

S/L 26
20.01.2023
Court. No. 12
Sourav

CO 3895 of 2018

**Fajlu Momin & Ors.
Vs.
Aflatun Momin & Ors.**

Mr. Indrani Pal

...for the petitioners.

*Ms. Shila Sarkar
Mr. Sibasis Ghosh*

...for the opposite party nos. 1 to 14.

In this application as filed under Article 227 of the Constitution of India, the order No. 69 dated 31.08.2018 as passed by the learned Civil Judge, (Senior Division) 2nd Court, Malda in Partition Suit No. 243 of 2008 is the subject matter of the challenge.

By the impugned order, learned trial court in a suit for permanent injunction and for partition has been pleased to allow the plaintiffs' amendment petition thereby permitted the plaintiffs to include certain averments in the plaint as well as the prayer for recovery of possession in the prayer portion of the said plaint by removing the prayer for permanent injunction.

The defendants felt aggrieved and thus preferred this instant revisional application.

In support of the present revisional application, learned advocate for the defendants/petitioners at the very outset draws attention of this Court to the photocopy of the plaint as filed in Partition Suit No. 243 of 2008 before the learned trial court. Attention of this Court is also drawn to the order dated 23.09.2015 as passed by this Hon'ble Court in FA 17 of 2014, the petition for amendment as well as the

written objection as filed by the defendants/revisionists before the trial court.

It is contended that in FA 17 of 2014, this Hon'ble Court while disposing of the said appeal allowed the present plaintiffs to take steps for setting aside the abatement which occurred on account of death of defendant no. 9 and thus set aside the impugned judgment as passed in the said suit. It is further contended on behalf of the revisionists/defendants that after setting aside the abatement, the plaintiffs had come forward with an application for amendment of plaint which practically tantamounts to changing of nature and character of the said suit which is not permissible in the eye of law. It is further contended that since the said petition for amendment has been filed at a very belated stage, learned trial court ought not to have allowed such amendment application in view of the provisions of the proviso of Order 6 Rule 17 of the Code of Civil Procedure.

In support of his contention, learned advocate for the defendants/revisionists places her reliance upon the reported decision of ***Nemai Chandra Basuri Vs. Chandra Mohan Ghosh***, reported in **2016 (2) CHN (CAL) 354**.

It is thus contended that the present revisional application be allowed thereby rejecting the prayer for amendment as made by the plaintiffs before the learned trial court. While opposing the contention of the learned advocate for the revisionists/defendants, learned advocate for the plaintiffs/opposite parties submits before this Court that on account of subsequent events, the proposed amendment had become necessary which is why a prayer was made for amendment of the plaint.

It is further argued that the proposition of law as enunciated in the case of *Motilal Saha Vs. Narasingha Saha*, reported in **2012 (5) CHN (CAL) 11** is squarely applicable in this case.

This Court has perused the entire materials as placed before this Court including the impugned order. This Court has given its due consideration over the submissions of the learned advocate for both sides. On perusal of the amended plaint as filed before the learned trial court, it reveals to this Court that originally the said Partition Suit No. 243 of 2008 was filed with prayers for declaration, permanent injunction and for partition by way of preliminary decree followed by a final decree and for other ancillary reliefs.

Admittedly, the said suit was dismissed by a judgment and decree dated September 20, 2013. However, the said judgment and decree of dismissal was set aside by an order dated 23.09.2015 as passed by this Hon'ble Court in FA 17 of 2014 and the matter was sent back to the learned trial court with some direction on account of setting aside of the abatement in view of the death of defendant no. 9 during the pendency of the said suit. It is admitted position that after such remand, the abatement was set aside and at this stage, the plaintiff had come forward with the prayer for amendment as discussed above.

On perusal of the petition for amendment, it appears to this Court that it has been averred by the plaintiffs in the trial court that during the pendency of the said suit for partition, that is **on 10.11.2011** plaintiffs have been prevented from entering into the suit property and thus finding no other alternative, the plaintiffs have prayed for

amendment of the plaint including its prayer for recovery of possession after partition.

In considered view of this Court, the amendment as sought for by the plaintiffs before the learned trial court has become necessitated on account of change of circumstances and that too during pendency of the suit for which this Court considers that the learned trial court made no error or mistake in allowing the said prayer for amendment espacially when the trial of the said suit had not yet commenced after remand.

In view of such, this Court finds no illegality in the impugned judgment and accordingly, the instant revisional application deserves to be dismissed. It is thus ordered that the present revisional application being CO 3895 of 2018 is dismissed on contest. The impugned order No. 69 dated 31.08.2018 as passed by the learned Civil Judge, (Senior Division) 2nd Court, Malda in Partition Suit No. 243 of 2008 is hereby affirmed.

Learned trial court is hereby directed to give opportunity to the defendants of Partition Suit No. 243 of 2008 to file their additional written statement if there be any.

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

(Partha Sarathi Sen, J.)