

02.01.2023
Item No.1
Ct. No.7
CHC
(disposed of)

C.O. 1207 of 2022
IA NO: CAN/1/2022

Sri Din Dayal Kayan
Vs.
Sri Rakesh Chandra Agarwal

Mr. Rahul Karmakar,
Mr. Abir Lal Chakravorti,
Mr. Sounak Mukherjee,
Mr. Sourav Guchhait

...for the petitioner

Mr. Bratin Kumar Dey,
Ms. Anjana Banerjee,
Ms. Mahesweta Pramanik

...for the opposite party

The subject-matter of challenge in this case is against the rejection of a prayer for amendment, proposed at the execution stage, by the petitioner/decreed-holder in connection with Ejectment Suit No.165 of 2012 of learned Judge, 5th Bench, Presidency Small Causes Court, at Calcutta.

Mr. Karmakar, learned advocate appearing for the petitioner submits that admittedly, an appeal has been preferred before the first lower appellate court challenging the decree, but pendency of that appeal will not prevent the petitioner to file an application proposing amendment to make the schedule property more specific and reflective one so that there may not

be any doubt with regard to the suit property in any manner whatsoever, and execution may be effected smoothly pursuant to the decree being granted.

Disputing with the order impugned, Mr. Karmakar submits that merely upon viewing the pendency of an appeal preferred by the opposite party/judgment-debtor, facts and circumstances pressed in the application proposing amendment could not be considered by the court below, which is against the spirit of the law.

Per contra, Mr. Bratin Kumar Dey, learned advocate appearing for the opposite party/judgment-debtor submits that an appeal has been preferred by the opposite party challenging the decree, which is still pending, and there has been a conditional stay order granted by the first lower appellate court regarding the execution of the decree with a direction upon the opposite party to pay occupational charges at the rate of Rs.5,000/- per month. In view of the pendency of the stay order, there should not be any further movement of the proceedings pending before the court below, may be it is an execution proceedings.

It is incidentally disclosed by the opposite party that the schedule of the property is one of the grounds of the challenge taken in the appeal, and

during the pendency of appeal, the proposed amendment should not be considered by this Court, even in exercise of authority available under Article 227 of the Constitution of India.

Having considered the submission of both sides, it appears that parties to this case are not in dispute about the pendency of the first appeal pending before the first lower appellate court against the decree being granted in favour of the petitioner. The purpose of the proposed amendment is intended to make the suit property more and more specific, concise thereby leaving no chance to suffer the schedule of plaint from vagueness of the subject property mentioned in the schedule.

No new cause of action is seen to have ascertained, by the proposed amendment relatable to the schedule of plaint.

When there is an appeal pending before first lower appellate court, without going into the details, it is better for this Court to pass a direction requiring the first lower appellate court to consider the proposed amendment, to be filed by the petitioner/deeree-holder within three weeks from the date of communication of this order to the court below.

Liberty is given to the petitioner to seek for proposed amendment before the first lower appellate

court, upon supplying a copy of the same well in advance to the opposite party/judgment-debtor. The first lower appellate court in connection with a pending appeal being T.A.29 of 2019 would decide the amendment in accordance with the provisions of the law, providing sufficient opportunity of hearing to either of the parties to this case.

The impugned order is thus set aside.

Simultaneous with the exercise of the prayer for amendment, to be filed before the first lower appellate court, the fate of the proposed amendment pending before the court below may be reappreciated and/or reviewed in the light of the decision, to be returned by the first lower appellate court.

The revisional application is thus disposed of without entering into the merits of the case. The application being CAN/1/2022 also stands disposed of.

This would not however, prevent the learned Judge remaining in –Charge of the court of learned Chief Judge, City Civil Court, Calcutta, while in T.A.29 of 2019 is pending to take up the interlocutory application referred hereinabove subject to his suitability and convenience.

Parties are directed to make communication of this order to the court below.

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

(Subhasis Dasgupta, J.)