

July 3, 2023
Sl. No.4
Court No.19
s.biswas

CO 448 of 2023
With
CAN 1 of 2023
(Not available with the file)

Anupam Saha
vs.
Sachindra Nath Das

Mr. Atanu Das

... for the petitioner

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

Despite service, none appears on behalf of the opposite party.

This revisional application is directed against an order dated January 25, 2023, passed in Title Suit No.40 of 2021, by the learned Civil Judge (Junior Division), 2nd Court, Chandannagar, Hooghly. By the order impugned, the application under Order 6 Rule 17 of the Code of Civil Procedure filed by the defendant was allowed.

The defendant wanted to incorporate a fact, which could not be incorporated in the written statement, due to bona fide mistake. The fact sought to be incorporated was that the plaintiff/petitioner had taken an amount of Rs.25,000/- from the defendant and the plaintiff agreed not to evict the defendant. The defendant was allowed to possess the suit property till he ran business therefrom. The defendant was around 72 years old.

The petitioner has challenged the order on the ground that the said amendment could not have been allowed at the stage of evidence. By allowing the amendment, the learned court below has acted contrary to the proviso to Order 6 Rule 17 of the Code of Civil Procedure. The facts which was sought to be incorporated was known to the defendant at the time of filing of the written statement, but were not pleaded. The amendment was an attempt to frustrate the eviction suit.

The court below came to the conclusion that the amendment, if allowed, would not change the nature and character of the suit.

Although, this court finds that the learned trial court did not adduce proper reasons for allowing the amendment, the amendment sought to be filed was merely an elaboration of the statements already made in the written statement and did not in any way introduce contrary pleas. The amendment did not amount to taking away of any admission made in the written statement, nor did it amount to destruction of any right which may have accrued in favour of the plaintiff after the defendant's case was disclosed.

Under such circumstances, although the suit has progressed, this court is of the view that for the ends of justice, the facts sought to be incorporated

by way of amendment, should be allowed. The defendant shall be allowed to file amended written statement, if not already filed and the petitioner shall file a rejoinder to the same, within three weeks from the receipt of the copy of amended written statement. Correctness or merits of the pleading which were to be incorporated cannot be decided at the stage of hearing the amendment application and they have to be proved at the trial.

In the decision of ***Rajesh Kumar Aggarwal and others vs. K.K.Modi and others*** reported in ***AIR 2006 SC 1647***, the Apex Court held on similar lines and directed that the Court was not to go into the merits. The relevant portion is quoted below:-

"While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."

In the matter of ***Life Insurance Corporation of India vs. Sanjeev Builders Private Ltd. & anr.*** decided in ***Civil Appeal No.5909 of 2022***, the Hon'ble Apex Court held as follows:-

“**22.** It would be useful to also notice the observations of this Court in, *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*, 1957 SCR 595 : AIR 1957 SC 363, wherein this Court considered an objection to the amendment on the ground that the same

amounted to a new case and a new cause of action. In this case, this Court laid down the principles which would govern the exercise of discretion as to whether the court ought to permit an amendment of the pleadings or not. This Court approved the observations of Batchelor, J., in the case of *Kisandas Rupchand v. Rachappa Vithoba Shilwant* reported in ILR (1909) 33 Bom 644, when he laid down the principles thus:

10.'All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties ... but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same : can the amendment be allowed without injustice to the other side, or can it not?'

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25.The proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the application for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

(See South Konkani Distilleries v. Prabhakar Gajanan Naik, (2008) 14 SCC 632)

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30. From the above, therefore, one of the cardinal principles of law in allowing or rejecting an application for amendment of the pleading is that the courts generally, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of filing of the application. But that would be a factor to be taken into account in the exercise of the discretion as to whether the amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interest of justice.”

In the matter of ***Usha Balashaheb Swami & Ors. Vs. Kiran Appaso Swami & Ors.*** reported in ***AIR 2007 SC 1663***. It is equally well settled that in the case of an amendment of a written statement, the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed.

The order of the trial court is modified to the extent that the application for amendment should be allowed upon payment of costs of Rs.5000/- to be paid by the opposite party to the petitioner or the learned Advocate for the petitioner within 10 days. The suit will proceed upon satisfaction of the learned Court below, of such payment of cost.

It is directed that further issues may be framed and if the PW finds it necessary that further

examination-in-chief is required to be filed to deal with the amended written statement, the learned court below shall allow the same and the suit shall proceed from that stage.

The revisional application is thus disposed of.

All the parties are allowed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)