

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1024 of 2018

Sri Amitava Sengupta, Since deceased, represented by Smt.

Sumita Sengupta &Ors.

Vs

Smt. Malati Saha

For the petitioners : Ms. Somoshree Saha

For the opposite parties : Mr. Subhojit Saha
: Ms. Sirshania Roy

Heard on : 24.04.2023

Judgment on : 08.06.2023

Ajoy Kumar Mukherjee, J.

1. Present application under Article 227 of the Constitution of India has been directed against the order dated 18.01.2018 passed by Additional District Judge, Fast Track, 1st Court, Alipore, South 24 Parganas, in Ejectment Appeal No. 28 of 2015 arising out of Title Suit No. 215 of 2004. Petitioners contended that petitioners' predecessor as plaintiff filed a suit for eviction against the defendant/opposite party on the ground of reasonable requirement and also on other grounds. The defendant/opposite party entered appearance in the said suit and denied all material allegations made in the plaint by filing written statement. However subsequently the

defendant chose not to appear and contest the said suit. Ultimately by an order dated 22.04.2015 the said ejectment suit was dismissed ex-parte wherein learned trial court did not accept the plaintiffs ground for eviction including the ground of reasonable requirement.

2. Being aggrieved by that order of dismissal the plaintiffs/ petitioners herein preferred aforesaid Ejectment Appeal no. 28 of 2015. During the pendency of the said appeal petitioners made an application for amendment of the plaint to incorporate subsequent fact of increase of family members and dearth of accommodation and subsequent enhancement of reasonable requirement of the petitioners. Said application came up for hearing before the court below but learned court below after hearing the said application was pleased to reject the amendment application by the impugned order.

3. Mrs. Somoshree Saha learned Counsel appearing on behalf of the petitioners submits that proposed amendment is formal in nature and they do not in any way intend or purport to change the nature and character of the suit. she further submitted that due to passage of time the original plaintiff and subsequently his substituted son and daughter have died and now present appellants are the third generation and as such with the increase in number of members in the family the dearth of accommodation which was existing at the time of filing of the suit became more acute now and by way of present amendment, the petitioners have only tried to explain their acute shortage of space to show reasonableness of their requirement and there is no case to fill up lacuna on which judgment has been passed but the court below erroneously observed that only to fill up lacuna appearing in the trial court's judgment, the petitioner has prayed for such

amendment. Learned court further observed that if the proposed amendment is allowed it may be prejudicial for the opposite party but he has failed to consider that the opposite party herein has accommodation elsewhere and she had chosen not to contest the suit and also not interested in the result of its outcome and as such question of causing prejudice to the opposite party does not arise. She further submits that it is settled law that the subsequent event can always be incorporated by way of amendment. She also submits that amendment can be incorporated at any stage of the proceeding. In the present application for amendment plaintiffs/appellants have not sought to incorporate any new fact but only tried to explain the existing fact in details i.e. the subsequent events that occurred after institution of the suit. Accordingly petitioners have prayed for setting aside the order impugned and to allow the proposed amendment.

4. Mr. SubhojitSaha learned Counsel appearing on behalf of the opposite party/defendant argued that the facts enumerated in the application under order VI Rule 17 of the Code of Civil Procedure, were already before the trial court and as such all the averments made in the plaint to that effect, were dealt with and considered by the trial court at the time of passing judgment. He further submits, that on perusal of the schedule of amendment it appears that it is couched in a different language and as such the contention is same as it is in the plaint, which in substance are Rooms required for the purpose of expansion of the Gymnasium, setting up a Thakur ghar (puja room), one dining room, one sitting room for accommodation of guests, one room for whole time maid servant, two rooms for physiotherapy and one office room etc. These requirements were all along

in the plaint and have been dealt with by the Trial Court and after considering all these and the Advocate Commissioner's report, the trial court pronounced the judgment impugned. He further submits that the court below was justified in observing that the application under order VI Rule 17 of the code has been filed to fill up lacuna of the plaintiffs' case on which the judgment has been pronounced. He strenuously argued that the application for amendment of plaint shall not be allowed after the trial has commenced and judgment has been delivered by the court unless court comes to a conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial. Accordingly he submitted in the facts and circumstances of the case that the plaintiffs were substituted before the commencement of the trial and as such subject matter of amendments sought for were also placed before the learned trial court below and was dealt with elaborately by the learned trial court in its judgment. Therefore the order impugned is justified and does not call for any interference by this court.

5. Before going to further details let me reproduce order VI Rule 17 of the Code of Civil Procedure

“Or. 6 R. 17 : Amendment of Pleadings : The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

6. Accordingly rule 17 envisages amendment of the pleading and court may at any stage of the proceeding allow either party to alter or amend his

pleading in such manner and such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Therefore court should allow such amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice to the other side. The “real question in controversy” tests is the basic test and it is primary duty of the court to decide whether such amendment is necessary to decide real dispute between the parties.

7. In ***North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das*** reported in **(2008) 8 SCC 511**, it was observed by Apex Court in paragraph 16 as follows:-

“16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In PirgondaHongondaPatil v. KalgondaShidgondaPatil [AIR 1957 SC 363] which still holds the field, it was held that 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. 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.”

8. Now in the above backdrop let me examine whether the proposed amendment is at all necessary for the purpose of determining the real question in controversy between the parties and also to consider if such amendment if allowed, whether it would cause injustice to the other side or not. On perusal of the schedule of amendment in the application under order VI rule 17 it appears that plaintiff sought to incorporate in the first part that their predecessor during the pendency of the case died which is not required to be incorporated for adjudication of the suit as heirs have

been substituted secondly they have contended that they immediately require two rooms in the ground floor to run the gymnasium. Admittedly there are five rooms in the ground floor and out of five rooms, two rooms are in occupation of defendant /tenant and rest three rooms are in occupation of the plaintiffs. Plaintiffs are using one such room as changing room of gymnasium students, one room is used as physiotherapy and one room is used by plaintiffs as office cum chamber. Further contention of the plaintiff in the amendment application is that plaintiff is required to shift the gymnasium from second floor asbestos shaded roof top to the ground floor as the plaintiffs are facing inconveniences in running the gym classes and as it also involves privacy issue. Similarly they have stated in the amendment application that in the first floor plaintiff no. 1(a) , plaintiff no. 1(b) and plaintiff no. 1(c) require one room each and one more room is required for plaintiff 2(a). One small room is used as Thakur Ghar. It is also plaintiffs case that there are one big room and three medium rooms and one small room in the first floor. However plaintiff sought to incorporate by way of amendment that there are no bedroom for plaintiff no. 2(b), 2(c) and 2(d) in the suit house though they are co-owners of the said house and now they are compelled to arrange accommodation elsewhere after making huge expenses therein. So immediately they require at least three bedrooms of their own in the suit house, beside one drawing cum guest room. The second floor room is required for keeping gymnasium articles. Beside these requirements plaintiff also require kitchen, Bath, Privy, covered varanda, common space etc.

9. On perusal of the plaint it appears that initially plaint was filed by one Bani Sengupta, since deceased. Bani died leaving behind one son and one daughter namely Amitabha and Gopa . Both Amitabha and Gopa have died during pendency of the suit. Amitabha died leaving behind his widow who is plaintiff no. 1(a) and son and daughter who are plaintiff no. 1(b) and 1(c). Similarly Gopa died leaving behind her husband who is plaintiff no. 2(a) and three issues who are plaintiff no. 2(b) to 2(d). It further appears from paragraph 5,6 and paragraph 7 of the plaint that plaintiff has dealt with all these issues relating to requirements including the issue relating to need for shifting the gymnasium from the roof top to the ground floor. Besides being original plaintiff's own requirement the requirement of grandson and grant daughter [who are present plaintiffs as 1(b) and 1(c)] have also been pleaded in the plaint. Need for original plaintiffs' Aya's room has also been pleaded. Plaintiff has specifically stated in paragraph 7 that the original plaintiffs' family comprises of herself (since deceased) her son and daughter (since deceased) two grandchildren and one whole time maid servant. In view of the above and comparing with the plaint case, it appears that as far as plaintiffs reasonable requirements is concerned no new issue has been set up for adjudication in the proposed amendment and accordingly the inevitable conclusion is, the proposed amendment is not at all required for the purpose of adjudication of the said appeal. I have already stated that the plaintiff in his plaint has specifically averred that her family comprises of herself her son and daughter and two grand children and whole time maid servant.

10. In view of Civil Procedure Amendment act 2002 the proviso has been added in Rule 17 of Order VI in order to restrict the court from permitting an amendment to be allowed in the pleading of either of the parties, if at the time of filling of an application for amendment the trial has already been commenced. However the court may allow amendment, if it is satisfied that despite due diligence the party could not have raised matter before the commencement of the trial. Accordingly I find no substance in the present revisional application in seeking aforesaid amendment at the Appellate Stage, which is not at all required for adjudication of real controversy between the parties, even though original plaintiff and her legal heirs died during pendency of the suit because all the issues relating to reasonable requirement of plaintiffs which plaintiffs sought to incorporate by way of amendment have already been considered and dealt with by the Trial Court, while passing the judgment and again if the same issue are permitted to be raised by way of amendment, it may cause serious injustice to the other side, in whose favour issue of reasonable requirement has been decided by the Trial Court.

11. In view of above C.O.1024 of 2018 is dismissed. The court below is requested to make expeditious disposal of the pending appeal since the appeal is pending from 2015. It is also made clear that the observation made herein are restricted only to the issue of amendment application and I have not gone into the merits of the appeal, which will be disposed of by the court below without being influenced by any observation made herein.

There will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)