

S/L 62
24.02.2023
Court No.652
SD

CO 225 of 2016

Ajay Kumar Ghosh, since deceased, represented by Smt.
Mamata Ghosh & Ors.

Vs.

Mantu Kunbi (Kurmi), since deceased, represented by Smt.
Kanti Kunbi (Kurmi) & Ors.

Mr. Pinaki Ranjan Mitra

...for the Petitioners.

Mrs. Chandrani Mukherjee

...for the Opposite Parties.

Affidavit-in-opposition filed by the opposite parties in court today be kept with the record.

Being aggrieved and dissatisfied with the Order No.208 dated 28.07.2015 passed in Title Suit No.11 of 1992 by the learned Civil Judge (Senior Division), First Court, Howrah, present revisional application has been preferred.

The petitioners contended that the petitioners as plaintiffs instituted the aforesaid suit praying for declaration that the plaintiffs are the owners and in possession of the property in suit described in the schedule to the plaint and defendants have no right, title or interest therein and further declaration that the plaintiffs are entitled to cut down the branches of the tree and to remove the rain pipe affixed to the roof of the defendants building and for permanent injunction restraining the defendants, their men and agents from causing any illegal or wrongful act over the properties of the plaintiffs.

The petitioners also prayed for mandatory injunction directing the defendants to cut down the fig trees hanging over

the pond (doba) and some other trees situated at the encroached portion of the Dag No.7 at the end of Dag No.3 hanging over the doba and remove the rain water pipe affixed to the roof of defendants building by virtue of which water falls in the land of the plaintiffs in plot no.4.

Defendants appeared in the suit and filed written statement and denied all material allegations.

The plaintiffs/petitioners also prayed for local investigation commission and learned commissioner, after making local investigation commission, has already submitted report.

The petitioners further submits that while recalling application of P.W.1 was pending it was detected by the plaintiffs/petitioners that they have not given the boundary of the Schedule A property in the plaint in respect of which they have raised their claim in the plaint. Accordingly, for effective and conclusive adjudication of the suit, the boundary of the said Schedule 'A' property needs to be incorporated by way of amendment.

Learned counsel appearing on behalf of the opposite parties opposed the prayer for amendment and contended that they are the sole owners of the house situated in C.S. Plot No.3 and the south-western portion of the said plot was eroded into doba towards, plot no.7 of the petitioner to the extent of about 6 feet in width from East to West.

She further submits that the said amendment application has been filed while the evidence of P.W.1 was closed. Accordingly, present case clearly attracts proviso to

Order VI Rule 17 and as such, as trial has already been commenced, so there is no scope to amend the plaint unless case of due diligence is proved and as such, the observation made by the court below is justified and does not call for any interference.

On perusal of the order passed by the court below, it appears that the learned court below rejected the said application for amendment mainly on the ground that the plaintiffs have failed to show any sufficient satisfactory ground which may show that in spite of their due diligence they failed to raise the plea of amendment prior to commencement of trial. They could have prayed for such amendment long before the commencement of trial and as such, they are not diligent enough and considering their conduct, the court below rejected the application for amendment with a cost of Rs.500/-.

I have considered the submissions made by both the parties and also the order impugned.

It appears that learned court below has overlooked that the plaint in respect of which amendment was sought for, was filed in the year 1992. According to Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002), which came into effect on July 1, 2002, the provisions of Rules 5, 15, 17 and 18 of Order VI of the First Schedule shall not apply in respect of any 'pleading' filed before commencement of section 16 of the Amendment Act of 2002, i.e., before July 1, 2002. The effect is that plaintiff's prayer for amendment in the present case shall be guided under the old provisions relating to

amendment and the amended provision of Order VI Rule 17 shall have no application in the present case.

The other aspect of the issue is that from the pleading it is clear that there is boundary dispute between the parties. While plaintiff alleged that doba in dag no.7 has been encroached by the defendants, in contradiction, defendant's defence is south western portion of defendant's land has eroded into the pond (doba) of the plaintiffs to the extent of about 6 feet width from east to west. Accordingly, when pleading discloses dissolute about extent of suit land and adjacent land, then boundary of suit schedule property required to be depicted in the plaint for complete and effective adjudication of the dispute in suit.

It is well-settled that a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. Court always gives relief to amend pleading of party unless it is satisfied that party applying was acting mala fide or that by his blunder he has caused injury to his opponent which cannot be compensated for by order of cost. (AIR 2015 SC 2270). Therefore, if the amendment sought is bona fide, legitimate, honest and necessary, the court must not refuse the same.

On perusal of schedule of amendment it is very much clear that proposed amendment if allowed would not alter cause of action, nor it would cause inconsistency in the cause of plaintiff or will cause prejudice to defendant. Since dominant purpose of Order VI Rule 17 is to minimise litigation, learned

court below was not justified in rejecting petitioner's prayer for amendment of plaint.

It appears from the schedule of amendment that the plaintiffs only wanted to incorporate the boundary of the schedule mentioned suit property to the plaint and nothing more. If the proposed amendment is allowed, it will not cause such prejudice to the defendant which cannot be compensated by money. Moreover, for effective and conclusive adjudication of the suit, it appears to me that the proposed amendment is required to be incorporated in the plaint otherwise it may also create problem in case of drawing decree and as such, the revisional application is required to be allowed subject to payment of cost.

In view of the above, CO 225 of 2016 is allowed subject to payment of cost of Rs.3000/- which the plaintiffs/petitioners will pay to the defendants/opposite parties within a period of two weeks from the date of communication of the order.

On such payment, the court below will incorporate the schedule of amendment to the plaint and the plaintiffs will file amended plaint in the court below accordingly.

The court below in case of payment of cost as above will also give opportunity to the defendants/opposite parties to file additional written statement, if any and also will give opportunity to both the parties to examine and cross-examine the witnesses on the point of amendment to those who have already been examined by the court.

In default of payment of costs as above, the impugned order passed by the court below dated 28.7.2015 shall revive.

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

(Ajoy Kumar Mukherjee, J.)