

10.10.2023.
Item no. 31.
Court No.19
ap

C.O. No. 3037 of 2023

**Pabitra Vincom Private Limited & Anr.
Versus
Malay Halder**

Mr. Sudhasavya Banerjee,
Mr. Shuvajit Bose.

...For the petitioners.

This revisional application arises out of an order dated 28th July, 2023 passed by the learned Civil Judge (Junior Division), 2nd Additional Court at Alipore in Title Suit No. 220 of 2016.

By the impugned order, an application for amendment was allowed by the court below. The schedule of the amendment is quoted below:

“Schedule of the proposed amendment

1. In the cause title of the plaint, where the name of the defendant no.1 is written, after “PABITRA VINCOM”, the words “PRIVATE LIMITED” will be replaced by the words “LIMITED LIABILITY PARTNERSHIP”.

2. After paragraph no.9 of the plaint, a new paragraph will be inserted as paragraph no.9(a) which runs as follows:

“9(a) With the progress of the suit, the defendant nos.1 and 2 have been making construction at the suit premises in full swing with a view to defeating the claims of the plaintiff as prayed for and trying to sell and part with possession of the suit premises in favour of the third party outsider. If the defendants succeed in their malafide attempts, the same will open the floodgate of litigation causing serious prejudice to the

plaintiff. Therefore, a Decree for mandatory injunction is required to be passed directing the defendant nos.1 and 2, their men and agents to demolish the construction as erected covering the area of the land of the suit property.”

3. After prayer ‘c’ of the plaint a new prayer will be inserted as prayer ‘cc’ which runs as follows:

“cc) A Decree for mandatory injunction, directing the defendant nos.1 and 2 and the persons claiming through them to demolish the construction as erected covering the area of the land of the suit property;”

The first amendment sought to incorporate the correct name of the defendant no.1. Next, the plaintiff sought to incorporate the facts that during the pendency of the suit, the defendant nos.1 and 2 had been making construction on the property in question, thereby defeating the tenancy right of the plaintiff. That the defendants were trying to sell out part of the property to outsiders which would lead to a floodgate of litigation. Therefore, a decree for mandatory injunction was required to be passed directing the defendant nos.1 and 2, their men and agents to demolish the construction already erected, covering the suit property. Finally, an additional prayer (cc) for mandatory injunction directing the defendant nos.1 and 2 and the persons claiming through them to demolish the construction, was also sought to be added.

The suit is for declaration, recovery of possession as also mandatory and permanent injunction.

Mr. Banerjee, learned Advocate for the petitioner for the petitioners submits that the relief claimed in the amendment application was time barred. Paragraphs 4, 6, 7 and 9 of the plaint is placed by Mr. Banerjee, in support of his contention that from the very beginning it was the plaintiff's case that the defendants were continuing with the construction work. Such facts were not pleaded in the plaint, although known to the plaintiff.

The prayers apropos the alleged constructions in the nature of mandatory injunction was not made in the plaint. Having omitted to incorporate such averments and prayers in the plaint, belated insertion of the same, should not be allowed.

It is further stated that the learned Court below, while allowing the application for amendment, did not assign any reasons. Allowing the application for amendment, after the suit has progressed substantially, was contrary to law. The plaintiff had failed to bring on record the already existing facts, when the suit was filed.

Having considered the nature of the suit, it appears that the positive case of the plaintiff was that the plaintiff was inducted as a tenant in respect of the

suit property by the erstwhile owner (since deceased). The owner left behind three daughters and two sons.

The plaintiff became a monthly tenant under the proforma defendant nos.3 to 7, by operation of law. The plaintiff paid rent to the proforma defendant no.6, who used to collect rent on behalf of heirs of Sri Sunil Kumar Mitra, after July, 2009. The proforma defendant no.6 refused to accept the rent and the plaintiff started depositing the rent before the Rent Controller since October, 2009. The plaintiff used the said property as his storeroom for keeping materials. On December 16, 2015, the plaintiff visited the suit property and found that the storeroom had been demolished and furniture were lying around. The plaintiff lodged a complaint before the Tollygunge Police Station. Subsequently, the plaintiff came to know that the proforma defendant nos.3 to 7 had sold out the property to the defendant nos.1 and 2 i.e. the petitioners herein. Thereafter, upon searching the records of the Registry Office, the plaintiff obtained the Deed of Sale. The plaintiff alleged that the defendant nos.1 and 2, along with the proforma defendant nos.3 to 7 hatched a plan and demolished the suit property in order to oust the plaintiff forcibly from the same. The proforma defendant nos.3 to 7 made desperate attempts to oust the plaintiff forcibly from the suit property, but they failed. The plaintiff had substantial tenancy right in the suit property and he had never

surrendered his tenancy. The defendant nos.1 and 2 were trying to make construction in respect of the suit property, thereby, denying the plaintiff's right of tenancy. It was necessary that a decree for permanent injunction be passed restraining the defendant nos.1 and 2, their men and agents from interfering and disturbing and/or making any construction on the suit property.

The plaintiff prayed for various reliefs. Prayer (c) is a prayer for a decree of mandatory injunction directing the defendant nos.1 and 2 to hand over the possession of the suit property as it was before demolition, to the plaintiff. The fact that attempts at construction was going on by the defendant/petitioners has been pleaded.

The learned Court below considered the aspects relating to amendment of pleadings and relied on various decisions of the Hon'ble Apex Court. Upon consideration of the rival contentions of the parties, the learned Court came to the finding that a lenient approach should be taken while allowing the amendment of the pleadings. The amendment was filed to bring on record subsequent events with regard to the continuation of construction work, creation of third party interest etc. A further prayer for mandatory injunction was made. Under such circumstances, the application was allowed with reasons.

The defendants were allowed an opportunity to file their additional written statement. From the pleadings and the records, it does not appear that the suit is at an advanced stage. The amendment would not be hit by the proviso to Order VI, Rule 17 of the Code of Civil Procedure.

It appears from the records that the amendment application was filed when the injunction application was fixed for hearing. The proforma defendants had not been served with the copy of the plaint when the said amendment was allowed.

Thus, the first contention of Mr. Banerjee with regard to the belated amendment, is not accepted by this Court. Secondly, the plaintiff wanted to incorporate an additional fact that the construction was continuing even during the pendency of the suit and third party rights were being created. An additional prayer that a mandatory order of injunction be passed directing demolition, was sought to be incorporated in the plaint. The merits of the amendments sought, were not to be decided while considering such application.

In the decision of ***Rajesh Kumar Aggarwal and others vs. K.K.Modi and others reported in AIR 2006 SC 1647***, the Apex Court held that the Court was not to go into the merits. The relevant portion is quoted below:-

"While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."

The question of the prayer being barred by limitation does not arise as the plaintiff has specifically stated that during the continuity of the suit, certain constructions had been further made.

Moreover, the amendment should be allowed to avoid multiplicity of proceedings. Amendments should be allowed liberally. The amendment does not either amount to withdrawal of admission or setting up of contrary pleas. No prejudice will be caused to the defendants. The plaintiff has not set up a new cause of action.

In the decision of **Ganesh Prasad vs. Rajeshwar Prasad and ors.** reported in **2023 SCC OnLine SC 256**, the Hon'ble Apex Court held as follows:-

"37. Thus, the Plaintiffs and Defendant are entitled to amend the plaint, written statement or file an additional written statement. It is, however, subject to an exception that by the proposed amendment, an opposite party should not be subject to injustice and that any admission made in favour of the other party is not but wrong. All amendments of the pleadings should be allowed liberally which are necessary for determination of the real controversies in the suit provided that the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken."

The plaintiff wanted to elaborate his pleadings and also bring on record the subsequent events. Whether the facts which have been pleaded are true or untrue, will be decided at the time of trial, on evidence.

With the aforesaid observations, the instant revisional application is dismissed.

The defendant nos.1 and 2 are at liberty to file their additional written statement within two weeks from the reopening of the Court after the long Puja Vacation for the year 2023.

There will be, however, no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Sarkar, J.)