

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 1207 OF 2022

Dr. Madhuri Singh and another ***Petitioners***
Mr. Rajeet Roy, Advocate

-versus-

Manoranjan Dalai ***Opp. Party***
Mr. Amit Prasad Bose, Advocate

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
09.12.2022

Order No.

2.
 1. This matter is taken up through hybrid mode.
 2. This CMP has been filed assailing the order dated 15th October, 2022 (Annexure-8) passed by learned 1st Additional Civil Judge (Senior Division), Bhubaneswar in I.A. No.1 of 2017 (arising out of C.S. No.1117 of 2017), whereby an application filed by the Plaintiffs-Petitioners under Order VI Rule 17 C.P.C. for amendment of the plaint has been rejected.
 3. Mr. Roy, learned counsel for the Petitioners submits that the aforesaid suit has been filed for permanent injunction simplicitor. But the averments made in the plaint clearly disclose that the Plaintiffs have acquired title over the suit property by adverse possession. The Defendant after receipt of notice filed his written statement along with the counter claim. Thus, it necessitated the Plaintiffs to amend the plaint. Accordingly, an application under Order VI Rule 17 C.P.C. was filed by the Plaintiffs-Petitioners for amendment of the plaint. The said application was rejected vide order dated 19th June, 2018. Assailing the same, the Petitioners preferred CMP

No.1040 of 2018, which was disposed of vide order dated 12th May, 2022 (Annexure-3) with the following direction:

*“7. For this Court recording the joint submission of the learned counsel for the Parties that in the meantime, C.S. No.724 of 2012 has been disposed of by a decree on 27.3.2019, this Court permitting the Plaintiff-Petitioners to bring a formal Application on the date of appearance with service of such copy on the learned counsel for the Defendant to further amend the Plaint giving in the disposal of the above suit. In such event, such Application shall also be allowed within seven days from the date of filing of the formal Application. For the amendment involved, the Plaintiff is also directed to bring a consolidated plaint at least within seven days after service of copy of the same on the Defendant. In such event the Defendant is directed to file additional written statement within two weeks. **Considering** the suit is pending long since, the trial court is directed to dispose of C.S. No.1117 of 2017 at least within a period of nine months from the date of filing of the additional written statement.*

8. With the above order, the CMP stands disposed of.”

Accordingly, formal amendment application as well as consolidated plaint was filed. The Defendant also filed his additional written statement to the consolidated plaint. When the matter stood thus and the suit was posted for adducing evidence, the Plaintiffs realized that a prayer for declaration of title through adverse possession is required to be incorporated. As there was no specific pleading with regard to the date of entering into possession, nature and manner of possession etc., the Plaintiffs-Petitioners filed an application under Order VI Rule 17 C.P.C. to amend such pleadings and to incorporate the prayer for adverse possession. They also prayed for deleting the words ‘*until the Plaintiff is evicted with due process of law*’ from the prayer (a) of the plaint.

4. It is submitted by Mr. Roy, learned counsel for the Petitioners that pleadings with regard to adverse possession are already available in the plaint. The Plaintiff No.2, who is looking after the suit, also instructed his counsel to take plea with regard to the amendment as proposed. But due to lockdown for COVID-19, his counsel informed that such step would be taken after normal functioning of the Court commences. While preparing evidence, when it came to the notice of the Plaintiff No.2, who is looking after the suit, that steps for amendment as sought for has not been taken, the present application has been filed. Learned trial Court observing that the Plaintiffs are trying to convert a suit for permanent injunction on the ground of agreement to sale to a suit for declaration of title by adverse possession, rejected the petition for amendment. It is also observed that the amendment will change the nature and character of the suit. Further, it is observed that the fact of adverse possession having commenced from the year, 1979 cannot be said to be not within the knowledge of the Plaintiffs at the time of presentation of the plaint.

5. It is his submission that since the amendment sought for is necessary for effective and complete adjudication of the dispute between the parties, it should have been allowed. Admittedly, at the time of consideration of the application for amendment, hearing of the suit had not commenced. Delay in filing the amendment application can be compensated by cost. Hence, he prays for setting aside the impugned order under Annexure-8 and to allow the amendment sought for.

6. Mr. Bose, learned counsel for the Defendant-Opposite Party vehemently objects to the same. It is contended that the amendment sought for will not only meant to drag the litigation, but also will change a suit for injunction simplicitor to a suit for adverse possession by enhancing the valuation of the suit. The proposed amendment with regard to deletion of words '*until the Plaintiff is evicted with due process of law*' from the prayer (a) of the plaint clearly connotes that the Plaintiffs are admitting the fact that they are tenants under the Defendant. Thus, a prayer for declaration of title by way of adverse possession is not maintainable. The proposed amendment to the effect that on the date of 'Basant Panchami' in the year, 1979, the husband of the Plaintiff No.1 had reclaimed the suit land which was full of bushes, is nothing but to patch up lacunae in their pleadings and to make out a case of adverse possession, which was not there in the plaint. He further submits that some of the paragraphs of the proposed amendment have already been incorporated in the pleadings by virtue of direction of this Court in CMP No.1040 of 2018. Thus, it would only amount to repetition of averments already made in the amended plaint. If the amendment is allowed, the Defendant has to file additional written statement and may require recasting of the counter claim also. Thus, it will not only protract the litigation, but also is not permissible in law. When the Plaintiffs have not exercised due diligence either at the time of filing of the suit or at the time of filing of the previous petition for amendment to incorporate the amendment proposed, the same should not be allowed at a belated stage. The present amendment application has been filed after taking

adjournments on three occasions to produce the witness on behalf of the Plaintiffs. Fact remains that by the time the present amendment application was filed, issues have already been settled. Thus, it cannot be said that hearing of the suit has not commenced at the time of filing of the instant application for amendment. He, therefore, submits that the CMP merits no consideration and is liable to be dismissed.

7. Considering the rival contentions of the parties, this Court vide order dated 2nd December, 2022 directed learned counsel for the Petitioners to produce the copy of the earlier amendment petition to test the veracity of the submission of Mr. Bose, learned counsel for the Opposite Party. On perusal of the petition for amendment, it appears that some of the proposed amendments in the instant application have been considered in the previous application though not in same language. But, the proposed amendment with regard to the date when the possession of the Petitioner became adverse, was not there in the previous amendment. True it is that, the Petitioner could have sought for incorporation of those amendments at the time of filing of the previous petition. But that by itself cannot be a ground to reject the subsequent application. Law is well settled that ordinarily trial of the suit said to have commenced after framing of the issues, but while considering a petition for amendment, commencement of the trial should be considered when the witness enters the witness box to lead evidence. In the instant case, at the time of consideration of the application for amendment by learned trial Court, the witness of the Plaintiffs had not entered into the witness box. However, at the time of

taking up the CMP, the Plaintiffs had presented one witness for examination. Certainly, the same cannot be a ground to apply the proviso to Order VI Rule 17 C.P.C. to the instant case as by the time the petition for amendment was considered, the evidence of the Plaintiffs had not commenced.

8. Mr. Roy, learned counsel for the Petitioners relied upon the case of ***Pankaja and another –v- Yellappa (DEAD) By Lrs. and others***, reported in (2004) 6 SCC 415, wherein at Paragraph-18, it is held as under:

“18. We think that the course adopted by this Court in Ragu Thilak D. John Case applies appropriately to the facts of this case. The courts below have proceeded on an assumption that the amendment sought for by the appellants in ipso facto barred by the law of limitation and amounts to introduction of different relief than what the plaintiff had asked for in the original plaint. We do not agree with the courts below that the amendment sought for by the plaintiff introduces a different relief so as to bar the grant of prayer for amendment, necessary factual basis has already been laid down in the plaint in regard to the title which, of course, was denied by the respondent in his written statement which will be an issue to be decided in a trial. Therefore, in the facts of this case, it will be incorrect to come to the conclusion that by the amendment the plaintiff will be introducing a different relief.”

In the case of ***Revajeetu Builders and Developers –v- Narayanaswamy and Sons and others***, reported in (2009) 10 SCC 84, it is held that a petition for amendment can be considered on the plea taken in the petition for amendment, if a fresh suit on the said plea is maintainable.

9. In the instant case, there is no bar under law for the Plaintiffs to file a suit for adverse possession on the plea

available on record. Thus, a prayer to incorporate the plea for adverse possession should not be denied only because it will change the nature and character of the suit. By allowing such amendment, multiplicity of litigation can be avoided.

10. Further plea of Mr. Bose, learned counsel for the Opposite Party to the effect that by deleting the line from prayer (a) in the plaint, if read as it is, would clearly give a picture that the Plaintiffs admit their tenancy under the Defendant. This Court is not in a position to accept such submission as the terms '*until the Plaintiff is evicted with due process of law*', does not give rise to a presumption that they are tenant under the Defendant. It is the pleading read as a whole should be taken into consideration the case of the Plaintiffs. In the instant case, if the prayer for declaration of right through adverse possession along with the supporting pleadings is allowed to be incorporated, it will certainly prevent multiplicity of litigation. However, the submission of Mr. Bose, learned counsel for the Opposite Party to the effect that the amendment proposed could have been taken in previous petition for amendment, appears to be reasonable. But that cannot be a ground to deny the amendment sought for in a subsequent petition for amendment as held in the case of ***Pankaja and another*** (supra), when prejudice, if any caused to the Defendant, can be compensated by adequate cost.

11. Accordingly, the prayer sought for in the petition for amendment is allowed subject to payment of cost of Rs.10,000/- (Rupees ten thousand only) to the Defendant which shall be made over at the time of presentation of the consolidated plaint.

The Defendant is at liberty to file additional written statement to consolidated plaint. It is also directed that the amendment sought for should be carried out within a period of ten days hence.

12. Accordingly, this CMP is allowed to the aforesaid extent.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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