

14.12.2022
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Ct. no. 652
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**C.O. 1992 of 2019
With
CAN 1 of 2022**

**Md. Abdus Salam Rahimi
Vs.
A.M. Abasan Private Limited & ors.**

Mr. Javed K. Sanwarwala
Mr. Shariq A. Sanwarwala ...for the petitioner

Mr. Rajdeep Bhattacharya
Mr. Shaveq Siddique ...for the opposite party

Mr. Sk. Md. Galib
Ms. Tanwishree Mukherjee ...for the Board of Auqaf

Affidavit of service filed by the petitioner, is taken on record.

Being aggrieved and dissatisfied with the order No. 41 dated 28.3.2019 passed by Waqf tribunal in suit no. 10 of 2013, the present application under Article 227 of the Constitution of India has been preferred.

By the impugned order, the tribunal was pleased to reject the petitioner's prayer for amendment of plaint under Order VI rule 17 read with Section 151 of the Code of Civil Procedure.

The petitioner contended that the petitioner filed aforesaid suit for declaration and permanent injunction and other reliefs against the opposite parties before learned Waqf tribunal. In the plaint, the plaintiff alleged that opposite party no. 1 is in wrongful and unlawful

possession of portions of Zubiada Khatoon Waqf Estate at premises no. 100 Dikusha Street (previously 22, Tiljala, 1st Lane) Kolkata. In the month of January, 2013, the petitioner found that some persons are measuring the aforesaid waqf estate and further enquiry revealed that the opposite party nos. 2 and 3 are in the process of ascertaining the boundaries of the waqf Estate vis a vis boundaries of an alleged non-existent adjoining premises no. 31/1 Tiljala Road claimed to be owned by opposite party no. 1. There is no existence of any other premises starting with number “31” abutting, adjoining, connecting on touching the alleged non-existent premises no. 31/1 Tiljala Road, Kolkata-46, said premises No. 31 falls under KMC ward no. 59, whereas Zubaida Khatoon Wakf Estate falls under KMC ward No. 64. Similarly PIN Code no. of address of said premises is 39, whereas PIN Code of said Wakf Estate is 17. The predecessor in title of the vendors of the opposite party No. 1 was a tenant in respect of portion of said wakf Estate and boundary given in the schedule of the properly mentioned in the deeds of opposite party No. 1 is incorrect and does not tally with the boundaries or with schedule of earlier documents.

The petitioner further submits that there is no mother deed of the alleged premises no. 31/1 Tiljala Road and the vendors of the opposite party no 1 claimed the property under a will executed by Tarak Nath Banerjee on 19.4.1949. He further submits title of a property cannot

be created through a will unless the testator at the time of his death had the title of such property, which can only be established through a document of title and not otherwise. The claim of opposite party no. 1 is on the basis of assessment record of Kolkata Municipal Corporation which cannot be treated as conclusive proof. The opposite party nos. 4 and 5, Mutwallis of Zubiada Khatoon Waqf Estate have not taken any step for protection and preservation of the said waqf Estate.

Plaint case is the opposite parties by their aforesaid acts cast a cloud upon the waqf estate as such the petitioner was compelled to file the aforesaid suit for protection and preservation of wakf properties. In the said suit, the petitioner also filed an application for injunction. It is alleged in order to stall the hearing of the injunction application the opposite party no. 1 took out an application challenging the maintainability of the suit on the ground that suit is barred under section 87 of the Wakf Act, 1995 because premises no. 100, Dilkusha Street, Kolkata-17 has been included in the wakf deed, the same has not find it's place in the wakf register. Learned waqf Tribunal by its order dated 28.2.2014 allowed the application of the opposite party no. 1 and dismissed the suit of the petitioner as not maintainable under Section 87 of the Waqf Act. Challenging the said order, the petitioner preferred civil revisional application before this court being C.O. 1144 of 2014 and said

application was allowed on contest by this court on 16.9.2015. The opposite party no. 1 challenging the aforesaid order dated 16.9.2015, preferred special leave petition (Civil no. 36023 of 2015 before the Hon'ble Supreme Court, which was dismissed by the Supreme Court keeping all the points open for decision as may be available to the petitioner in law.

The opposite party no. 1 ultimately filed written objection and the injunction application filed by the petitioner in the said suit was taken up for hearing after four years and was allowed on contest by the tribunal vide order dated 7.2.2018 directing the opposite party no. 1/defendant no. 3 not to create third party interest till disposal of the suit. During the hearing of the injunction application, the opposite party has taken a plea that premises no. 31/1, Tiljala Road is not mentioned in the schedule of the plaint and that premises no. 31/1 is not part and parcel of the waqf Estate but the waqf Tribunal demolished the said argument of defendant no. 3 by concluding that in the body of plaint and in the application, it is alleged that a portion of the premises no. 100, Dilkusha Road has been curved out and created a fictitious premises no. 31/1 Tiljala Road which is sought to be declared as a part and parcel of the waqf estate in the suit.

It is further alleged by the petitioner that in view of the development of premises no. 31/1 Tiljala Road by the

opposite party no. 1 and transfer of various portions of the building to various third parties during pendency of the suit and further in view of the dubious stand of opposite party no. 1 regarding existence and/ or non-existence of premises no. 31/1 Tiljala Road, it became necessary for plaintiff to bring on record those facts which came to the knowledge during pendency of the suit for better elucidation of the facts which is already on record. Petitioner submits it is necessary and essential to incorporate such fact in the body of the plaint and accordingly, the petitioner filed the aforesaid application under Order VI rule 17 of the Code of Civil Procedure for amendment. Learned tribunal by its order dated 28.3.2019 was pleased to reject the said prayer for amendment.

Learned counsel for the petitioner submits that learned tribunal has failed to appreciate that the rejection of the said amendment in plaint will amount to denial of justice and shall enable to the opposite party no. 1 of to take advantage of it's own wrongs. The tribunal failed to appreciate that the same was filed to elucidate the facts, which are already on record and to bring on record, certain events which took place during pendency of the suit. Learned trial court erred in holding that the incorporation by way of amendment would change the nature and character of the suit. On the contrary, the fact already pleaded in the plaint is required to be elucidated by way of amendment. The petitioner in this context has

relied upon two judgments, reported in **AIR 2012 SC 2831 and AIR 2018 SC 2635.**

Learned counsel for the opposite party submits that the issues have already been framed and as such the trial has already commenced and the petitioner has not shown anything that in spite of due diligence he could not bring such fact in the plaint by way of amendment before commencement of trial. Accordingly, the proposed amendment is barred under the proviso to Order VI rule 17 of the Code of Civil Procedure and if the proposed amendment is allowed, it would cause serious prejudice to the opposite party.

I have considered the submissions made by both the parties and also perused materials on record.

While disposing the injunction application the concerned Tribunal noted that in the body of plaint it is alleged that a portion of premises no. 100, Dilkusha Road has been curved out and created a fictitious premises no. 31/1 Tiljala Road which is sought to be declared as part and parcel of the waqf estate enrolled under E.C. 9858. It is also observed in the order that there is a dispute as to whether the disputed premises no. 31/1 Tiljala Road is part and parcel of the waqf estate enrolled under E.C. 9858 or not, which can only be decided on the basis of evidence in course of trial. It also appears from the impugned order that the tribunal has held that the main prayer of the plaintiff through amendment application is

to incorporate premises no. 31/1 Tiljala Road into the plaint and impleaded of the purchaser of flat of premises no. 31/1 Tiljala Road, Kolkata-46 as defendants. It is further observed in the impugned order that the premises no. 31/1 is stated to be non-existence and the same is reflected in the averments of the plaint and in the prayer of suit but as per observation of the tribunal, in the order dated 7.2.2018 the disputed premises no. 31/1 is whether part and parcel of waqf estate or not shall be decided on the basis of evidence during the course of trial.

When tribunal has specifically held that there is serious dispute between the petitioner and the opposite parties as to whether the premises no. 31/1 Tiljala Road is part and parcel of the waqf estate or not and which can only be decided on the basis of evidence during trial then it is not understandable how it can be taken into evidence by the petitioner unless there is illustrative pleading on that dispute.

In ***Mahila Ramkali Devi & others Vs. Nandram & others*** reported in **AIR 2015 SC 2270**, Apex Court held in Para 20 as follows:-

“20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.”

The ground for refusal of amendment application by Tribunal, is proposed amendment sought is contrary to the facts in the plaint because by the proposed amendment, plaintiff wishes to insert premises no. 31/1 and also wishes to implead more than 60 purchasers of flats constructed over premises no. 31/1. The other ground for refusal is such amendment prayer is premature as during trial , if plaintiff succeeded to prove that premises no. 31/1 is part and parcel of wakf Estate only then petitioner's case will stand and as such at this stage such inconsistent plea cannot be incorporated to harass a large number of public.

Moreover petitioner has specifically alleged that opposite party no. 1 by keeping petitioner's injunction application in abeyance which was disposed of after four years of filing had taken full advantage of it's own wrong of delaying the disposal of the suit had developed the portion of the wakf property by wrongly describing it as premises no. 31/1. Accordingly as per petitioner's allegation, when cause of action of said amendment arose during pendency of the suit, proposed amendment ought to have been granted because even after proposed amendment basic structure of the suit will not be changed in as much as suit will remain a suit for adjudication as to whether said premises no. 31/1 is part of wakf estate or not. It is not understandable if it is permissible to take action against purchasers by the

petitioner in a different suit, why the same relief could not be prayed for in the present suit by permitting plaintiff to incorporate the same in the plaint by way of amendment. It is needless to add that one of the main purpose for considering prayer for amendment, is to minimize litigation.

It is true that after framing of issue plaintiff has came up with the proposed amendment and proviso to order VI, Rule 17 provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. But in present case it appears that proposed amendment has been sought for elaborating the plaint case, when the evidence of the suit has not yet started and over an issue which allegedly took place during pendency of suit.

In ***Revajeetu Builders & Developers Vs. Narayanaswami and sons & others*** reported in (2009) **10 SCC 84** in Para 63 Apex Court has laid down factors to be taken into consideration while dealing with application for amendment which runs as follows:-

“63. *On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:*

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;*
- (2) whether the application for amendment is bona fide or mala fide;*
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;*

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

Accordingly as proposed amendment is required for proper and effective adjudication of the case and there is nothing to show that the application is malafide or if it is allowed it would cause such prejudice to the other side which cannot be compensated adequately in terms of money and also when proposed amendment if allowed will not change basic nature and character of suit, refusing petitioner's prayer for amendment may cause multiple litigation.

In view of above, C.O. 1992 of 2019 is disposed of. Pending application, if any, also stands disposed of.

Let the plaint be amended as per schedule of the petition. However, tribunal will give opportunity to the defendants to file additional written statement if any and if required, will frame additional issue on the said point and will make every endeavour for expeditious disposal of the suit.

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

(Ajoy Kumar Mukherjee, J.)