

01.
26.11.2021
S.D.

C.O. 4027 of 2019

**Strategic Management Technology Consultants
(SMTC) represented by authorized Director**

Mr. Avijit Banerjee

Vs.

Chaya Ghosh & Ors.

Mr. Milon Bhattacharya

Ms. Sulagna Bhattacharya

...For the Petitioner.

Mr. Tarak Nath Halder

...For the Opposite

Parties.

The petitioner, as the defendant of Title Suit No. 53 of 2016 now pending in the Court of Civil Judge, Senior Division, 2nd Court, Barasat, has assailed the order dated 14.11.2019 passed by the Trial Court in the said suit whereby the prayer of the petitioner for amendment of written statement was rejected for the reason that the defendant had not exercised due diligence in taking out amendment of his written statement in the suit in respect of the facts sought to be amended vide paragraph 4 of the written statement. The learned Trial Court rejected the amendment based on the finding that such facts were disclosed and averred by the defendant in his plaint in suit for

declaration of tenancy and recovery of possession of schedule B property to the plaint in Title Suit No. 63 of 2015. The opposite party/plaintiff filed the suit for decree for recovery of khas possession of the suit property as described in the schedule to the plaint and for decree for arrear of rent of 16 months amounting to Rs.1,16,000/- together with interest @ 12% against the defendant till recovery of the amount, decree for pendente lite, damages against the defendant at the rate of Rs.500 per diem from 1.11.2015 till the disposal of the suit. The suit was being contested by the present petitioner by filing written statement denying all materials particulars made in the plaint contending *inter alia* that description of the suit property as mentioned in paragraphs 1 and 2 of the plaint by the opposite parties in their suit and the schedule of the property thereof was not at all correct as the petitioner/defendant was inducted as a tenant in respect of the entire flat on the ground floor of the suit premises no. HB-217, Salt Lake City, Sector III, Kolkata – 700106 on monthly rent basis in 2005 for the purpose of running an educational institution. The petitioner/defendant sought for amendment of para 4

of the written statements under Order 6 Rule 17 read with Section 151 CPC at the cumulative stage of the argument in the suit. Amendment sought for is to the following effect-

“Be it mentioned here that T.S. 63/2015 as referred to above is a suit for declaration of tenancy in respect of whole of the tenancy as described in schedule ‘A’ to the plaint of T.S. 63/2015 and recovery of khas possession in respect of ‘B’ schedule of the said plaint wherefrom the present defendant has been dispossession forcibly by the present plaintiffs. More over so long this defendant is not restored with peaceful possession of said dispossessed portion of the tenancy, the liability to pay rent, or any amount equivalent to rent/ or occupational charge/ damage etc does not arise at all as principle of suspension of rent and/or abatement of rent would apply.”

The prayer so made was rejected by the Trial Court on the consideration of the submission that defendant/petitioner was a tenant in respect of the suit property including other rooms in the suit building and from the schedule B property mentioned in the plaint filed by the defendant/petitioner as a plaintiff in Title Suit no. 63 of 2015 wherein the petitioner sought for recovery of possession in respect of the B schedule property mentioned in the schedule of the plaint narrating the facts as to how the petitioner was ousted from the said portion mentioned in the schedule B to the plaint.

Mr. Milon Bhattacharya, learned Senior Counsel, appearing for the petitioner submits that the learned Trial Court committed an error in finding that the fact as stated by the petitioner was not mentioned in the written statement as the fact has been well disclosed in paragraph 4 of the written statement with regard to the description of the suit property. It is submitted that the learned Trial Court has failed to consider the prejudice which may be caused to the petitioner if the proposed amendment is not allowed and further that the proposed amendment will also not change the nature and character of the suit. Therefore, learned Trial Court ought to have considered the application for amendment of the written statement. It is pointed out that particular amendment sought for in the written statement does not require any evidence at all because the basic facts are to be borne out from the record and this was not a sudden change by virtue of introducing any new facts in the matter. It is further submitted that the learned Judge has failed to appreciate the particulars of the amendment sought for in the written statement because a serious dispute or anomaly will arise at the time of execution of the

decree in both suits and to clarify the situation, an amendment was needed. As such it is submitted that there was no intentional delay or suppression of facts and so the explanation was not required to be given.

Mr. Tarak Nath Halder, learned Counsel for the opposite party on the contrary submits that the order impugned is absolutely tenable in law and in facts of the case and that amendment has been sought for at the stage of argument only to delay the trial.

My attention is invited to the provision of Order 6 Rule 17 which reads thus:-

“17. Amendment of pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

To support his contentions, reference to a decision in the Case of **Ajendraprasadji N. Pande & Anr. Vs. Swami Keshavprakeshdasji N. & Ors.** reported in **AIR 2007 SC 806** is relied by taking cue

from the observations that the proviso to Rule 17 of Order 6 is required to be taken note of in the facts of the case as the amendment sought for is at the belated stage of argument when the deposition and evidence of witnesses is already over as well the documentary evidence is already tendered.

I have respectfully gone through the decision. It appears that Hon'ble Supreme Court dismissed the application rejecting the prayer for the amendment of the pleading as three witnesses were already examined and documentary evidence were tendered in the above cited case. That apart, there is no due diligence on part of the petitioner/defendant to take out such application and thus, urged that the learned Trial Court has rightly rejected the application for amendment. Reliance is also placed in the case of **Vidyabai & Ors. Vs. Padmalatha & Anr.** reported in **AIR 2009 SC 1433** on the observation made in paragraphs 7, 8 and 14 which are reproduced hereunder for better appreciation of the case:-

“7. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition.

The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding.

14. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

Emphasising on the observation of the Hon'ble Apex Court in para 14 above noted, it is pointed out that it is for the Trial Court to first decide as to whether amendment is at all necessary to adjudicate the moot issue in the suit and further submitted that the present suit by the opposite party has been brought under Section 106 of Transfer of Property Act. So, the Trial Court is required firstly to decide as to whether there is jural relationship of landlord/tenant between the parties and secondly whether the notice under Section 106 TP Act has been duly served on the defendant/tenant.

Learned Counsel for the opposite party/plaintiff relied on a decision in the Case of **Payal Vision Limited vs. Radhika Choudhury** reported in (2012) 11 SCC 405 to contend that the opposite party as plaintiff filed the suit for recovery of possession on eviction of the defendant/petitioner herein and the suit filed is under the provision of Section 106 of Transfer of the Property Act. So, the Trial Court is only required to address two issues as to whether there is jural relationship of landlord and tenant between the parties and secondly whether the notice issued under Section

106 of the Transfer of Property Act has been duly served on the present petitioner/defendant. It has been held in the cited case that in a suit for recovery of possession from a tenant whose tenancy is not protected under the provision of Rent Control Act, all that is required to be established by the plaintiff landlord is the existence of jural relationship of landlord and tenant between the parties and the termination of the tenancy either by lapse of time or by notice served by the landlord under Section 106 of the Transfer of Property Act. So long as these two aspects are not in dispute, the Court can pass a decree in terms of Order 12 Rule 6 of the CPC.

Thus, by referring to the above-cited decisions, it is urged on behalf of the opposite party that the revisional application is not maintainable and is liable to be dismissed.

Mr. Milon Bhattacharya, learned senior Counsel, for the petitioner submits that the Civil Court has wide power to apply its discretion in allowing amendment at any stage of the suit. It is also submitted that any stage of the suit means that so long the judgment is not delivered, the stage of suit remains open for discretion

of the Court to consider the amendment of the pleading. There is no quarrel to such a submission.

To fortify his stand, reference to **Baldev Singh & Ors. Vs. Manohar Singh & Anr.** reported in (2006) 6 SCC 498 is made relying on the observation in paragraphs 9, 15 and 17 which are quoted herein for profitable consideration.

“9. Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings which provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. A bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the Court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 of the CPC it cannot be doubted that wide power and unfettered discretion has been conferred on the Court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the Court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the Court shall allow amendment of pleadings if it finds that delay in disposal of Suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act, 2002 a proviso has been added to Order 6 Rule 17 which restricts the Courts from permitting an amendment to

be allowed in the pleadings either of the parties, if at the time of filing an application for amendment, the trial has already commenced. However, Court may allow amendment if it is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. So far as proviso to Order 6 Rule 17 of the Code of Civil Procedure is concerned, we shall deal with it later.

15. Let us now take up the last ground on which the application for amendment of the written statement was rejected by the High Court as well as the Trial Court. The rejection was made on the ground that inconsistent plea cannot be allowed to be taken. We are unable to appreciate the ground of rejection made by the High Court as well as the Trial Court. After going through the pleadings and also the statements made in the application for amendment of the written statement, we fail to understand how inconsistent plea could be said to have been taken by the appellants in their application for amendment of the written statement, excepting the plea taken by the appellants in the application for amendment of written statement regarding the joint ownership of the suit property. Accordingly, on facts, we are not satisfied that the application for amendment of the written statement could be rejected also on this ground. That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides

that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted herein after, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings.”

Thus, it is well settled that an amendment of plaint and amendment of a written statement are not necessarily governed by exactly the same principle, but the general principle is certainly common to both. But the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. It is pointed out that Hon’ble Apex Court in the above cited decision allowed the amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers

wide power and unfettered discretion to the Court to allow an amendment of a written statement at any stage of the proceedings. It has also been observed that commencement of trial as used in provision to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of the witnesses, filing of documents and addressing of arguments, as such, it is submitted even at the stage of argument, the petitioner has right to seek amendment of his pleadings if required in the interest of justice or for the adjudication of the controversy arising out of the pleadings between the parties and the amendment be liberally allowed and the question of prejudice is also required to be judged by the Trial Court.

With regard to the stage of the suit and the commencement of the trial, learned counsel for the petitioner relied on a Division Bench judgment of this Hon'ble Court in the case of **Sree Sree Iswar Radha Behari Jew & Sree Sree Iswar Salgram Jew represented by Basudeb Das vs. Malati P. Soni** reported in **2019 (3) CLJ (Cal) 77** wherein reference to a question was raised for decision whether in view of

Vidyabai & Ors. (supra), commencement of trial as envisaged in the proviso to Order VI Rule 17 of the CPC, would mean the date of first hearing, that is the date of framing of issues, or the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. This question was answered to the effect that the expression “Commencement of Trial” in the proviso to Order 6 Rule 17 of the CPC would imply the date when the Court first applies its mind after the affidavit of evidence is filed and when the first witness proves his affidavit of evidence or such witness seeks to prove a document for it to be tendered in evidence or the cross examination of such witness begins, whichever is earlier. It has been held that the proviso sets out a jurisdictional precondition for the exercise of an authority to allow an amendment. Ordinarily, Courts have been liberal to allow pleadings to be amended at any stage so that the real disputes between the parties may be determined and there is no multiplicity of judicial proceedings. However, for several decades the provision permitting amendment has been misused to stall a worthy claim or to harass the other side. The proviso now leaves

very little room for the Court's discretion. The only element of discretion is the subjective satisfaction of the Court that in seeking amendment was not by design and that such delay was occasioned despite due diligence on the part of the applicant. Thus, learned counsel for the petitioner relied on the various paragraphs being 12, 14, 16, 17, 18 and 20 to contend that the amendment can be allowed at any stage of the suit.

On behalf of the petitioner reliance is also placed on a decision of **Usha Devi vs. Rijwan Ahamd & Ors.** reported in (SC; Suppl.) 2008 (2) CHN 7 to the observation in paragraphs 9 and 10 which reads thus:-

"9. Mr.Bharukha, on the other hand, invited our attention to another decision of this Court in Baldev Singh & Ors. Vs. Manohar Singh & Anr. [2006 (6) SCC 498]. In paragraph 17 of the decision, it was held and observed as follows : !!Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of

arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.[¶] Mr. Bharukha also invited our attention to a three-Judge Bench decision of this Court in *Sajjan Kumar vs. Ram Kishan* [2005 (13) SCC 89]. In this decision too the proposed amendment related to correction of the description of the suit premises in the plaint. The amendment was sought on the plea that the description of the property given in the rent note itself was incorrect and the same description was repeated in the plaint and there would be complications at the stage of execution to avoid which the description of the suit premises as given in the plaint needed to be corrected. Another similarity with the case in hand was that the prayer for amendment was opposed by the defendant-respondent on the principal ground that although the defendant had taken the plea in the written statement itself that the suit premises were not correctly described, yet the plaintiff-appellant proceeded with the trial of the suit and did not take care to seek the amendment at an early stage. The trial court rejected the prayer for amendment and the High Court dismissed the civil revision against the order of the trial court. Allowing the prayer for amendment this Court in paragraph 5 of the decision observed as follows :

“Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so

when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit.”

10. In view of the decision in Sajjan Kumar, we are of the view that this appeal too deserves to be allowed. We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in Sajjan Kumar and following that decision the prayer for amendment in the present appeal should also be allowed.”

It emerges from the above observations that it is true that the plaintiff/appellant ought to have been diligent in seeking the amendment in the pleading at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still the Hon’ble Supreme Court was of the opinion that the proposed amendment was necessary for the purpose of bringing to the plaintiff that real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of

the plaintiff/appellant succeeded in the suit. In these set of facts, the amendment was allowed by the Hon'ble Apex Court.

In the case in hand, question is whether the averments sought to be amended in paragraph 4 of the written statement is at all necessary for adjudicating the real controversy arising out of the pleadings. I understand from the decision in **Baldev Singh & Ors.** (supra) that by the Civil Procedure Code (Amendment) Act, 2002 proviso has been added to Order 6 Rule 17 which restricts the Court from permitting an amendment to be allowed in the pleadings of either of the parties if at the time of filing of an application for amendment, the trial has already commenced. However, the Court may allow amendment if it is satisfied that despite due diligence the party could not have raised the matter before the commencement of the trial. In the cited decision, the Hon'ble Court took note of the well-settled proposition that an amendment of the written statement are not necessarily governed by exactly the same principle as in case of amendment of plaint. In the cited case, the amendment of the written statement was considered as

the Court has wide power and unfettered discretion to allow the amendment in the written statement in any stage of the proceedings, but it was allowed because the trial had not even commenced. Therefore, the ratio of decision in the cited case is not within the facts and circumstances of the instant case and is quite distinguishable. No doubt, the Court can apply its discretion in allowing the amendment at any stage of the suit, but the amended provision as to the proviso to Order 6 Rule 17 are necessarily to be adhered.

Having heard rival contentions and in the above context, this Court finds that the petitioner had every knowledge from the beginning about the fact which is sought to be amended in a suit of eviction filed by the plaintiffs/opposite parties herein. That apart, I am of the considered view that amendment sought for is not necessary for adjudication of the real controversy arising out of the pleadings between the parties as on the principle of law, the Court is required to entertain two issues in a suit under Section 106 of the Transfer of Property Act that to decide whether there is a jural relationship between landlord and tenant and secondly whether the tenancy has been determined by

efflux of time or notice duly served upon the defendant/tenant. However, it is made clear that since the petitioner has already filed a suit for declaration of tenancy in respect of the whole of the flat on the ground floor of the premises and further relief, both the suit should be heard analogously or simultaneously before by the Trial Court. This Court finds that impugned order rejecting the prayer for amendment at the stage of argument is substantially correct because bare reading of the provision of Order 6 Rule 17 of Civil Procedure Code reflects that rule is to be applied mandatorily and the Court has no jurisdiction at all to allow amendment in absence of jurisdictional facts in view of proviso clause to Order 6 Rule 17, although, the Civil Court has absolute discretion to allow amendment at any stage of the suit, but an applicant has to explain that despite due diligence, such amendment could not be made at an early stage.

Accordingly, the revisional application being C.O. 4027 of 2019 is dismissed, however, without any order as to cost.

All parties shall act in terms of copy of this order
downloaded from Official Website of this Court.

(Shivakant Prasad, J.)