

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2724 of 2022

Sri Nemai Sadhukhan alias

Nemai Sadhukhan

VERSUS

Sri Badal Das & Ors.

For the petitioner:

Mr. Animesh Paul, Adv.

For the opposite parties No. 1:

Mr. Tanmoy Mukherji, Adv.
Ms. Shinijini Chakraborty, Adv.

Judgment on: May 19, 2023

Biswaroop Chowdhury, J:

The petitioner before this Court is a defendant in a suit for permanent injunction and is aggrieved by an Order dated 08.07.2022 passed by Learned Civil Judge (Junior Division) 1st Court at Howrah allowing prayer for amendment made under Order VI Rule 17 of the Code of Civil Procedure filed by the plaintiffs.

The case of the defendant/petitioner may be summed up thus:

1. The opposite parties/plaintiffs have filed a suit for permanent injunction being Title Suit No. 1579 of 2016 against the petitioner and opposite party no.-5 before Learned Civil Judge (Junior Division) 1st Court at Howrah.
2. Upon entering appearance in the said suit the opposite party no-5 has filed written statement to the said suit and the petitioner has also filed written statement along with counter claim to the said suit. The written statement of the petitioner and counter claim was initially refused by the Learned Trial Court but was subsequently accepted in terms of order passed by this Court in C.O. 2817 of 2019 allowing the written statement to be accepted with cost of Rs. 25,000/-.
3. In the meantime trial of the suit was started and plaintiff witness No.1 was subsequently examined and partly cross-examined.
4. Thereafter opposite party Nos. 1 to 4 filed an application under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure 1908, inter-alia praying for amendment of the plaint. In the said application it was contended that at the time of adducing evidence it was detected that at the time of filing of the suit due to haste and inadvertence some dag numbers have been wrongly incorporated in the plaint which are now required to be deleted from the plaint and as such it was prayed that L.R. Dag Nos. 510, 1933 and 1942 be deleted from paragraph 1 and schedule of the plaint.

5. The petitioner and opposite party no-5 have filed their separate written objection to the petition of amendment. In the said objection the contention made in the application for amendment was denied, and it was urged that the cross examination of plaintiffs witness no-1 was complete and the plaintiffs are withdrawing admitted facts.
6. The Learned Trial Court upon hearing the application was pleased to reject the prayer for amendment by Order No. 30 dated 19/08/2019.
7. The opposite party no 1 to 4 being aggrieved by the Order dated 19/08/2019 passed by the Learned Trial Court moved a revisional application before this Court being C.O. 3534 of 2019.
8. By Order dated 17-02-2022 the revisional application being C.O. 3534 of 2019 was disposed. Order no – 30 dated 19-08-2019 passed by the Learned Trial Court was set aside and the Learned Trial Court was requested to reconsider the application for amendment afresh in accordance with law.
9. Pursuant to the Order passed in C.O. 3534 of 2019 by this Court Learned Trial Court reconsidered the application for amendment filed by the opposite party no1 to 4 and allowed the said application by Order dated 08.07.2022.
10. The petitioner being aggrieved by the Order dated 08-07-2022 passed by the Learned Trial Court has come up with the instant application.

It is contended by the petitioner that the Learned Judge acted illegally and with material irregularity in failing to consider the scope and ambit of the provisions contained under Order VI Rule 17 read with proviso of the Code of Civil Procedure. It is further contended that the Learned Court failed to consider that the said application for amendment of the plaint having been filed after the commencement of the evidence is hit by the proviso to Order VI Rule 17 of the Code of Civil Procedure 1908. It is also contended that the application for amendment has effect of withdrawing the admission made by the plaintiff witness no 1 from the plaint and the evidence already adduced which cannot be allowed in the eye of law. Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party no 1 to 4 perused the petition filed and materials on record. Learned Advocate for the petitioner submits that the Learned Trial Court erred in allowing the amendment, when the trial of the suit has started and cross examination of the plaintiff witness was done in part. Learned Advocate further submits that amendment cannot be allowed as right of his client has accrued by admission and his client has filed a counter claim.

Learned Advocate for the opposite party nos. 1 to 4 submits that his clients by seeking the amendment has not improved his right but has curtailed his right with regard to some portions of the property. Learned Advocate further submits that as per Rule 1 of Order XXIII of the Code of Civil Procedure at any time after the institution of a suit the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim, thus it is open to

the plaintiffs/opposite party no 1 to 4 to abandon portion of the suit property on which relief is claimed. Learned Advocate also submits that the counter claim of the petitioner is not affected by the amendment sought for by the plaintiff/opposite party no 1 to 4.

Now in order to consider the legality of the order passed by the Learned Trial Court allowing the amendment it is necessary to consider the provision contained in Order VI Rule 17 of the Code of Civil Procedure.

Order VI Rule 17 of the Code of Civil Procedure provides as follows:

‘The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.’

‘Provided that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.’

In the instant matter although the amendment was sought for after the trial commenced but trial did not progress much as part examination of one plaintiff witness was done and the proposed amendment does not change the nature of the suit. In the case of Gurbaksh Singh V Buta Singh reported in (2018) 6 SCC. P-567 the Hon’ble Supreme Court allowed amendment on the ground that trial

had not progressed much, only two official witnesses were examined when the application for amendment was filed, and that the proposed amendment neither changes the nature and character of the suit nor does it introduce any fresh grounds.

It is a well settled principle of law that amendment cannot be allowed where it seeks withdrawal of admission. In the instant matter the plaintiffs did not seek to withdraw any admission but is giving effect in pleading to what they have admitted in cross examination. By seeking to amend by deleting some of the properties mentioned in the schedule the plaintiffs are not claiming better rights but curtailment of some rights claimed by them.

Thus taking into consideration that the amendment was sought at the stage when trial did not progress much, and upon considering that right to abandon or forego part of the claim is permitted at any stage of the suit as per Order XXIII Rule 1 of the Code of Civil Procedure and that the amendment does not change the nature of the suit or seek to withdraw any admission already made this Court does not find any error in the Order of the Learned Trial Court allowing amendment. However, in the facts of the case petitioner should be compensated by costs.

Hence, this revisional application stands disposed. Order dated 08.07.2022 passed in Title Suit No. 1579 of 2016 stands modified to the extent that the amendment shall be carried out upon payment of costs of Rs. 1,000/- (Rupees

One Thousand only) by opposite party no – 1 to 4 to the petitioner. Other contents of the order of Learned Trial Court remain un- altered.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)