

D/L
Item No. 69
13.01.2023
KOLE

CO 1035 of 2019

**Goutam Ghosh & Ors.
-Vs.-
Bally Municipality & Ors.**

*Mr. Sounak Bhattacharya,
Mr. Subrata Bhattacharjee,*

...for the petitioners.

*Mr. Ayan Banerjee,
Mr. D. Dhamali,*

...for the opposite party nos 1 and 3.

*Mr. S. Ghosh,
Ms. M. Ghosh,*

...for the respondent nos. 4 to 7 and 10.

This is an application under Article 227 of the Constitution of India challenging the order dated 05.03.2019, passed by the Learned Civil Judge (Junior Division), 1st Court, Howrah, in Title Suit No. 66 of 2010. By the impugned order, court below has rejected plaintiffs'/petitioners' application for amendment of plaint, as well as other application for addition of parties made by the plaintiffs/petitioners.

The petitioners contended that the plaintiffs filed the aforesaid suit against the defendants/opposite parties for declaration and injunction and the opposite parties no. 4 to 8 entered appearance in the suit and filed written statement denying all material allegations. The petitioner in the plaint stated that plaintiffs are the lawful owners of the property with the structure standing thereon described in plaint under the Bally Municipality. The suit property was taken by way of settlement from the erstwhile landlords Hemanta

Ghosh and Lalit Mohan Ghosh by way of registered Kabuliyat dated 23.04.1940, which was bilaterally executed by the petitioners predecessor Indu Bala Dassi and the said erstwhile landlords. After the death of Indu Bala Dassi, his only son Sourendra Nath Ghosh and upon his death his wife and his son and daughters owned and seized the suit property. Plaintiffs/petitioners alleged, Recently there has been some illegal and/or mala fide attempt at the instance of the employee of the defendant, on 12.04.2016, resorted to exercise all sorts of illegal and forcible endeavor to make out and/or carve out as alleged passage through or across the said residential house property of the plaintiff with the aid of defendant nos. 4 to 9. Further allegation is that the defendant no. 1 had totally blocked the eastern mouth of an adjacent land by erecting a pucca wall to create camouflaged evidence as to alleged non-existence of any passage for the purpose of doing egress and ingress from the respective house of defendant nos. 4 to 9, knowing exclusive ownership of the plaintiffs in respect of concerned property. It is also alleged that the defendant no. 4 forcibly and illegally has taken electricity connection under ground of the plaintiff's southern portion of the property with the connivance of CESC Limited. The defendant no. 4 filed a writ petition before this Court being WP No. 19293 (W) of 2009 against the plaintiffs and Bally Municipality for water connection in his premises through the alleged common passage, but after hearing the writ petition High Court was pleased to pass an order for water connection subject to the result of the civil suit pending between the parties. Petitioners accordingly

submitted that the said acts of the defendant in collaboration made with each other with the CESC Limited and Bally Municipality required to be uprooted and removed from the underground portion of the property, since the said illegal act has been done by the defendant to form out an illegal passage through and/or from the residential house of the plaintiff.

During the pendency of the suit, the plaintiff filed an amendment petition for amendment of plaint on account of supplying material facts in detail and to incorporate certain subsequent event and to describe schedule of plaint property and another application for addition of Howrah Municipal Corporation and CESC as party in the suit. The learned court below took up the applications for hearing and after hearing was pleased to reject both the applications by passing the impugned order dated 05.03.2019.

Mr. Bhattacharyya, learned Counsel appearing for the petitioner submits that the order impugned not being a speaking order has resulted a gross failure of justice. The Court below misread and misunderstood the case made out by the respective parties in the application for amendment and objection filed against said application. He ought to have allowed both the applications. The proposed amendment is formal in nature and if allowed will not change the nature and character of the suit nor it would take or curtail any valuable right of the opposite party.

Mr. Bhattacharya further submits that the observation of the trial Court that because of the previous twice amendment of plaint, the present amendment cannot

be allowed, is not based on any principle of law and as such the finding of the court below is vague and erroneous and liable to be struck down. He further submits that the proposed amendment is of elucidation of material facts already stated in plaint and he further submits that trial has not yet commenced. There is nothing in the record that examination-in-chief has been filed. Nor any document has yet been filed. Examination and cross examination has not been started and as such there is no bar to allow both the applications by the court below. The amendment is needed for divergent causes, but at the time of adjudication of the amendment application, the trial Court has done miscarriage of justice.

Mr. Bhattacharyya further submits that the main consideration for deciding amendment matter are two folds in nature i.e., whether amendment is necessary for the adjudication of the suit and whether the other side will be prejudiced if the amendment is allowed and this proposition of law has been settled by the Apex Court in divergent cases but the Trial Court without following the aforesaid guidelines has rejected the prayer for amendment. Accordingly, he prayed for setting aside of the order impugned.

Learned Counsel appearing on behalf of the opposite party raised objection and contended that on the earlier occasions the plaint were amended twice and this prayer for amendment has been made for the third time and all these facts were known to the plaintiff at the time of filing his earlier amendment applications but they have not

incorporated the same and as such at this stage they cannot be allowed to pray for further amendment of the plaint.

Regarding the prayer for addition of party, learned Counsel appearing for the Howrah Municipal Corporation/opposite party submitted that Howrah Municipal Corporation has now merged with Bally Municipality and Bally Municipality is functioning under its individual capacity and as such Howrah Municipal Corporation is not required to be impleaded as party.

I have considered the submissions made on behalf of both the parties. On perusal of the order it appears that the trial court rejected the prayer for amendment on the basis of the following observations:

“Firstly, the facts proposed to be amended are not subsequent happenings. Secondly, no statement as to due diligence has been pleaded by the plaintiff, explaining why in spite of commencement of trial and in spite of previous amendments, plaintiff could not incorporate the proposed facts in the plaint.

As a matter of fact, this plaint was amended twice earlier. Every time, plaintiff cannot be allowed to plead that certain facts could not be incorporated due to bona fide mistake. This is a third amendment application filed by the plaintiff without any statement as to due diligence.

First amendment application was allowed vide order no. 56 dated 12.03.2014, thereafter recently vide order no. 84 dated 05.04.2018 another application for amendment was allowed. The suit was fixed for P. H. of 18.05.2018 for the first time.

Accordingly, this instant application for amendment cannot be allowed.”

From the aforesaid order it is clear that the ground for rejection was that the amendment has been sought for the third time and that the suit has been fixed for pre-emptory

hearing and as such the proposed amendment cannot be allowed and also because no statement as to due diligence has been pleaded and also not stated what prevented the plaintiff to incorporate the proposed facts in the plaint earlier.

I am told that though the suit has been posted for pre-emptory hearing but evidence has not been started. It is true that under the proviso to Order VI, Rule 17, parties are not allowed to sought for amendment after commencement of trial. In the present context though the amendment has been sought for at a belated stage, but it is not the case of the opposite parties that the proposed amendment is not at all required for adjudication of real controversy between the parties, not it shown how the opposite parties will be prejudiced if the proposed amendment is allowed. Accordingly it can hardly be stated that even if opposite parties suffer any loss or injury for filing the amendment petition at a belated stage, it can very well be compensated with costs.

On critically analyzing both the English and Indian case, Apex Court has laid down certain basic factors to be taken into consideration while dealing with application for amendment in ***Revajeetu Buuilders and Developers Vs. Narayanswamy and sons and others*** reported in **(2009) 10 SCC 84**, (para 63).

“63. *On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:*

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

Here proposed amendment if allowed will not change the basic nature and character of the suit as the suit even after amendment will remain a suit for declaration and injunction. On the contrary proposed amendment might help the court to adjudicate dispute conclusively and effectively and nothing malafide in presenting the application is brought before the court.

On perusal of the schedule of amendment I also find that the plaintiff has already pleaded that they have acquired right title interest by way of Kabuliyat deed dated 23.04.1940 and by the proposed amendment they only want to make it specific and elaborate. Moreover, the CESC appears to be a necessary party in the suit and as such the adding of CESC is needed in the present context. However, as submitted by the Bally Municipality that it has already merged with the Howrah Municipal Corporation, so the Howrah Municipal Corporation is not required to be added as a party in the said suit. In view of the above, CO 1035 of 2019 is allowed. The order dated 05.03.2019 is hereby set aside. Let the plaint be amended as per schedule of petitions subject to costs of payment of Rs. 5000/- which the plaintiff shall pay to the defendant within a period of four weeks from the date of communication of this order. On such payment, the plaint

will be amended and the defendant plaintiff will file the amended plaint in terms of Order VI Rule 18 of the CPC. The defendant will be at liberty to file additional written statement and liberty is given to plaintiff to add CESC as defendant in the instant suit. The court below is requested to dispose of the suit as expeditiously as possible and preferably within a period of eight months from the date of the communication of this order.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Ajoy Kumar Mukherjee, J.)