

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

C. O. No. 1393 of 2021

Pintu Mondal

-Vs.-

Somnath Dey & Ors.

For the petitioners : Mr. Asis Ch. Bagchi, Advocate
Mr. Chirantan Sarkar, Advocate

For the opposite parties : Mr. Satrajit Sinha Roy, Advocate

Heard on : 28.09.2021

Judgement on : 28.09.2021

Hiranmay Bhattacharyya, J.:

Leave is granted to the learned advocate on record for the petitioner to amend the Cause Title of the instant Civil Order, insofar as the description of the parties is concerned, here and now.

The defendant in a suit for eviction under Section 6 of the West Bengal Premises Tenancy Act, 1997 has filed the instant application under Article 227 of the Constitution of India challenging a portion of the order no. 45 dated July 13, 2021 passed by the learned Civil Judge, Junior Division, 1st Court, Katwa in Title Suit No. 80 of 2016.

By the order impugned, the learned Trial Judge rejected the application under Order VI Rule 17 of the Code of Civil Procedure filed by the defendant/petitioner herein for amendment of the written statement. However, liberty was granted to the defendant to file the same after curing the defects.

Being aggrieved by the portion of the order granting liberty to the defendant to file a fresh application after curing the defects, the plaintiff/ opposite party no. 1 herein filed a Civil Order No. 1302 of 2021. The said Civil Order was dismissed by a coordinate Bench by an order dated July 27, 2021. Subsequently, the present petitioner filed the instant application challenging the other portion of the order whereby the prayer for amendment of the written statement was rejected.

Mr. Bagchi, the learned senior advocate for the petitioner submits that the order passed by the learned Trial Judge on July

13, 2021 did not merge with the order dated July 27, 2021 passed in CO 1302 of 2021 as the same was dismissed at the threshold without even issuing any notice or a rule upon the petitioner herein.

In support of such submission he relied upon a judgment of the Hon'ble Supreme Court of India in the case of *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapa*, reported at AIR 1970 SC 1.

He further submits that the challenge in the earlier Civil Order was restricted only to the issue of grant of liberty to the defendant to file a fresh application and there was no occasion on the part of the coordinate Bench to enter into the issue with regard to the prayer for amendment of written statement. Thus it is submitted that the instant Civil Order is maintainable.

Insofar as the prayer for amendment is concerned, Mr. Bagchi submits that the application for amendment of the written statement was filed immediately after it came to the knowledge of the petitioner that a tenant has vacated the shop room which is a part of the same building and surrendered the possession in favour of the landlord during the pendency of the suit. Mr. Bagchi submits that such subsequent event ought to

have been allowed by the learned Trial Judge, this being a suit for eviction, *inter alia*, on the ground of reasonable requirement.

Mr. Sinha Roy, the learned advocate for the opposite party no. 1 submits that the instant application is not maintainable in view of the fact that the order impugned was assailed by the plaintiff by filing a Civil Order No. 1302 of 2021 and a coordinate Bench after considering the order impugned dismissed the said application. According to Mr. Sinha Roy, the order passed by the learned Trial Judge merged into the order passed by the coordinate Bench on July 27, 2021 in CO 1302 of 2021 and as such the selfsame order cannot be subjected to a fresh challenge at the instance of the defendant. He further submits that the instant Civil Order is also barred by the principles of *res judicata* or constructive *res judicata* as the issues decided by the impugned order has already been finally and conclusively decided in CO 1302 of 2021..

He also submits that when the coordinate Bench exercising the supervisory jurisdiction under Article 227 of the Constitution of India has decided the matter, the same cannot be reopened again at the instance of the present petitioner by filing a separate application. Thus according to him, the present

application under Article 227 of the Constitution of India is not maintainable.

Mr. Sinha Roy submits that the petitioner herein filed this application for amendment only for the purpose of delaying the suit for eviction as the said application was filed intentionally by the defendant after the closure of evidence of the sole witness of the plaintiff. Mr. Sinha Roy relies upon the judgment in the case of *Surya Dev Rai Vs. Ram Chander Rai & Ors.*, reported at (2003) 6 SCC 675 in support of his argument that the High Court can exercise jurisdiction under Article 227 to keep the subordinate Courts within the bounds of their jurisdiction.

I have heard the learned advocate for the parties and perused the materials on record.

Since an objection as to the maintainability of the application under Article 227 of the Constitution of India has been raised by the opposite party no. 1 herein, I propose to decide such issue before taking up the other issue.

It is evident from the order dated July 27, 2021 passed by the coordinate Bench in CO 1302 of 2021 that the challenge was with regard to granting liberty to the petitioner herein to file a fresh amendment application on the ground that there was a

technical defect in the amendment application already filed by the petitioner herein.

After hearing the learned advocate for the petitioner and without even issuing notice or a rule upon the petitioner herein who was the opposite party in CO No. 1302 of 2021, the coordinate bench dismissed the said Civil Order.

The order impugned has two parts. The first part relates to rejection of the application for amendment of the written statement. By the other part, liberty was granted to the defendant to file a fresh application for amendment. The landlord/plaintiff/opposite party no. 1 herein who was the petitioner in CO 1302 of 2021 could not be said to be a person aggrieved insofar as the rejection of the application for amendment of written statement is concerned. He was only aggrieved against granting liberty in favour of the defendant to file a fresh application and accordingly assailed the said order only on such ground.

The order dated July 27, 2021 has to be read in the light of the challenge thrown to the impugned order and the affirmation of the order no. 45 dated July 13, 2021 is to be construed as an affirmation of the portion of the said order whereby liberty was

granted to the defendant to file a fresh application. The issue of amendment of written statement was not directly and substantially in issue in CO 1302 of 2021. The said issue being decided in favour of the plaintiff by the learned Trial Judge, the same could not be a ground of attack in the earlier Civil Order. Since no notice was issued to the defendant in the earlier Civil Order and no challenge being thrown earlier to the issue of amendment, the same also could not have been taken as a ground of defence by the plaintiff in the earlier Civil Order.

For the reasons as aforesaid, this Court is unable to accept the argument of the plaintiff/opposite party no. 1 that the instant Civil Order is barred by the principles of *res judicata* or constructive *res judicata*. Furthermore, since the Civil Order No. 1302 of 2021 was dismissed without issuing any notice upon the opposite party of the said civil order, the order no. 45 dated July 13, 2021 passed by the learned Trial Judge cannot be said to have merged with the order passed in CO 1302 of 2021 in view of the judgment in the case of *Shankar Ramchandra Abhyankar (Supra)* wherein it has been held that a judgment pronounced by the High Court in the exercise of its appellate or revisional

jurisdiction after issue of a notice and a full hearing, in the presence of both the parties would replace the judgment of the lower Court thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below.

In the instant case no notice or rule was issued upon the defendant in the earlier Civil Order and the same was dismissed only upon hearing the plaintiff. Thus, the impugned order cannot be said to have merged into the order dated July 27, 2021, in view of the judgment of the Hon'ble Supreme Court of India in *Shankar Ramchandra Abhyankar (Supra)*.

There is, however, no quarrel to the proposition of law laid down by the Hon'ble Supreme Court in *Surya Dev Rai (Supra)*. But the said decision is of no assistance to the plaintiff/opposite party no. 1 in the instant case.

Thus, in the considered opinion of this Court, the instant civil revisional application is maintainable at the instance of the defendant insofar as the rejection of the prayer for amendment of the written statement is concerned.

The instant suit is for eviction of a premises tenant, *inter alia*, on the ground of reasonable requirement. In a suit for eviction filed under Section 6(1)(d) of the West Bengal Premises Tenancy Act, 1997 the burden of proof lies upon the landlord/plaintiff to prove that the premises is reasonably required for his own occupation and also that the landlord is not in possession of any suitable accommodation within the same municipal corporation or municipality or in any other area within 10kms. from such premises where the Act extends.

In the instant case, the defendant attempted to incorporate the fact that during pendency of the suit one of the tenants of the said building has vacated and delivered possession in favour of the plaintiff/landlord by way of amendment of his pleadings.

In the application, it has been stated that such application was filed immediately after coming to know of such fact. The plaintiff/landlord contested the said application by filing a written objection specifically denying the fact that one of the tenants have vacated the suit property during the pendency of the said suit.

The learned Trial Judge rejected such application only on the ground that specific date, month or year of such vacation

and acquirement of possession of the room has not been specifically stated in the said amendment application. In order to get a decree for eviction on the ground of reasonable requirement, the onus lies upon the plaintiff to prove that he is not in possession of any other alternative, reasonable, suitable accommodation. The defendant has only tried to bring to the notice of the Court of fact that one of the tenants have in the meantime vacated. In order to contest the suit for eviction on the ground of reasonable requirement the tenant has to show that the accommodation available to the plaintiff is sufficient. For such purpose the defendant filed the amendment application. The exact date, month and year when the possession was allegedly handed over to the landlord is not necessary. The only fact relevant is whether the landlord reasonably requires the suit premises.

The truth and veracity of such claim of the tenant is to be decided after a full fledged trial. It is well-settled that pleading is not a substitute of proof. Even if, the said fact is allowed to be incorporated in the said pleadings, the defendant has to prove such fact and it is open to the plaintiff to disprove such allegations in the pleadings in accordance with law.

The proposed amendment is a subsequent event. As such the proviso to Order VI Rule 17 of the Code of Civil Procedure shall not be a bar in allowing such prayer for amendment in the instant case. The proposed amendment is necessary for the purpose of deciding the real controversies between the parties.

The application for amendment of written statement filed by the petitioner herein on June 21, 2021, stands allowed. The defendant/petitioner herein shall file the amended written statement positively on or before October 7, 2021.

Since in the meantime the evidence of the plaintiff has been closed, the plaintiff is at liberty to recall the witness for the purpose of giving evidence to contradict the statements made by the defendants in the amended written statement after the amended written statement is filed by the petitioner herein before the court below.

The revisional application being CO 1393 of 2021 thus stands allowed. The learned Trial Judge failed to exercise the jurisdiction vested in him by law. The impugned order no. 45 dated July 13, 2021 insofar as the rejection of the application for amendment of written statement is concerned suffers from infirmity and the same is accordingly set aside.

Since this is a suit for eviction, *inter alia*, on the ground of reasonable requirement filed in the year 2016, the learned Civil Judge, Junior Division, 1st Court, Katwa is requested to dispose of Title Suit No. 80 of 2016 as expeditiously as possible and preferably by the end of March 2022 without granting any unnecessary adjournments to either of the parties.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

(Hiranmay Bhattacharyya, J.)