

3.7.2023
96
Ct. no. 652
sb

CO 1523 of 2018

**Kenaram Mondal
Vs.
Kashem Ali Mollah & ors.**

Mr. Asit Kumar Bhattacharya
Ms. Mousumi Biswas ...for the Petitioner

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

Being aggrieved by the order dated 12.4.2018 passed by the learned Civil Judge, Junior Division, 2nd Court, Baruipur, South 24 parganas in Title Suit no. 277 of 2015, present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that the petitioner as plaintiff filed aforesaid suit, inter alia for declaration, damages and permanent injunction. The plaintiff/petitioner also filed an application for ad interim order of injunction and learned court below, by the impugned order dated 15th December, 2015, was pleased to direct both the parties to maintain status quo as regards the nature and character of the suit property. The petitioner filed an application under Order VI rule 17 of the Code, for amendment of the plaint and learned court

below, by the impugned order, after hearing the plaintiff's amendment application was pleased to reject the same.

Learned counsel for the petitioner submits that the learned court below acted illegally and with material irregularity in rejecting the application for amendment of plaint on the ground that if there be any violation of the order of status quo, the plaintiff's liberty is to file application under Order XXXIX Rule 2A of the Code and such statement is not required to be incorporated by way of amendment. Learned court below acted illegally and with material irregularity in observing that the norms of amendment of plaint carries with certain aspect of strictness and he did not consider at all materials on record. In fact, learned court below failed to exercise his jurisdiction by not following the well-accepted principle laid down in connection with prayer for amendment and he ought to have allowed such prayer made by the petitioner. Accordingly, the petitioner has prayed for setting aside the impugned order.

Perused the schedule of amendment as well as the order impugned. On perusal of the schedule of amendment, it appears that the plaintiff wants to incorporate that during pendency of the suit on 16.1.2016, the defendants violating the order of injunction has constructed well-privy (kuo paykhana) and as such the plaintiff by incorporating a prayer in the plaint, wants for demolition of the said privy and also

wants to incorporate prayer for recovery of possession of the said portion of the land from the defendants and accordingly, the plaintiff wants to insert a new schedule under the heading “schedule Kha”. Learned court below after considering the submissions, came to the conclusion that the allegations of encroachment has not been prima facie established before the court and local inspection or local investigation has also not been made and as such learned court below was pleased to reject the said application.

The order impugned passed by the learned court below is perverse since it violated the basic principles of dealing with an application for amendment. Settled principle of law has been enunciated by the Hon’ble Apex court in the case of **Revajeetu Builders and Developers vs. Narayanaswami and sons & others** reported in **(2009) 10 SCC 84**. Paragraph 67 of the judgment runs as follows”-

“67. On critically analyzing 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.”

Accordingly, the basis test which should govern the court’s discretion in grant or refusal of the amendment is whether such amendment is necessary for the determination of the real question in controversy subject to the condition that it would not cause prejudice or injustice to the other side which cannot be compensated by costs. In the instant case what sought to be incorporated by way of amendment is a subsequent event. Such amendment involving question of encroachment and/or recovery of possession unless incorporated by way of amendment, the real controversy between the parties will not be adjudicated effectively and conclusively. At the stage of deciding prayer for amendment, court should not go into correctness or falsify of the case of amendment, that is to say whether plaintiff’s contention of encroachment by defendant in respect of suit property is true or false. He is also not supposed to consider merits of amendment at the stage of considering prayer for amendment and while dealing with such application, court should also take notice of subsequent events to shorten the litigation, to preserve and safeguard, the rights of both parties and to sub-serve the ends of justice. It is to be kept in mind that dominant purpose of allowing amendment is to minimise litigation.

Moreover, nothing mala fide is found in the prayer which can justify trial court decision.

In view of the facts and circumstances of the case, the learned court below ought to have considered whether the proposed amendment is required for adjudication of the real controversy between the parties or not. Since the averments made in the proposed amendment is required for the purpose of final adjudication of the suit, learned court below was not at all justified in rejecting the said application and he ought to have allowed the said petition for amendment. Prayer for amendment does not depend upon the fact as to whether, the plaintiff will ultimately able to succeed in proving his case or not.

In view of above, the order impugned dated 12.4.2018 is hereby set aside. The plaint is accordingly amended as per schedule of the petition. The plaintiff is directed to file amended plaint within a period of four weeks from the date of communication of the order before the court below. Since the suit is pending for a considerable period of time, learned court below is directed to expedite the final hearing of the suit.

C.O. 1523 of 2018 is accordingly allowed.

Urgent photostat certified copy of the order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)