

Item No. 6
12.10.2023
Court. No. 19
GB

C.O. 1782 of 2023

Smt. Sharmista Dutta & Ors.
Vs.
Smt. Nibadita Karmakar & Ors.

Mr. Indranath Mukherjee,
Mr. Sukanta Mondal

...for the Petitioners.

Mr. Ram Prakas Banerjee

...for the Opposite Parties.

The revisional application arises out of an order dated March 21, 2023 passed by the learned Civil Judge (Junior Division) Serampore, Hooghly in Title Suit No.8 of 2021.

By the order impugned, the learned court below rejected an application for amendment of the plaint. According to the learned court below, the plaintiffs wanted to incorporate new facts. The amendment was hit by the proviso to Order 6 Rule 17 of the Code of Civil Procedure. The plaintiffs were not diligent when the plaint was filed. Such facts were already available with the plaintiffs.

Mr. Mukherjee, learned advocate appearing on behalf of the plaintiffs/petitioners submits that a suit for declaration and injunction was filed. In the prayer portion, the factum of encroachment was mentioned. Inadvertently, such facts were not pleaded in the body of the plaint. The affidavit-in-chief had not been filed by the plaintiffs. Thus, trial had not commenced. Under such circumstances, the learned court below ought not to have rejected the application for amendment.

Mr. Banerjee, learned advocate appearing on behalf of the opposite parties/defendants submits that the suit was originally filed for declaration and injunction. The question of encroachment was not pleaded. Rather, it was stated that the defendants were trying to dispossess the plaintiffs from a part of the suit property. In a suit which had been framed as in the present case, subsequent amendment, by introduction of a further cause of action with regard to encroachment and an additional prayer for recovery of possession, would change the nature and character of the suit. Further, the right which accrued in favour of the defendants due to passage of time, would also be denied if such amendment is allowed to be incorporated.

Having heard the rival contentions of the parties, it appears that the plaint case is that the defendants had been disturbing the plaintiffs and preventing them from enjoyment of the suit property. Various alleged illegal activities of the defendants have been narrated in detail, in the plaint. From the prayer portion, it appears that prayer 'Gha' and 'Una' indicate the factum of alleged encroachment and dispossession from a portion of the property.

Thus, it is not a case where the facts sought to be incorporated by way of amendment were alien to the suit. The prayer and the averments sought to be incorporated were not ex facie barred by law. Dispossession and recovery of possession were the main facts which were sought to be incorporated. The plaintiffs also had the right to file a separate suit on the said cause of action. Thus, the

amendment should have been allowed in order to avoid multiplicity of proceedings. It would be convenient for both the parties to contest a single suit. Not allowing such amendment would be relegating the parties to another suit.

This Court finds that the learned court acted illegally and with material irregularity in rejecting the application for amendment, for the following reasons :-

- a) Trial had not commenced. The evidence in chief had not been filed, as per the information slip filed in court by the petitioners.
- b) It has been judicially settled that the trial is said to have commenced when the evidence starts and the court starts applying its mind.
- c) It is well-settled, that amendment should be allowed liberally and in all cases where the plaintiff can compensate the defendant by paying cost.
- d) There is neither a withdrawal of admission nor setting up of contrary plea.

Under such circumstances, the order impugned is set aside. The plaintiffs will file their amended plaint within a period of two weeks after reopening of the court after the puja vacation. The amended plaint will be accepted by the court upon being satisfied that cost of Rs.6,000/- has been paid to the defendants. Such cost shall be paid to the learned advocate for the defendants or directly to the defendants by cash and be shared equally by them. The defendants will file their additional written statement within four weeks from

receipt of the amended plaint. The learned court below shall continue with the suit in accordance with law.

Accordingly, the revisional application is disposed of.

All the parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)