

20.2.2023
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Ct. no. 652
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CO 1777 of 2018

Subhasis Karmakar
Vs.
Sri Shyamal Karmakar & Ors.

Mr. Surya Prasad Chattopadhyay
Mr. Arjun Samanta ...for the Petitioner

Mr. Ayan Banerjee
Ms. Debasree Dhamali
Ms. Riya Ghosh ..for the Opposite parties

Being aggrieved and dissatisfied with the order dated 3.5.2018 passed by the learned Civil Judge, (Senior Division), Chandannagore in Title Suit no. 566 of 2017, present revisional application under Article 227 of the Constitution of India has been preferred.

By the impugned order, the learned court below was pleased to reject the prayer for amendment of plaint filed by the transposed plaintiff. The petitioner contended that this is a suit for partition and on the very date of transposition, they have filed a petition for amendment of plaint. In fact, the petitioner herein, after being transposed as plaintiff filed the aforesaid application under Order VI rule 17 to bring the fact that the deceased plaintiff never executed any deed of conveyance in favour of the defendants and the said deed was procured on the basis of fraud and misrepresentation. The defendant/opposite parties filed written objection against

the amendment application and it came up for hearing before the court below on 3.5.2018, when by the impugned order, said prayer was refused.

Learned counsel for the petitioner submits that the court below erred in law in rejecting the amendment application. The learned court below cannot enter into the merit of the application as to whether it is barred by law or not and he ought to have allowed the application. Learned court below ought to have considered that after knowing about the aforesaid fraudulent transfer the petitioner has sought for the present amendment and period of limitation will run from the date of knowledge. Learned court below was erred in observing that the trial has already commenced and as such the prayer for amendment cannot be allowed but in fact, the issues have been framed only and evidence has not yet been tendered and accordingly, trial has not yet commenced. Learned court below has rejected the said application on a misdirected opinion that the proposed amendment if allowed, it would change the nature and character of the suit. Accordingly, the petitioner has prayed for setting aside the impugned order of dismissal.

Learned counsel for the opposite parties submits that earlier in connection with self-same property, a suit was filed before the court of learned Civil Judge, Senior Division, Chandannagore being Title Suit no.23 of 2010, where in the written statement submitted by the

defendant no. 2 of that suit disclosed that the defendant no. 1 of that suit has sold $\frac{1}{4}$ share by registered sale deed on 20.10.2006. Accordingly, the transposed plaintiffs who were proforma defendants in that suit, were all along aware about the sale deed but they have not taken that plea before the court below and only after commencement of trial, they have come with the said application to take that plea which is hopelessly barred by limitation. He further contended that it is a suit for partition and if the proposed amendment for declaration of deed as void, is incorporated in the prayer, then obviously the nature and character of the suit will be changed. He further submits that before the trial court, other set of plaintiff filed the prayer for amendment in the plaint but that set of plaintiffs has not filed the present revisional application. This revisional application has been filed against the order of rejection by another set of plaintiffs and accordingly, the revisional application is not maintainable. In support of his contention, opposite party has also relied upon a judgment of Apex court reported in (2008) 15 SCC 610 and contended that the remedy for declaration of a deed as void was available to the plaintiff by filing another suit but as the same itself is barred by limitation, so the amendment of the plaint cannot be allowed.

In reply, learned counsel for the petitioner submits that in the alleged earlier suit, petitioners being non-

contestant proforma defendants, they were not informed about execution of impugned deed and as such question of limitation does not arise.

I have gone through the impugned order dated 3.5.2018 wherefrom it appears that the court below has rejected the prayer for amendment only on the ground that the said application has been filed after commencement of trial and furthermore, the plaintiff/petitioner has failed to show that in spite of due diligence, he could not raise the said issue before the trial court and if at this stage proposed amendment is allowed it would retard the progress of speedy trial in the suit.

I have considered the submission of the parties and also perused the schedule of amendment. The impugned order has been supported by opposite parties mainly on four grounds:-

- (i) the subject matter of amendment is hopelessly barred by limitation.
- (ii) This is a suit for partition and if prayer for cancellation of deed is incorporated in the plaint, the nature and character of the suit will be changed.
- (iii) In the suit, issues have already been framed and as such trial commenced and under the proviso to order VI, rule 17 amendment cannot be allowed at this stage without proving the case of due diligence.

- (iv) The set of plaintiff, who filed amendment application did not feel aggrieved and another set of plaintiff has filed the revisional application and as such present application is not maintainable in the eye of law.

It is no longer res integra that dominant purpose of order VI, rule 17 is to minimise litigation. It is also well settled, that though decision on application under order VI, rule 17 of the Code of Civil Procedure is a very serious judicial exercise and the same cannot be undertaken in a casual manner, but if the amendment sought is bona fide, legitimate, honest and necessary, the court must not refuse the same.

In ***Revajeetu Builders and Developers Vs. Narayanaswamy and sons and others*** reported in **(2009) 10 SCC 84**, Supreme Court has laid down some basic principles 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."*

The main cause of opposition advanced by the opposite parties is that petitioner had knowledge about existence of the deed since 2010 and as such subject matter of proposed prayer for amendment is barred by limitation which however has been strongly denied by the petitioners herein. Since the issue as to whether petitioner herein had knowledge about the deed since long and thereby prayer has become barred or not is an arguable issue in the context of allegation and counter allegation and the petitioner's plea of being barred by limitation is a disputed one and it should be subject matter of the issue in controversy for complete and effective adjudication of the suit. In this context reliance has been placed in ***Ragu Thilak D. John Vs. S. Rayappan and others***, reported in **(2001) 2 SCC 472**. Moreover in view of disputed fact about date of knowledge of petitioners regarding existence of deed in question, if it is permissible for the petitioners to file an independent suit, why the same relief which could be prayed for, in a new suit cannot be permitted to be incorporated in the pending suit.

Then comes the question whether proposed amendment, if allowed will change the nature and character of suit or not. Now if the proposed prayer for cancellation of the deed incorporated in the plaint, the nature and character of the suit will not be charged, since the suit will remain a suit for partition. Addition a new

ground of attack in the plaint does not raise the same problem as adding, altering or substituting a new cause of action. The proposed amendment if allowed will neither add nor alter or substitute cause of action since cause of action of suit shall remain within the ambit of partitioning the suit properly and the effect of proposed amendment at best will have an impact upon co-sharer's share, which by no means changes nature or character of the suit either fraudulently or constitutionally.

As regards court's observation that trial has already commenced in view of the fact that issues have already been framed and thus it attracts proviso to order VI rule 17, it can be said that in ***Baldev Singh and Others vs. Manohar Singh and another***, reported in **(2006) 6 SCC 498**. The Apex Court was pleased to observe that "commencement of trial" as used in proviso to order VI, rule 17 in the code 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. Furthermore it is well settled that power to grant amendment to proceedings is intended to serve needs of justice and is not governed by any narrow or technical limitations. Rules of procedure are intended to be a handmade to administration of justice.

Having considered the facts and circumstances of the case, it appears to me that since this is a suit for

partition so if the other sets of plaintiffs have preferred this revisional application being aggrieved by the order of amendment that must not cause the revisional application infructuous since in a partition suit every party can be treated as plaintiff and every party can also be treated as defendant. Furthermore, it appears that the evidence has not yet been tendered in the said suit, only the issues have been framed, hence if the proposed amendment is allowed, the court below only would be required to frame an additional issue for adjudication and nothing more. Since the evidence has not been commenced, the court below should have allowed the prayer for amendment. Law is not now well settled that while considering the prayer for amendment, the court below must not have gone into the merits of the prayer. Furthermore, in a suit, all the questions connected with the suit for effective and conclusive adjudication of the dispute between the parties should have settled and disposed of once forever.

In view of above, C.O. 1777 of 2018 is allowed subject to the payment of cost of Rs. 3,000/-which the plaintiff will pay to the defendant no. 2 within a period of three weeks from the date of communication of the order. On such payment, the plaint will be amended and the court below will be at liberty to frame additional issue after giving opportunity to defendants to file additional

written statement. In default of payment of cost, the order dated 3.5.2018 shall revive.

I have made it clear that I have not gone into the merits of the suit, including the question whether impugned prayer is barred by limitation or not and all such questions shall be kept open for adjudication before trial court without being influenced by any observation made herein.

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

(Ajoy Kumar Mukherjee, J.)