16.04.2024
Item No. 05
Ct. No. 652

CO 989 of 2021

Saibal Sen.
Vs.
Saikat Sen & Ors.

Mr. Probal Kumar Mukherjee
Mr. Shebatee Datta
.. For the Petitioner

Ms. Kushal Chatterjee
Mr. Debabrata Ray
Mr. Abir Lal Chakraborti
…For the Opposite Parties

The predecessor of petitioner herein as plaintiff filed a suit for partition and accounts before the court below against the predecessor of opposite parties, which has been registered as Title Suit no 211 of 2004. According to plaint case the entire suit property and the suit business mentioned in the Schedule to the plaint belonged to three brothers namely late Dilip Kumar Sen, late Bimal Kumar Sen and late Asim Kumr Sen having 1/3rd undivided share each. The legal heirs of the respective parties have already been substituted.

On the basis of the prayer, learned court below had appointed the petitioner and the opposite party no. 3 herein as joint receivers in the said suit over the entire suit properties described in the schedule to the plaint and they have taken charge and also look after the suit properties including family business and submit quarterly accounts.

During pendency of the said suit, plaintiff filed an application seeking amendment of plaint under Order VI Rule 17 of the Code of Civil Procedure and opposite parties herein filed written objection against said application. Learned court below upon hearing the parties and upon perusal of the available materials in record had rejected the said application, by the order impugned.

Being aggrieved by the said order Mr. Probal Kumar Mukherjee, learned senior counsel appearing on behalf of petitioner submits that after getting appointment as joint receiver as stated above, the petitioner/plaintiff has acquired knowledge about the illegal and unauthorized activities over the suit property which are subsequent discovery and are required to be incorporated in the plaint for complete adjudication of the lis by and between the parties. He further submits that there has been no deliberate delay on behalf of the petitioner in filling the application.

He further submits learned court below while passing the order impugned has failed to appreciate that the petitioner had immediately approached the court below with the application for amendment after gathering knowledge about new fact and after collecting proper evidence in support of the averment. Learned court below failed to appreciate that rejecting of prayer for amendment has resulted manifest injustice to the petitioner. The court below has passed the order mechanically without applying judicious mind. Accordingly, he has prayed for setting aside the order impugned.

Mr. Kushal Chatterjee, learned counsel appearing on behalf of the opposite party raised vehement objection against the submission made by Mr. Mukherjee and contended that this is a suit for partition and according to plaint case parties have 1/3rd share in the suit property and as such for passing preliminary decree in order to declare admitted share of the parties, proposed amendment is not at all required. Moreover plaintiff has not explained what prevented him from making such prayer at the time of filing the suit.

He also argued that the plaintiff in his prayer for amendment has sought for adjustment from 1/3rd share of the original defendant no.1 late Dilip Kumar Sen in the prayer portion of his plaint and if such prayer is allowed it will cause serious prejudice to the defendant/opposite parties. Accordingly the two main ingredients for considering a prayer for amendment i.e. whether the proposed amendment is required for adjudication of the real controversies between the parties and whether proposed amendment if allowed will cause serious prejudices to the defendant/opposite parties are in favour of the defendant/opposite parties, and as such the court below was justified in rejecting the prayer for amendment, which does not call for interference by this Court, invoking jurisdiction under Article 227 of the Constitution of the India. In this context he also referred and relied **Narain Bhaduri and Satyanarayan Bhaduri ILR 1941 410** and **Shub karan Bubna Vs. Sita Saran Bubna and others** reported in **(2009) 9 SCC 689** and contended that in a suit for partition declaration of right or shares is only the first stage. Relying upon the said judgment he further contended that when the commissioner will give report as to the manner of division in terms of the proposal contended in the report, then it will have to be considered by the court and after hearing objection to the report, if any, the court is supposed to pass final decree whereby the relief sought in the suit is to be granted. In this context he also referred Order XX Rule 17 and Order XXVI Rule 14 of the code.

In reply learned counsel for the petitioner submits that trial has not yet commenced and this is a suit for partition on settlement of account and as such the proposed amendments are integral to the nature of the suit. He further submits that proposed amendment unless incorporated in the plaint in order to decide real controversy between the parties, petitioner will be remediless, so far as their prayer for adjustment of the amount is concerned.

I have considered submission made by both the parties. On perusal of the order impugned it appears that the court below has rejected the proposed amendment on the following grounds:

i) Technically the trial has already been commenced since issues have been framed.

ii) The case record transpires that joint receiver was appointment on 27.06.2005 and the petition for amendment was filed by the plaintiff on 25.02.2020 and the plaintiff has not assigned any reason that inspite of due diligence they could not amend the plaint earlier.

iii) If any co-sharer illegally used the income of the suit property for their personal gain, it is the duty of the learned Receiver to inform the matter before the court, but no such report have been submitted by the receiver.

iv) Most importantly the amendment sought for by the plaintiff is not necessary for the purpose of determining real question in controversy.

So far as the courts observation that since issues have been framed so the trial has commenced and plaintiff failed to explain that inspite of due diligence he could not incorporate it in the pleading earlier so proposed amendment cannot be allowed, is not based on sound reasoning. Firstly because there is no quarrel with the proposition of law that framing of issue is the first date of hearing but the term used in the proviso to Order VI, Rule 17 is "after the trial has commenced". While dealt with this issue in ***Baldev Singh & Others Vs. Manohar Singh & another*** reported in **(2006) 6 SCC 498**. Apex court is of clear view that "Commencement of Trial" as used in proviso to Order VI, Rule 17 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.

In the present case admittedly evidence has not been started. A Division Bench of this Court while dealt with the same issue in ***Sree Sree Iswar Radha Behari Jew and Sree Sree Iswar Salgram Jew*** reported in **AIR 2019 Cal 131** had discussed earlier findings on this point and observed in paragraph 32 as following:-

> ***"32.*** *There is a distinction between when the trial stage commences in the life of a civil suit and when the trial actually commences within the meaning of the two relevant expressions used in the proviso to Order VI, Rule 17 of the Code. Ordinarily, the trial stage commences in a suit immediately upon issues being determined. However, it is not immediately thereupon that the trial in a suit commences in right earnest and the commencement of the trial is only when any witness takes to the box, whether to prove his affidavit of evidence or to prove any document to be tendered into evidence or to face any cross-examination for, it is at this stage that the court applies its judicial mind to examine the evidence or to consider whether a particular document is to be received in evidence or to consider the permissibility of the questions put in cross-examination. It is also open to the court to put its own questions to the witness; and, when the court does so, it surely applies its mind for the purpose of assessing the merits of the lis."*

Secondly plaintiffs have clearly averred in the application that they came to know about the fact sought to be incorporated after taking charge as joint Receiver and as such question of "due diligence theory" lost it's importance in the present context.

There are other aspects also in the present context. It is well-settled proposition of law that dominant purpose of Order VI, Rule 17 is to minimize litigation and I fail to understand, if it is permissible for the petitioner herein to file an independent suit, to set up his claims sought to be incorporated in the plaint, why the same relief which could be prayed for in the new suit, cannot be permitted to be incorporated in the present suit.

Without referring several authorities, it can be said that law laid down precisely is that all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties and the amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct but the amendment would cause him an injury, which could not be compensated in costs.

In the present context schedule of amendment *prima facie* shows that the amendment which is sought is merely an attempt to clarify the existing pleading and does not in substance add to or alter the original suit for partition and for declaration of share. Mere delay in applying for amendment alone should not be a ground to dis allow the prayer for amendment, unless proposed amendment, if allowed is going to change nature of the suit as the cause of action to set up an entirely new case, foreign to the case set up in the plaint. Present amendment as it appears is with respect to relief in the plaint, which is predicated on facts which are already pleaded in the plaint.

It is well settled that at the time of considering the prayer for amendment the correctness of the prayer or chance of plaintiff's success in proving such prayer, cannot be the subject matter of consideration and accordingly the court below was not proper in reaching to a finding that since learned receiver had not reported any illegality, so the proposed amendment is not necessary for the purpose of adjudication of the real controversy in the suit. Proposed amendment if allowed will also not change the nature and character of the suit since even if the proposed amendment is allowed, suit will remain a suit for partition.

In the present context if the proposed amendment is allowed and if the defendant is given an opportunity to file additional written statement, I think the defendant will not suffer such prejudice, which cannot be compensated by cost.

Since the suit is still at the pre-trial stage and the proposed amendment, if allowed, will not change the nature of the suit and since the proposed amendment involves subsequent event and cannot be said to have filed at a belated stage and since the court's approach in such circumstances should have been liberal in allowing the proposed amendment, I must concluded that the court below was not justified in rejecting the plaintiffs prayer for amendment. In this context reliance has been placed in ***N.C. Bansal Vs. Uttar***

Pradesh Financial Corporation and another, reported in **(2018) 2 SCC 347**.

In view of aforesaid discussion **C.O. 989 of 2021** is allowed. The plaint will be amended as per schedule of the amendment application subject to payment cost of Rs. 10,000/-, to be paid by the plaintiff in favour of defendant within a period of four week from the date of communication of the order. On payment of such amount by the plaintiff within the period mentioned above, the plaint will be amended as per schedule of the petition and the plaintiff will file amended plaint within two weeks thereafter. If the plaint is amended, the defendant will get an opportunity to file additional written statement within a period of four weeks from the date of filling amended plaint by the plaintiff. However if the plaintiff fails to pay the cost as stated above, the order impugned will revive.

It appears that the suit is pending for the last 20 years. Learned Court below is requested to make every endeavor for expeditious disposal of the suit and to conclude the entire proceedings of the suit preferably within a period of six months from the date of communication of the order.

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

(Ajoy Kumar Mukherjee, J.)