

29.07.2024.
Item No. 71.
Court No. 13
sp

F.A.T. No. 689 of 2017
With
I.A. No. 2 of 2018 (Old CAN 10031 of 2018)

Chandi Charan Karmakar & Ors.
Versus
Ratan Chandra Karmakar & Ors.

Ms. Deblina Lahiri,
Mr. Mrinmoy Chatterjee.

...For the appellants.

1. Despite notice, contesting defendants/respondent is not present.
2. Copy of the notice be kept with the record.
3. The appeal is directed against the judgment and order dated 29th April, 2017 passed in T.S. 102 of 2017 by the learned Civil Judge (Sr. Division), Kalyani, Nadia. By the impugned order, the suit for partition was dismissed after disallowing the application of the plaintiff for amendment of the plaint.
4. The brief facts of the case are that the appellants and the respondents are family members. The appellants filed a suit for partition of property which included those that do not belong to each of the parties of the suit. In some properties, some of the parties did not have any share.
5. The defendants did not file any written statement. The suit was in the ex parte Board. On the said date,

the defendant filed an application for removal of the suit from the ex parte list and leave to file written statement. Alternatively he prayed for leave to cross-examine the plaintiff's witness and to submit oral arguments.

6. By the said date the oral examination of the sole witness of the plaintiff appellant was taken up and completed nearly 4 years after filing of the suit.

7. On the same day, the plaintiff also filed an application for amendment of plaint under Order 6 Rule 17. Deletion of certain properties from the schedule of the plaint and other amendments were also sought, i.e., to name the correct shareholders of the portions of the suit property.

8. The defendant's application for removal of the suit from the ex parte Board was rejected. The defendant was, however, allowed to cross-examine the plaintiff witness and also make oral arguments.

9. The plaintiff's application for amendment of the plaint under Order 6 Rule 17 of the CPC was rejected in view of the proviso to Rule 17. It is found by the Court below that the plaintiff could not come up with the proper or effective explanation for the delay in filing the application for amendment. The proviso to Rule 17 was invoked since the trial of the suit had already commenced.

10. The preliminary issue that was framed in the suit for maintainability was decided and the suit was dismissed. The court below found that since the properties to be partitioned was not clear and the named shareholders in the plaint were not entitled to the properties in question, no decree could be passed.

11. This Court has carefully considered the judgment and the pleadings and the evidence of the PW/1. The plaintiff is indeed guilty of delay of four years in taking out the application for amendment to rectify the defects in the plaint in the suit.

12. While the trial had commenced it not concluded as on the date of hearing of the application under Order 6 Rule 17. It is equally true as found by the Court below that a convincing explanation for delayed filing of the application for amendment was not available in the pleadings.

13. This Court, however, notes the dicta of the Hon'ble Supreme Court in the case of ***Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and others*** reported in ***(2009) 10 SCC 84***. The said decision has been cited by the learned counsel for the appellants.

14. At paragraph 63, the Hon'ble Supreme Court has been pleased to set out the factors to be considered while dealing with an application under Order 6 Rule 17 in the context of its proviso.

“Factors to be taken into consideration while dealing with applications for amendments

63. On critically analyzing both the English and Indian Cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of publication.

There are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

15. Applying the aforesaid dicta to the facts of the case, this Court finds that the amendment would not have caused any serious prejudice or loss that cannot be compensated in terms of money to the defendants and other co-sharers. The amendment was absolutely imperative and necessary. The nature and character of the suit would not have been altered. The amendment was also necessary to prevent multiplicity of judicial proceedings. A prayer for partition of the suit property is generally not barred by limitation.

16. In the backdrop of the above, this Court is of the view that the Court below committed error in disallowing the appellant’s prayer under Order 6 Rule 17 of the CPC and dismissing the suit.

17. The impugned judgment and decree dated 29th April, 2017 shall stand set aside.

18. The plaintiffs' application under Order 6 Rule 17 is hereby allowed. The impugned order rejecting the application stand set aside. The plaintiff shall pay costs assessed at Rs. 25,000/- to the defendant no. 1 within a period of 14 days from date.

19. Let the amended plaint be served on all the defendants afresh.

20. The defendants shall be entitled to file a written statement within a period of 6 weeks from the date of receipt of the amendment plaint.

21. There shall be a cross order of discovery within a period of 2 weeks of the contesting defendants' filing their written statement or after 6 weeks from date of receipt of amended plaint, whichever is earlier inspection forthwith thereafter.

22. The suit may be taken up for hearing on the issues already framed or any additional issues that the Court below may choose to frame.

23. In default of payment of costs as indicated above, T.S. 102 of 2017 shall automatically stand dismissed.

24. In view of the above, CAN 2 of 2018 shall also stand disposed of.

25. The Registry and the parties may communicate this order to the Court below.

26. Let the L.C.R. be returned to the Court below.

27. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)