

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

C.O. No. 717 of 2013

Sri Ashish Kumar Das (since deceased) substituted by Smt. Mousumi

Das & Ors.

-Versus-

Sri Chetan Prakash Jindal & Anr.

For the Petitioners : Mr. Kishore Mukherjee, Advocate,
Mr. Soumyajit Mukherjee, Advocate.

For the Opposite Parties : Mr. Shreyaan Bhattacharyya, Advocate,
Mr. Sayantan Bose, Advocate,
Mr. Neha Mishra, Advocate.
Mr. Sattik Paul

Hearing concluded on : 07.12.2023

BEFORE

PRASENJIT BISWAS, Judge

Date: 22.12.2023

Prasenjit Biswas, J:-

1. The instant revisional application is filed by the petitioners challenging the impugned order dated 2nd February, 2013 passed by the learned Civil Judge

(Senior Division), Second Court, Barasat in connection with Misc. Case No. 46 of 2008.

2. By passing the impugned order learned Trial Court rejected the application filed by the petitioner for amendment of application filed under Order 9 Rule 13 of the Civil Procedure Code and Section 5 of the Limitation Act.

3. Being aggrieved by and dissatisfied with the impugned order passed by the learned Trial Court the instant revisional application is preferred on behest of the petitioners.

4. The petitioners have filed the Misc. Case being No. 46/2008 under Order 9 Rule 13 read with Section 151 of C.P Code praying for setting aside the ex-parte decree dated 26.03.2008 passed in T.S No. 332/95 along with a petition filed under Section 5 of the Indian Limitation Act for condonation of delay. The opposite parties entered their appearances in the said Misc. Case and are contesting the same by filing written objection. It is stated by the petitioners that due to inadvertence and/or mistakes some facts have not been incorporated in the original petition of Misc. Case and those facts are relevant for adjudication of the case. Opposite Party No. 1 filed an objection against the said amendment petition filed by the petitioners with a prayer for dismissal of the said application.

5. By passing the impugned order dated 02.02.2013, the learned Trial Court dismissed the said application for amendment on the ground that the petitioners by way of amendment intended to incorporate certain facts and circumstances that took place in the year 2008 in connection with the residential address of the petitioners where the summons were allegedly sent and the hearing of the Misc. Case has already started. So, the learned Trial Court found and came to the

conclusion that there is no necessity to amend the petition filed under Section 5 of the Limitation Act.

6. Mr. Kishore Mukherjee, learned Advocate appearing on behalf of the petitioners submitted that although the application under Section 5 of the Limitation Act is filed in connection with Misc. Case but eventually, they came to know about the ex-parte decree passed by the learned Trial Court on 30.07.2008 and the application under Order 9 Rule 13 of the CPC was filed within 30 days from the date of knowledge and it is filed within the stipulated period. However, for abundant precaution they filed this instant application under Section 5 of the Limitation Act with a prayer for condonation of delay in preferring the application for setting aside the decree passed ex-parte against them. Learned Counsel further assailed that the learned Trial Court committed mistake in dismissing the application filed under Order 6 Rule 17 of the CPC as the petition for amendment is a formal amendment and the document would reveal that these petitioners are the permanent residents in the state of Assam and the summons were sent to the address in Kolkata which were collected by the plaintiffs from the sale deed but in reality these petitioners were not residing at the address in Kolkata where the summons were served. For that reason, the petitioners did not receive the summons sent by the Court and they were in dark about the suit filed by the plaintiffs pending before the trial court. As per submission of the learned Counsel that the learned Trial Court committed mistake in rejecting the application filed by the petitioners praying for amendment on the ground that if the application for amendment would be allowed then the nature and character of the case will be changed. By way of amendment these petitioners intended to incorporate the fact that they are the permanent residents in the state of Assam and if the said

fact is incorporated in the Misc. Case filed by the petitioners, then the question of changing nature and character of the Misc. Case would not arise.

7. Mr. Shreyaan Bhattacharyya, appearing on behalf of the opposite party no. 1 vehemently opposes the submission advanced on behalf of the petitioners. The learned Counsel assailed that the learned Trial Court has not committed any mistake, error in passing the impugned order. It is submitted by the learned Counsel that the petitioners filed the petition for amendment with ulterior motive just to fill up the lacuna and to frustrate the decree passed ex-parte against these petitioners. It is further submitted by the learned Counsel that if the amendment petition is allowed then the nature and character of the case will be changed which is not permissible under the law. Under the above said grounds learned Counsel prayed to reject the present revisional application *in limini*.

8. Prior appreciation of the fact of sustainability of the present revisional application let us travel through certain settled provisions of law in respect of the amendment of the pleading.

9. Order 6 Rule 17 of the Code of Civil Procedure provides for the amendment of the pleading. The provision enumerates that a Court may allow any party at any stage to amend the proceeding if it considers that to be just. All such amendments which are necessary for the purpose of determining the real question in controversy between the parties shall be made by the Court. A Proviso has been added to this provision through the CPC (Amendment) Act, 1999, which intends the limit to powers of the Court's discretion of amendment of pleading. It says that no application for the amendment shall be allowed by the Court after the commencement of the trial, unless the Court is of the opinion that

notwithstanding the party's due diligence, they could not have raised the matter before the commencement of the trial.

10. It is the general rule that lead to amend will be granted so as to enable the real question on issue between the parties to be raised in pleading, where the amendment does not cause any injury to the opposite party. Now, let us look at the approach of the judiciary in solving this issue.

11. In the context of an application for amendment under Order 6 Rule 17 CPC, the Hon'ble Apex Court in **Pream Bakshi and Others Vs. Dharam Dev and Others** reported in **(2002) 2 Supreme Court Cases 2** at paragraph 6 observed *interalia* that :-

“6. Now the question is whether the order in question has caused failure of justice or irreparable injury to Respondent 1. It is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps the converse is possible i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. After all, amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable injury to any party.”

12. It is profitable to quote the observations made by the Hon'ble Apex Court in case of **Chander Knata Bansal Vs. Rajinder Sing Anand** reported in **(2008)**

5 Supreme Court Cases 117 *interalia* that: -

“The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment. So whether a party has acted with due diligence or not, would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.”

13. It has been observed by the Hon'ble Apex Court in case of **State of Madhya Pradesh Vs. Union of India and Another** reported in **(2011) 12 Supreme Court Cases 268** wherein the Hon'ble Apex Court observed that the

Courts have ample power to allow the application for amendment of the plaint, however, they must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties. Normally amendments are allowed in pleading to avoid multiplicity of litigations and further held that where application is filed for amendment after commencement of trial it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

14. Paragraph 10 of the said judgment says: -

“10. This Court, while considering Order 6 Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh [(2009) 10 SCC 626 : (2009) 4 SCC (Civ) 294] , at para 5 : (SCC p. 627)

“5. As noted hereinafter, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the

Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment.”

(ii) North Eastern Railway Admn. v. Bhagwan Das [(2008) 8 SCC 511] , at para 16 : (SCC p. 517)

“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 Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil [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.”

(iii) Usha Devi v. Rijwan Ahamd [(2008) 3 SCC 717 : (2008) 1 SCC (Civ) 922] , at para 13 : (SCC p. 722)

“13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh [(2006) 6 SCC 498] . In para 17 of the decision, it was held and observed as follows : (SCC pp. 504-05)

‘17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not

yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings.”

(iv) Rajesh Kumar Aggarwal v. K.K. Modi [(2006) 4 SCC 385] , at paras 15 & 16 : (SCC pp. 392-93)

“15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for

determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.”

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons [(2009) 10 SCC 84 : (2009) 4 SCC (Civ) 37] , at para 63 : (SCC p. 102)

“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.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

The above principles make it clear that courts have ample power to allow the application for amendment of the plaint. However, they must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties.”

15. In the present case the amendment sought for was that the present petitioner are the permanent residents in the State of Assam and the summons were sent to the addresses in Kolkata but at the relevant point of time when the summons were sent to the addresses of Kolkata they were not residing there and as a consequent effect they did not receive the summon and were not aware to the fact that they had to be appeared before the Trial Court on the strength of the said summons. These petitioners intended to bring those facts before the Trial Court which I feel that incorporation of the said facts would not cause irreparable loss to the opposite party/plaintiff and the Trial Court ought to have allowed the amendment petition and the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties. If the Court is not going to consider the prayer of the amendment of the petitioners, then there is every possibility of arising multiplicity of the suit and per contra, the defendant side also not going to be prejudiced if the prayer of the petitioners for amendment is allowed.

16. Therefore, in the light of the aforesaid observation this Court is of considered opinion that the proposed amendment if allowed the other side will not be prejudiced rather it will help the Court to arrive at a proper conclusion of dispute.

17. I find that there is illegality and material irregularity in passing the impugned order passed by the learned Trial Court in rejecting the application for amendment filed by the petitioners and accordingly, it cannot stand in the eye of law.

18. The impugned order dated 02.02.2013 passed by the learned Civil Judge (Senior Division) Second Court, Barasat, North 24 Parganas in Misc. Case No. 46 of 2008 is hereby set aside.

19. Liberty is given to the petitioners to amend applications by way of inserting amendment portion as prayed by the petitioners. Petitioners further set at liberty to submit amended applications as well as evidence. Liberty is given to the opposite parties to submit additional written objection if they wish.

20. Learned Trial Court is hereby directed to dispose of the Misc. Case being No. 46 of 2008 as expeditiously as possible preferable within 3 months from the date of communication of this order without giving unnecessary adjournments to either of the parties.

21. Accordingly, CO 717/2013 is hereby allowed to the aforesaid extent. In the facts and circumstances of the case there shall be no order as to costs.

22. Interim order, if any, stand vacated.

23. Consequently, the applications, if any, filed in connection with the appeal are hereby disposed of.

24. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)