

15.02.2022
Ct. 21
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C.O. 1335 of 2021
(Via Video Conference)

Asit Baran Ghosh
-Vs-
Sri Ashes Kumar Ghosh & Anr.

Mr. Souradipta Banerjee,
Ms. Fatima Hassan,
Ms. Damayanti Kundu,

... for the petitioner

Mr. Kushal Chatterjee,
Mr. Debrup Chowdhury,
Mr. Abirlal Chakraborty,

... for the opposite parties

The present application under Article 227 of the Constitution of India is at the instance of the defendant who is facing eviction from the suit property being aggrieved by the order dated 15.03.2021 passed by the learned Judge, 2nd Bench, City Civil Court at Calcutta on 15.03.2021 in Title Suit No. 1746 of 2018 whereby the amendment petition filed by him was rejected with the finding no amendment can be entertained after the trial and when there is no utterance in the amendment petition that in spite of due diligence he could not raise the matter prior to the commencement of the trial.

It has been contended by learned Advocate for the petitioner, that the petitioner is a Cancer patient that he

could not apprise his previous Advocate about all the facts and circumstances of the case along with documents due to his treatment in different hospitals and due to mental disturbances. That on appointment of a new counsel it was found omission of material facts in the W.S. In order to incorporate such material facts the defendants has filed an amendment application after the framing of issue but before recording of the evidence of the witnesses, but learned court below not only failed to take into consideration such facts but also the settled principle that amendment can be allowed at any stage and provision contained in Order 6 Rule 17 of C.P.C. is directory and not mandatory.

He in support of such contention referred to Sree Sree Iswar Radha Behari Jew v. Malati P. Sone reported in AIR 2019 Calcutta 131, where Hon'ble Division Bench of this Hon'ble High Court held that " There is a distinction between when the trial stage commences in the life of a civil suit and when trial actually commences within the meaning of the two relevant expressions used in the proviso to Order 6 Rule 17 of CPC. Ordinarily, the trial stage commences in a suit immediately upon issues being determined. However, it is not immediately thereupon that the trial in a suit commences in right earnest and the commencement of the trial is only when any witness takes to the box, whether to prove his affidavit of evidence or to prove any document to be

tendered into evidence or to face any cross-examination for, it is at this stage that the Court applies its judicial mind to examine the evidence or to consider whether a particular document is to be received in evidence or to consider the permissibility of the questions put in cross-examination. It is also open to the Court to put its own questions to the witness and, when the Court does so, it surely applies its mind for the purpose of assessing the merits of the lis. If the purpose of the 2002 Amendment to the Code, in general, and to O.6,R.17 thereof, in particular, is to expedite the disposal of suits, such provision cannot be seen to encourage a multiplicity of proceedings. If a key matter that goes to the root of the claim is found to have been mistakenly not incorporated in the original pleadings and, by reason of the mandatory command in the proviso to O. 6, R. 17 of the Code, the application for amendment is not permissible to be entertained, the Court may readily accede to a prayer for withdrawal of the suit with liberty to file afresh under Order 23, 'R. 1 of the Code. However, such second bite of the cherry, so to say, would not be available to a defendant even if a key matter was not incorporated in such defendant's written statement and the bar under the proviso comes into operation. It is, thus, that the expression "in spite of due diligence" has to be read down to allow an element of discretion to come into play for the avowed

purpose "of determining the real questions in controversy between the parties" of O. 6, R.17 of the Code. But that does not imply that even if there is no plausible explanation, a key amendment applied for at a stage when the bar operates may be allowed for the mere asking. The expression "commencement of trial" in the proviso to O. 6, R. 17 of the Code 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."

Learned Advocate for the petitioner further referred to Baldev Singh & Ors. V. Manohar Singh & Anr. Reported in (2006) 6 SCC 498 and where it has been held court has been conferred with a wide power and unfettered discretion to allow amendment of pleading to a party in such manner and on such terms as it appears to the Court just and proper. That inconsistent defences can be raised in the W.S. although same may not be in case of the plaint.

On the other hand learned Advocate for the petitioner submitted that in a civil suit trial start immediately after the framing of suits. In the lower Court the case was fixed for peremptory hearing on 20.12.2019 after framing of issue the plaintiff had filed

his evidence in chief along with documents. The facts which the defendant wants to incorporate in the W.S. by way of amendment was well within his knowledge when he filed the written statement. That in order to delay the eviction case he has come with the proposed amendment. The impugned order passed by the learned Court below is just and proper.

Perused the Order 6 Rule 17 of C.P.C. and the new proviso that has been added to the rule and which specifically provides that no application for amendment of the pleadings 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 the trial.

It appears after commencement of trial no application for amendment of the pleadings shall be allowed unless the Court come to conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial.

Admittedly, the case was fixed for Peremptory hearing when the impugned order was passed and trial was not commenced as no witnesses was put to the box, in view of the finding of the Hon'ble High Court in Sree Sree Iswar Radha Behari Jew (supra) the Hon'ble Division Bench of this Court where it was held the trial is said to be commenced not after framing of issues, as held by the learned court below, but when any witness

takes to the witness box, whether to prove his evidence of chief on affidavit or to prove any documents to be tendered into evidence or to face any cross examination and at this stage the court applies its judicial mind to examine the evidence or to consider whether a particular document is to be received in evidence or to consider the permissibility of the question put in cross examination and to put question to the witness by the court for the purpose of determining the lis in merit. I find such citation was not placed before the learned court below when the amendment petition was taken into consideration and impugned order was passed.

Be that as it may, proviso to Order 6 Rule 17 of C.P.C. provides the party seeking amendment has to prove that in spite of due diligence such matter could not have raised before commencement of the trial.

The defendant to prove that in spite of due diligence he could not apprise the facts which he intend to bring by way of proposed amendment to his the then lawyer due to his terminal illness and treatment thereof in different hospitals. He has filed copy of his medical papers. The medical papers of the defendant lying in the record shows that he was suffering from serious ailment/cancer since the year 2017. Whereas, the plaintiff has filed eviction suit against him in the year 2018. So, it can be safely assume that plaintiff who was suffering from terminal disease cannot be expected to

be in sound state of mind, who in one side is undergoing treatment in different hospitals and at the same time to tackle the eviction proceeding started against him.

Perused the proposed amendment from where it is seen that he intend to incorporate those facts which appears to be vital and which is likely to affect the maintainability of the eviction suit initiated by the present plaintiff who appears to be the subsequent buyer of the property from the original owner who had filed eviction suit against Ananda Bazar Patrika Employees Co-Operative Credit Society who inducted the defendant as a sub tenant and dismissal of such Title Suit No. 229 of 1983. He wants to bring on record about another Partition suit being filed by the predecessor in interest of the plaintiffs and appointment of receiver and payment of rent to the receiver. I find, the proposed amendment is necessary for proper adjudication of the dispute between the parties and for coming to the correct finding. The order impugned is hereby set aside.

Accordingly, **C.O 1335 of 2021 is allowed.**

Connected applications, if any, are disposed of.

Interim order, if any, stands discharged.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(**Kesang Doma Bhutia, J.**)