

Ct.
No.
14 **16.9**
 2022
Item
No. 1

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION

C.O. 1647 of 2022

Dr. Tarun Kumar Maiti

-Versus-

Justice Dibyendu Bhusan Dutta (Retd.) & Anr.

Mr. Aniruddha Chatterjee

Mr. Abir Lal Chakraborti

...For the Petitioner

Mr. Piyush Chaturvedi

Ms. Susmita Pal

...For the Opposite Parties

This revisional application under Article 227 of the Constitution of India has been preferred by the petitioner challenging the order dated 20.05.2022 passed by the learned Additional District Judge, 3rd Court, Barasat, North 24 Parganas in a suit being O.S. Case No. 27 of 2014. By the order impugned the application filed by the petitioner under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure seeking amendment of the written statement was dismissed by the learned Court below.

Background facts which are necessary for disposal of the instant application may be summarized as under:

The opposite parties filed an application for grant of probate of the last holograph will and testament dated 14th April, 1990 executed by the testator Sridhar Maiti in the Court of the learned District Delegate i.e. the Court of the learned Civil Judge (Senior Division), 1st Court, Barasat and the said application was registered as Misc. (Probate) Case No. 42 of 2014.

After the petitioner made objection to the probate application challenging the genuineness of the last holograph will of the testator, the probate case became contentious and the case was registered as a suit. By order of the learned District Judge the suit was transferred to the Court of the learned Additional District Judge, 3rd Court, Barasat, North 24 Parganas and the suit was renumbered as O.S Case No. 27 of 2014.

During the pendency of the suit the petitioner filed an application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure before the learned Court below for amendment of his written statement. By order dated 14th January, 2016 the learned Court below allowed the amendment application as made by him.

Issues of the suit were framed on 9th April, 2015 and on commencement of trial evidence on the part of the opposite parties was recorded. After examination of one

witness of the opposite parties, the petitioner was searching for existing building plan for extension and/or renovation of his residential building situated at AK 58, Salt Lake, Sector-II and another residential building at 107C, Vivekananda Road, Kolkata-700006. In the process of searching, the petitioner found some documents which were lying uncared for in the personal almirah of his wife. The documents which the petitioner traced out are extremely important and relevant to substantiate the defence taken by him challenging the genuineness of the will. In order to incorporate the facts as to the said documents in the written statement the petitioner filed an another application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure before the learned Court below. But, by the aforesaid order the learned Court below rejected his application.

The learned Court below rejected the application recording the following observations:

“ It appears that the OP has earlier filed one application for amendment of written statement and now when the case is at the fag end of its trial, the OP by filing the instant application intends to take back the case to the initial stage. Moreover, in case, the contention of the OP as made in the application is accepted, there will be no end to this litigation because the OP has failed to explain

as to whether the above documents were not available with him at the time of filing written statement and at the time of filing earlier application for amendment of written statement despite due diligence. The OP has also failed to explain in the application as to how the alleged documents (which are not even filed with the application) are relevant, crucial and material for just decision of the case.”

Admittedly, after the issues were framed, the opposite parties examined one witness. This indicates that trial of the suit commenced and it proceeded substantially to some extent.

After the amendment of Order 6 Rule 17 of the Code of Civil Procedure by way of Amendment Act 22 of 2002 the amended provision now, inter alia, enjoins as under:

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.”

Mr. Aniruddha Chatterjee, learned counsel appearing for the petitioner submits that the petitioner in his amendment-application stated that after cross-examination of one witness on behalf of the opposite parties was over, the petitioner searched for his existing building sanction plan for extension and/or renovation of the residential building situated at AK 58, Salt Lake, Sector – II, but could not find out the same. However, after making further search in his another residential building at 107C, Vivekananda Road, Kolkata- 700006 he found some original documents which were lying uncared for in the personal almirah of his wife. Learned Counsel submits that the documents, the list of which is enumerated at paragraph 5 of the application, are relevant for the purpose of establishing the defence taken by the petitioner. Learned Counsel argues if an amendment of the written statement is sought for only to elaborate or amplify the defence already taken by defendant, such amendment may be allowed even though evidence on the part of the plaintiff stood closed. Learned Counsel further argues that if the facts as stated at paragraph 5 of the amendment application are introduced in the written statement by way of amendment, it will neither cause failure of justice or irreparable injury to the

opposite parties. In support of his contention learned counsel has cited two decisions i) in the case of ***State of Bihar and Others -Vs- Modern Tent House and Another*** reported in (2017) 8 SCC 567 and ii) in the case of ***Prem Bakshi and Others-Vs- Dharam Dev and Others*** reported in (2002) 2 SCC 2.

Per Contra, Mr. Piyush Chaturvedi, learned counsel appearing for the opposite parties submits that the impugned order passed by the learned Trial Court was so passed under the Indian Succession Act, 1925 and in terms of Section 299 of the Act the impugned order is appealable before this Court and not revisable. Learned Counsel emphasizes that after the trial has commenced, the amendment as sought for by the petitioner is not permissible in terms of the amended provision of Order 6 Rule 17 of the Code of Civil Procedure which is couched in mandatory form. Learned Counsel further submits that the learned Trial Court has observed that the petitioner failed to prove that after exercise of due diligence he could not find out those documents in time. Such being the factual and legal aspect, learned counsel argues that the learned Trial Court rightly rejected the amendment application. To countenance his submission learned counsel has cited a decision in the case of ***Vidyabai and Others-Vs- Padmalatha and Another*** reported in (2009) 2 SCC 409 and another decision in the case of ***Pandit Malhari Mahale***

-Vs- Monika Pandit Mahale and Others reported in ***(2020) 11 SCC 549.***

As to the first point raised by Mr. Chaturvedi it is trite to say that only the final order passed under the relevant provisions of the Indian Succession Act, 1925 is appealable before High Court.

As the facts emanate from the amendment application, it is the case of the petitioner that after the cross-examination of the first witness of the opposite parties was over, he was searching a sanction plan for the purpose of renovation of his residential building and in course of search he found out the documents as mentioned at paragraph 5 of the application which were lying uncared for in the personal almirah of his wife at his another building at 107C, Vivekananda Road, Kolkata-700006.

Perusal of the written statement, copy of which is annexed to the revisional application, shows that the petitioner alleges that the will allegedly executed by his father is false. At the time when the holograph will was allegedly executed, his father was suffering from Cerebral Stroke in head and he had no sound disposing mind at that time. As a paralytic patient he was unable to move freely and he was under the influence of his married daughter Anuradha Das and the applicants. The petitioner contends

that the documents as discovered by him after search have nexus with the defence taken by him in order to prove that the holograph will allegedly executed by his father was false and it was not a document executed out of his free will.

In the decision in the case of *State of Bihar and Others -Vs- Modern Tent House and Another* reported in (2017) 8 SCC 567 the Hon'ble Apex Court at paragraph 8 has held if the facts which are to elaborate or amplify the defence already taken by the defendant may be incorporated in the written statement by way of amendment even after trial has commenced. In the another decision in the case of *Prem Bakshi and Others-Vs- Dharam Dev and Others* reported in (2002) 2 SCC 2 the Hon'ble Apex Court at paragraph 6 has held that it is almost inconceivable how mere amendments or pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps, the converse is possible i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. However, in the decision in the case of *VidyaBai and Others -Vs- Padmalatha and Another* reported in (2009) 2 SCC 409 the Hon'ble Apex Court has held that Rule 17 under the Order 6 of the Code of Civil Procedure is couched in mandatory form. In *Pandit Malhari Mahale-Vs- Monika Pandit Mahale* (supra) the Hon'ble Apex Court has held that without any finding by

Court as to due diligence to discover the facts or documents in question, amendment under Order 6 Rule 17 should not be allowed after the trial commenced.

As stated above, the petitioner avers that after the cross-examination of the first witness on the part of the opposite parties was over he searched out the sanction plan for the purpose of renovation of his residential building firstly at his residence at AK 58, Salt Lake, Sector -II and thereafter at his residence at 107C, Vivekananda Road, Kolkata- 700006. After search at his residence at 107C, Vivekananda Road, Kolkata- 700006 he found out the documents as mentioned at paragraph 5 which were lying uncared in the almirah of his wife.

Having heard learned counsels appearing for the parties and on consideration of the facts as stated above, I feel that the petitioner in spite of due diligence could not find out the documents as mentioned in paragraph 5 of the amendment application while the trial commenced and the witness on the part of the opposite parties was being examined. At this stage, it cannot be ruled out that the facts which the petitioner intends to incorporate in the written statement have nexus with the defence as taken by him in the written statement. The facts, if introduced in the written statement, it will not change the defence of him, rather, it will elaborate or amplify the defence. I feel if the facts are

incorporated in the written statement it will not cause failure of justice or irreparable injury to the opposite parties since the opposite parties will be in a position to cross-examine the petitioner's witness on such facts/documents. Besides, the opposite parties will be at liberty to re-examine their witness on the aforesaid facts/documents.

In view of the above, the revisional application merits success and accordingly the revisional application is allowed on contest.

Order No. 64 dated 20.05.2022 passed by the learned Additional District Judge, 3rd Court, Barasat, North 24 Parganas in O.S. Case No. 27 of 2014 is set aside. The application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure filed by the petitioner is allowed. Let the written statement be amended in terms of the amendment application. The petitioner is directed to file the amended written statement in the learned Court below within such time as will be directed by the learned Court below.

In view of the amendment of the written statement, the opposite parties are at liberty to put questions to their witness on recall or re-examination on the facts/documents as introduced in the written statement by

way of amendment. As usual, the opposite parties will also have the liberty to cross-examine the witness of the petitioner on the facts/documents as stated above.

The learned Trial Judge is requested to conclude the trial and dispose of the suit within six months from the date of communication of this order.

With the aforesaid direction, the revisional application stands disposed of. No order as to costs.

Let a copy of this order be communicated to the learned Court below immediately.

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

(Rabindranath Samanta,J.)