

19.4.2024
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Ct. no. 652
bd.

C.O. 2840 of 2017

Sri Bireswar Kar
Vs.
Smt. Angur Dey & Anr.

Ms. Sulekha Mitra
Mr. Manas Kumar Das for the Petitioner

Affidavit of service filed by the petitioner is taken on record. In spite of service, opposite parties are not represented.

The opposite party herein filed a suit being Title Suit no. 201 of 2011 against the present petitioner *inter alia* praying for decree of eviction and khas possession against the opposite parties on the ground of default and for their own use and occupation and for damages. In the said suit one Lakshmi Kanta Dey, on the basis of alleged power of attorney, had filed Affidavit-in-Chief under the provisions of Order XVIII Rule 4 on behalf of the plaintiffs. On 7.7.2017 defendant filed an application *inter alia* praying for rejecting the said Affidavit-in-Chief contending that said Lakshmi Kanta Dey is not a party to the suit nor signed the plaint and he is also not aware about the plaintiffs alleged case of reasonable requirement. In his said objection the petitioner further contended that in the Affidavit-in-Chief filed under Order XVIII Rule 4 in paragraph 18

and 21, said PW-1 made certain statements which has not been pleaded in the plaint and it is an after thought and accordingly appropriate order is required to be passed rejecting the said Affidavit-in-Chief. However, learned Court below after contested hearing by the order impugned, had rejected the defendants objection.

Being aggrieved by that order Ms. Sulekha Mitra, learned counsel appearing on behalf of the petitioner relying upon the Judgment reported in ***Janki Vashdeo Bhojwani -vs- Indusind Bank Ltd (2005)2 SCC 217*** contended that Order III Rule 1 and 2 of the Code empowers the holder of power of attorney to “act” on behalf of the principal in respect of the “Acts” done by the power of attorney holder in exercise of power granted by the instrument. In the present case the power of attorney holder filed affidavit-in-chief and wants to depose for the plaintiffs in respect of the plaintiffs reasonableness of requirement, for which only the plaintiffs can have a personal knowledge and in respect of which the plaintiffs are only entitled to be cross-examined. She further referred the Judgment of ***Trojan and Company -vs- RM. N.N.Nagappa Chettiar (1953) 1 SCC 456*** and contended that the witnesses on behalf of the plaintiffs cannot depose outside the pleadings. She further submits without amendment of the plaint the Court was not justified in allowing the power of attorney holder to file Affidavit-in-Chief, with

the statements which are beyond the pleading. Accordingly, she has prayed for setting aside the order impugned invoking jurisdiction under Article 227 of the Constitution of India.

I have considered the submissions made on behalf of the petitioner and on perusal of the copy of the plaint it appears that in paragraphs 5, 6 and 7, plaintiffs in support of her case of reasonable requirement had contended that husband of plaintiff no. 1 has sufficient means and experience to run hotel business. accordingly, plaintiff no. 2 has decided that after retirement from service, he will settle in Burdwan and will run plaintiff no. 1's proposed business from the suit property and for which plaintiffs have requirement to get vacant possession of the suit premises.

However, in the Affidavit-in-Chief filed under Order XVIII, Rule 4 of the Code the power of attorney holder has come up with a case that the husband of the plaintiff no. 1 died 1½ years back and plaintiff's / opposite parties decided to run hotel business in the suit premises along with her husband's brother's son who has sufficient means and experience to run the said business and for which defendant's eviction from the suit premises is required. In fact such statement has been made in the Affidavit-in-Chief without making any amendment of the plaint.

Under order VI rule 1, plaintiff should contain material facts which the plaintiff relies for his claim. Material facts are those upon which the plaintiff's cause of action depends i.e. all those facts which must be proved in order to establish plaintiff's cause of action namely reasonableness of his requirement.

Here as I have mentioned above that the cause of action for filing the suit as pleaded in the plaintiff factually differ to some extent with the statements made in affidavit-in-chief in connection with the cause of action. It is not proper to raise a separate set of facts comprising cause of action at the time of trial, which plea has not been raised in the plaintiff. This is because defendant also have a right to get the opportunity to reply each and every material allegations and to state whether he admits or deny those allegations. It is well settled that the decision of a case cannot be based on the grounds outside the pleadings of the parties and where a claim has never been made, no amount of evidence can be looked into upon a plea, which was never put forward.

In view of above facts and circumstance of the case, I find that the Court below was not justified in accepting such Affidavit-in-Chief filed under Order XVIII, Rule 4 of the Code making a casual observation that *"it is the plaintiff who would suffer in case, they are*

unable to prove the grounds for eviction”, without going into the substance of defendant’s objection.

In such view of the matter, the order impugned dated 18th July, 2017 is hereby set aside.

The application, being C.O. 2840 of 2017 is allowed.

However, this order will not preclude the plaintiffs to seek for necessary amendment of the plaint if any, before the Court below and also to file fresh Affidavit-in-Chief in terms of material facts of the pleading subject to other provisions of law.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)