioners assailing the aforesaid order submits

- (i) The cause of action for making the prayer of recovery of

possession has arisen during the pendency of the suit i.e on 7.8.2018 and only the nature of relief is sought to be changed in the changed circumstances inasmuch as there is already a prayer for declaration of right, title and interest.

(ii) As the petitioners were allegedly dispossessed during the pendency of suit, therefore it has become necessary to amend the plaint as prayed by the plaintiffs and the same will not change the nature and character of the suit rather, if the amendment is not allowed the plaintiff will have to file another suit for recovery of possession relating to the same property which will lead to multiplicity of litigation.

(iii) Therefore, the learned trial court has dismissed the petition in ignorance of settled proposition of law. In support of such submission Mr. Pushilal, learned counsel relies on the judgment of Hon'ble Apex Court in the case of ***Sampath Kumar Vs Ayyakannu and another*** reported in ***(2002)7 SCC 559*** and the judgment of Hon'ble Apex Court in the case of ***Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited & anr*** reported in ***SLP(C) No 22443 of 2019***.

(iv) The cause of action arose itself during the pendency of the suit, therefore the findings of the learned court below that amendment was filed at the time of cross examination of DWs and that it was belated stage is not sustainable under the law.

7. Per contra Ms. Zia, learned counsel for the respondent submits that:

(i) It was well known to the petitioners that they are not in

possession of suit land, which is reflected at the paragraph 11 of the plaint as well as at paragraph 31 of the written statement. Therefore the contention of the plaintiffs that they were evicted during the pendency of the suit is not believable at all and therefore the court has rightly rejected such prayer.

(ii) The application itself shows that the whole basis of filing the amendment petition is the cross-examination of PW 1, which was done on 7.8.2018 and the amendment application has been filed on 24.2.2022. Therefore, it is nothing but an afterthought and the plaintiffs have failed to explain such delay and therefore the learned trial court has rightly dismissed such petition.

(iii) Relying on the ***Life Insurance Corporation of India*** (supra) Ms. Zia further contends that the amendment sought to introduce is not any additional or a new approach and not necessary for the proper determination of the suit.

8. This court has given anxious consideration to the submission advanced by learned counsel for the parties. Perused the materials available on record including the plaint, written statement, the application for amendment and objection thereto.

9. It is well settled that an amendment whereby it is proposed to introduce a cause of action which has arisen to the plaintiffs during the pendency of the suit, if not allowed will lead to multiplicity of proceeding, when the basic structure of the suit is not altered by the proposed amendment.

10. In the case of ***Sampat Kumar*** (supra) also, the plaintiffs were evicted during the pendency of the suit. Accordingly, amendment in the prayer for

recovery of possession was made, which was rejected and ultimately the Hon'ble Apex Court held that to avoid multiplicity of litigation, when the basic structure of suit is not altered through an amendment, the same should be allowed even at a belated stage. Recently the Hon'ble Apex Court in fact, had laid down certain guidelines in the case of ***Life Insurance Corporation*** (supra) at paragraph 17, incorporating certain principles when the amendment should be allowed.

In sub-Para 2 of paragraph 17 , the Hon'ble Apex Court held that all amendments are to be allowed which are necessary for determining the real question in controversy, provided it does not cause injustice or prejudice to the other side.

The Hon'ble Apex Court further went to held that it is mandatory, as is apparent from the use of word "shall" in later part of Order 6 Rule 17 of the CPC.

In Sub-Pare (iii) of paragraph 17, the Hon'ble Apex Court, amongst other, held that the prayer of amendment is to be allowed to avoid multiplicity of proceeding, provided amendment, does not result in injustice to the other side or by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the parties which confers a right on the other side and the amendment does not raise a time barred claim resulting in divesting of the other side of the valuable accrued right.

11. In view of aforesaid settled proposition of law now let this court consider whether the learned trial court has failed to exercise its jurisdiction in ignorance of such settled proposition of law by causing injustice to the present petitioners.

12. The suit was filed for declaration of right, title and interest over the suit land. In the plaint the petitioner has contended that they are title holder of the suit land and the respondent had tried to obtain construction permission from the competent Municipal Board without being any right, title of interest. It is their case that during the pendency of suit, the plaintiffs were disposed and accordingly sought for amendment.

13. As discussed hereinabove and from the perusal of the materials, such as the pleading in plaint and written statement, it is clear that the suit was for right, title and interest. The plaintiffs' claim their right over the suit land and specifically claims that they are dispossessed during the pendency of the suit.

14. It is also well settled that while dealing with an amendment petition the court should not go into the merit of the claim made in the proposed amendment. In the present case, whether the plaintiffs have been evicted during the pendency of the suit or they were evicted prior to the filing of the suit, is to be determined, in the suit itself, after appreciation of proper evidence that may be led by the parties. The amendment so sought is only for recovery of the possession of the suit land on the basis of a cause of action which has arisen, allegedly during the pendency of the suit .

15. Therefore in the backdrop of aforesaid proposition of law as well as the fact of the present case, this court is of the considered opinion that if the amendment is not allowed that will lead to multiplicity of litigation and shall not result in injustice to the other side, inasmuch as the respondent may be given liberty to file additional written statement to the pleadings so made.

16. The materials also reflects that by way of the amendment the plaintiffs had not withdrawn any clear admission made by the plaintiffs, which confers

any right upon the respondent, though Ms. Zia, learned counsel for respondent has argued relying on the paragraph 11 of the plaint that the petitioners have admitted possession of the defendant over schedule-B land. However, at paragraph 11 of the plaint the plaintiffs have admitted possession over the schedule-B land, so far the same relates to proforma defendants. There is no clear admission that the defendants are having possession over the schedule land.

17. This court, after perusal of the pleadings, as discussed herein above, is also of the prima facie opinion that the claim sought to be introduced, through the amendment is also not time barred inasmuch as, the allegation is that they were evicted during the pendency of the suit and it is in the year 2018. However, this court has not and cannot enter into and finally determine such issue whether the claim sought to be made are time barred, which is a mixed question of fact and Law, to be determined during the trial.

18. In view of the above, the present revision petition is allowed by setting aside the impugned order dated 27.7.2022 passed by the learned Munsiff No. 2, Sonitpur, Tezpur in Misc (J) Case No. 55/2022 arising out of T.S. No. 32/2011 and allow the amendment as sought for. However, after the amendment is made, the defendants be given a liberty to file additional written statement, if so advised and the parties to lead fresh evidence, if so desires.

JUDGE

Comparing Assistant