

30.01.2024
Court No. 19
Item no.09
CP

C.O. No. 3589 of 2023

Smt. Aloka Maitra

Vs.

Madhab Kumar Bhowmick & Ors.

Mr. Dibyendu Chatterjee

Mr. Pritam Majumdar

Mr. Rahul Deb Goenka

Mr. Mainak Singha Barma

.....for the petitioner.

1. The revisional application arises out of an order dated August 24, 2023, passed by the learned Civil Judge (Junior Division), 1st Court, Barrackpore. By a composite order, two applications - one under Order 1 Rule 10 of the Code and the other under Order 6 Rule 17 of the Code, were allowed. By the application under Order 6 Rule 17, the plaintiff wanted to incorporate certain facts and add the Board of Councillors of the Naihati Municipality as a defendant. The facts which the plaintiff wanted to incorporate were with regard to an alleged encroachment by the defendant no. 1 over a common passage, which, according to the plaintiff, had been mentioned as such, in the agreement for sale, when the plaintiff purchased the property.

2. As the common passage was allegedly being encroached upon by the defendant no. 1 and the municipality did not pay any heed to the complaint of the plaintiff in this regard, the facts were sought to be incorporated in way of an amendment of the plaint. Such encroachment allegedly took place when the construction was completed by the defendant no.1, by deviating from the plan sanctioned by the Naihati Municipality.
3. The learned court was of the view that a subsequent event which took place during the pendency of the suit, could always be incorporated and the delay in filing the application in this case would not be fatal. According to the plaintiff, the construction on the 'B' Schedule property and the encroachment were in violation of the sanction plan.
4. The further contention of the plaintiff was that the municipality failed to take necessary steps, although the plaintiff served a notice under Section 407 of the West Bengal Municipal Act with a prayer for removal of the illegal construction by way of demolition of the structures made on the 'B' Schedule property,

i.e., the common passage. As the municipality failed to grant relief, an amendment application was filed to incorporate such facts in the plaint.

5. The learned trial court held that notice under such circumstances was not mandatory. Although, Mr. Chatterjee relies on Section 407 of the West Bengal Municipal Act in this regard, the court held that the Chairman and all the Councillors of the municipality were already contesting the suit. The learned court took up the application for addition of party and found that the Chairman and the Councillors of the Naihati Municipality was already proforma defendant No.2. The Chairman was contesting the suit by filing a written statement. Thus, the prayer for transposition of the Chairman of Naihati Municipality as a principal defendant was allowed. Moreover, the learned court found that by impleading the Board of Councillors and by incorporating the issues of encroachment and deviation, the plaintiff did not enlarge the scope of the suit. That prior notice to the Board of Councillors, before filing the amendment application was not mandatory

in this case, as the Chairman of the municipality and Councillors were defendants. The Chairman was contesting the suit by filing a written statement.

6. Moreover, the allegation was that the encroachment took place during the pendency of the suit. It was a subsequent event, such facts were necessary to be brought on record for determining the real question in controversy between the parties. Cost of Rs.2000/- was directed to be paid on account of the delay caused. Admittedly, the Chairman and all Councillors of Naihati Municipality was the proforma defendant No.2. The Chairman filed a written statement. Thus, the transposition was allowed. By adding the Board of Councillors, the description of the defendant No.2 was corrected.
7. Mr. Chatterjee's contention is that the facts were not correct and the Chairman had categorically stated in the written statement that no complaint with specifications, had ever been received by the municipality. The applications ought not to have been allowed on incorrect facts. In my view, merits of the amendment should not be looked into at this

stage. They will be decided at the trial. In ***Rajesh Kumar Aggarwal & Ors. vs. K.K Modi & Ors.*** 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."

8. Secondly, the allegation of belated amendment is not accepted. The delay, in my opinion, is not such that the defendants cannot be compensated with costs. The learned court had compensated the defendants upon directing payment of cost.
9. In the decision of ***Life Insurance Corporation of India vs Sanjeev Builders Private Limited & Anr. decided in Civil Appeal No. 5909 of 2022***, the Hon'ble Apex Court laid down the principles of governing amendment in paragraph 70 of the decision. The relevant portion is quoted below:-

(ii) All amendments are to be allowed which are necessary for determining of the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed:-

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.”

10. The suit is for declaration and injunction. The allegation is that the defendant no. 1 was trying to make a construction on the ‘Z’ Schedule property by encroaching into the

'Y' Schedule property, thereby violating the municipal sanction plan. It has been further pleaded in the plaint that the Chairman of Naihati Municipality did not try to stop the defendants from raising such illegal construction. Thus, a decree for declaration of the right, title and interest of the plaintiff in the common passage was prayed for, a prayer for permanent injunction restraining the defendant no. 1 from making any construction on the said common passage was also made. By the amendment, the plaintiff wanted to incorporate an additional fact that the construction had encroached into the common passage and the said construction was in deviation of the sanction plan. Whether such allegations are correct, whether such allegations could be adjudicated by the learned court, whether it was within the domain of the municipality alone to decide the issue of deviation, are matters which will be decided in the suit, upon trial.

11. Under such circumstances, this court does not find either any material irregularity or illegality in the order impugned. The learned court acted within its jurisdiction. The

defendant has a right to challenge all the contentions brought in by way of an amendment by filing an additional written statement. Admittedly, the municipality is not aggrieved by the order impugned. All the defendants, including the added defendant, may file their written statement/additional written statement to the amended plaint within six weeks from receipt of a copy of the plaint. The issue of non-service of notice upon the municipality, can also be decided in the trial.

12. The revisional application is accordingly disposed of. There shall be no order as to costs.
13. Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)