

12.6.2023
24
Ct. no. 652
sb

C.O. 795 of 2019

**Sk. Ahmed Ali @ Dhali & Ors.
Vs.
Ibrahim Purkayet, Since deceased,
rep. by Kalimuddin Purkait & ors.**

Mr. Koustava Ratan Chatterjee
Ms. Bharati Ghoshfor the petitioners

Affidavit of service filed by the petitioners is taken on record. In spite of service, opposite parties are not represented.

Being aggrieved by order no. 43 dated 7.2.2019 passed by the learned Civil Judge (Senior Division), 3rd Court at Alipore in Title Suit no. 1269 of 2019, present application under Article 227 of the Constitution of India has been preferred. By the impugned order, the learned court below was pleased to reject the plaintiff's application for amendment of plaint filed under Order VI rule 17 of the Code of Civil Procedure.

The petitioners contended that the petitioners as plaintiffs filed aforesaid suit for partition and injunction against the defendants in connection with the properties mentioned in the schedule of the plaint. During pendency of the application, the plaintiffs/petitioners filed an application under Order I Rule 10(2) of the Code for allowing them to add some other co-sharers who are

also necessary parties in the suit and accordingly, they were added as parties vide order dated 20th August, 2018. Though issues have been framed in the said suit but trial has not yet commenced. In the meantime, the plaintiffs became aware from old papers from their household that some of the landed properties have been left out, which they have inherited from their forefather Jainuddin. Some purkaits became co-sharer with the plaintiffs by way purchase from their uncle and these properties are required to be brought in the common hotchpot for effective and conclusive adjudication of the suit. However, learned court below by the impugned order, was pleased to reject the said application with the observation that he had not gone into the merits of the application but as the trial of the suit has already commenced and as the plaintiffs failed to show that in spite of due diligence, they could not have raised the issue before commencement of trial, so the learned court below was pleased to reject the same.

Learned counsel for the petitioners submits that the court below was erred in holding that the trial of the suit has already been commenced and the plaintiffs have failed to show that in spite of due diligence, they could not be produce the same before the commencement of trial. In fact the suit being one principally for partition and other reliefs, all the the properties belonging to the plaintiffs are required to be

included for equitable division of the joint properties between the plaintiffs and defendants. Moreover proposed amendment, if allowed will not change the nature and character of the suit and most importantly the contesting defendants did not file any objection to the said amendment application. Accordingly, the petitioners have prayed for setting aside the order impugned and prayed for allowing the amendment application.

Having considered the facts and circumstances of the case, it appears that this is a suit for partition and the plaintiffs, by way of amendment, principally wants to incorporate certain plots in the plaint in respect of which parties are co-sharer and also about redistribution of share of the parties after transfer. However, it has been rightly pointed out by the defendants before the court below that the hand written portion of the schedule of amendment is not legible. It is further submitted by the petitioners herein that the court below was erred in interpreting that the trial has already been commenced but in fact, recording of evidence has not yet been commenced. Only issues have been framed and suit has been posted for premtary hearing. Accordingly, the grounds for rejection of the said application specially considering the nature of the suit and in the absence of any objection raised by defendants, appears to be not very convincing and as

such the order impugned being no. 43 dated 7.2.2019 is hereby set aside.

Liberty is given to the plaintiffs/petitioners to file fresh legible application for amendment along with supportive copy of documents, if any, before the court below within a period of three weeks from the date of communication of the order and in the event of filing such fresh application of amendment by the plaintiffs, the court below will invite objection from the opposite parties within a period of two weeks thereafter and thereafter, the court below will adjudicate the plaintiff's payer for amendment afresh. The defendants will also be at liberty to file additional written statement if any, if such amendment is allowed by the court below.

The court below is further requested to expedite the final hearing of the suit.

Accordingly, C.O. 795 of 2019 is disposed of.

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.)