

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3895 of 2024

**M/S. Karnani Properties limited & Ors.
Vs.
Harrow Hall**

For the Petitioner : Mr. Shounak Mondal
Mr. Anuradha Poddar

For the Opposite Party : Mrs. Sohini Chakraborty
Ms. Prajaaini Das

Heard on : 28.11.2025

Judgment on : 29.01.2026

Dr. Ajoy Kumar Mukherjee, J.

1. Order allowing amendment of the plaint by the court below dated 17th September, 2024 passed in Title Suit no. 414 of 2015 is under challenge in the instant Application.

2. The brief background is that the opposite party (in short OP) herein as plaintiff filed a suit *inter alia* praying for declaration with regard to the easementary right of the plaintiff to use the schedule mentioned property to the plaint *inter alia* as playground and for a further declaration that the

plaintiff is a licensee under defendant no.1/petitioner herein for using the said schedule property as lawn/playground and also for permanent injunction, being said Title Suit no.414 of 2015. In connection with the said suit, an interim injunction application was also filed praying therein to restrain defendant/petitioner from interfering/restraining the student and teachers of the plaintiff school from using the said playground. Learned trial Judge by an order dated 2nd April 2015 was pleased to reject the said prayer for ex parte *ad interim* order of injunction observing that OP had failed to prove prima facie case.

3. Being aggrieved by the said order OP herein preferred an appeal before this Court being FMA no. 1906 of 2015 and this High Court affirmed the order of the trial court and held that they did not find it an appropriate case, where ad interim order of injunction should be passed, but directed the Trial Court to dispose of the temporary injunction application on merit. Thereafter Trial court after hearing the parties has been pleased to reject the application for temporary injunction vide order dated 17.11.2016, observing that plaintiff failed to show any document that they are in possession of the said lawn on the date of filing of the suit or when they sought for such ad interim order of injunction. The OP herein thereafter again filed an application for reconsideration of the said order dated 17.11.2016 but it was again rejected.

4. The opposite party herein thereafter filed the subsequent suit being T.S. no. 972 of 2021 against the petitioner herein *inter alia* praying therein for a declaration that the OP herein have the easement right and he is entitled to enjoy the free light and air through and from the said lawn

described in the plaint. In the said suit for the year 2021 the OP however obtained an order of injunction against the petitioner vide order dated 13.09.2021 in aforesaid T.S. no. 972 of 2021. After receiving notice the petitioner herein filed an application under Order XXXIX Rule 4 CPC *interalia* praying for setting aside of the said order of injunction. Learned Court below rejected the said prayer for setting aside the order of injunction. Being aggrieved by the said order petitioner herein had preferred an appeal before this Court being FMAT 542 of 2023. Said appeal came up before a Division Bench of this Court, when Their Lordship allowed the said appeal on contest on the ground that OP herein failed to show any document relating to its physical possession of the said schedule property.

5. In the above background the opposite party herein being the plaintiff of the suit filed an application for amendment of the plaint of T.S 414 of 2015 on 15.03.24 whereby the opposite party as plaintiff had sought to incorporate certain events to establish that the petitioner had granted permission for using the said lawn cum playground as the playground of the students of the OP school and said permission was never withdrawn by the defendant no.1 as they continued regular physical activities of the children/students of the school and such permission was granted time to time to use the said playground for the welfare and benefit of the students of the school which is continuing. By the impugned order learned court below allowed plaintiffs aforesaid prayer for amendment of plaint.

6. Being aggrieved by the aforesaid order, learned counsel for the petitioner Mr. Mondal argued that from the aforesaid facts and circumstances, it is clear that inspite of getting opportunity, the OP herein

in their affidavit dated 26.11.2015 could not produce a single scrap of evidence to show their possession over the schedule mentioned suit property and for which learned Trial Judge was pleased to reject the application for injunction. Thereafter OP again prayed for reconsideration of the said order passed by learned trial judge but again it was rejected, since the OP herein could not produce any document to establish their possession over the lawn in question in the said earlier suit being T.S. no. 414 of 2015. As such in the subsequent suit the OP herein had voluntarily waived his claim of licensee although they were successful in obtaining an *ex parte adinterim* order of injunction but the same was ultimately vacated by this High Court in aforesaid FMAT no. 542 of 2023, since the OP herein could not produce any document to show their possession.

7. Therefore Mr. Mondal strenuously argued that the issue relating to possession of the said lawn had been put to rest, since all along the OP herein could not produce any document showing their possession. Mr. Mondal further submits that it appears that the OP herein had sought to implead a letter dated 12.09.2000 written by OP to the petitioner and the reply to the same dated 16.09.2000 written by the petitioner was given to the OP whereby it is alleged that the petitioner had given permission to the OP herein to use the suit property on that date also. From the said schedule of amendment it further appears that OP herein intends to incorporate that after obtaining the said permission from the petitioner it was never withdrawn by the petitioner.

8. Mr. Mondal in this context argued that it is trite law that the merits of the amendment could not be looked into at the time of hearing of the

amendment application but the case in hand carves out an exception to the same because in the instant case the conduct of OP herein had to be thoroughly examined. OP did not make out any case that they obtained or got letters subsequent to the order of injunction i.e. in the year 2018 or afterwards but the OP seeks to implead two letters of the year 2000, wherefrom it cannot be said that it is a subsequent event which prompted the OP to file the instant application for amendment, claiming that the license is still continuing. In this context he further argued that an amendment which is *malafide* and for which the adversary loses a valid defence should not be allowed. It is true that if the proposed amendment does not result in irreparable prejudice to the adversary or divest the adversary of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed, but the instant case does not fall within the scope and ambit as above and as such the proposed amendment ought not to have allowed by the Court below. In this context he relied upon the judgment reported in **(2022) 16 SCC 1, (Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited & Another).**

9. Learned counsel for the petitioner in reply to the argument advanced by the OP submitted that it is not the case of subsequent event but the OP herein had the document in his possession and choose not to produce the same. As such he has waived his right to show the said documents and presently he should be debarred to incorporate the same document in his pleading. Learned court below failed to consider that the pleading which has been sought to be brought in by way of amendment by the plaintiff/OP is

repetition and reiteration of the facts already pleaded in the plaint and the same has been made only to protract the litigation after almost 10 years from the date of filing of the plaint and the application does not disclose that inspite of due diligence there was no scope to incorporate the proposed amendment with the plaint for last 10 years. Therefore the impugned order is liable to be set aside.

10. Learned counsel appearing on behalf of the OP submits that the OP is an educational society and is running a school which is affiliated to the Council for the Indian School Certificate Examination. The said Educational Society used the Suit property/Lawn/playground for the students studying at such institution, which is close to the suit premises. Said lawn is also used for assembly, sports and physical training since the year 1975 on the basis of the permission given by the Karnani's Property Ltd. On 29th September, 2014 and thereafter the students and the teachers of the school were stopped from using the said lawn by the men and agents of the petitioners, for which OP herein filed aforesaid suit for declaration and injunction being T.S. 414 of 2015 though plaintiff's prayer for injunction was rejected. Thereafter the OP filed the subsequent suit wherein an order of injunction has been passed to maintain status quo regarding the nature and character of the suit lawn so that the easementary right of the OP herein may not be disturbed. Thereafter, said order of injunction got vacated by an order passed by a Division Bench of this court, which gives rise to the instant prayer for amendment of the plaint, which the court below allowed subject to payment of cost of Rs. 1000/-.

11. In this context Mrs. Chakraborty on behalf of the OP further argued that it is well settled that res judicata can apply in different stages of the same proceeding but in order to attract such principle it is required that there should be a conscious adjudication of such issue on merit. In the present case the observation of the trial court in its order dated November, 17, 2016 was solely based on the written objection filed by the defendants in connection with the injunction application and failure to file any document by the plaintiff at that stage. Therefore, there was no adjudication on merit regarding such issue at that stage. The scope of adjudication in an injunction application is different from adjudication during trial of a suit. This is because at the time of disposal of injunction application, the court is only required to see whether there is a prima facie case to go on for trial and does not hold a mini trial and for which any finding/observation made therein cannot be said to be finally decided on merit, unless the court specifically records so. The observation made in connection with the injunction application are designated to preserve the status quo, pending litigation and to ensure that the parties might not be prejudiced by the normal delay occurred during trial before a court. As the observation made therein does not decide the legal rights of the parties to the litigation nor decide any matter in merits of the controversy, the principle of res judicata does not apply to the findings on which these orders are based. Therefore by no stretch of imagination it can be said that the proposed amendment is in connection with the same relief which has been rejected earlier. In this context she relied upon judgment of ***Erach Boman Khavar Vs. Tukaram Shridhar Bhat and Ors.*** reported in **AIR 2014 SC 544** (para 27& 34).

12. She further argued that it is an admitted position that recording of evidence has not been commenced in the suit and therefore, the embargo created in the proviso to order VI rule 17 does not apply in the instant case. At this stage the court is only required to consider, whether the proposed amendment is required for proper adjudication of the lis between the parties. The proposed amendment sought to be incorporated, if allowed will not change the nature or the character of the suit but is essential for complete and effective adjudication of dispute between the parties. She further argued that while deciding an application for amendment, court should not go into the merits of such amendment. The documents based on which the proposed amendment is sought for have been produced by the OP in their affidavit in opposition. In this Context she relied upon judgment of ***Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others*** reported in **(2006) 4 SCC 385** (para 19). Therefore she contended that the learned Trial Judge was absolutely correct in passing the order impugned and therefore the instant Revisional Application is liable to be dismissed with cost.

13. I have gone through the plaint filed by the plaintiff as well as the proposed amendment. From the plaint it appears that plaintiff has specifically averred that pursuant to the letter dated 19.12.1973 issued by the then principal of Harrow Hall school addressed to the defendant, the defendant by its letter dated 21.01.1974 granted permission to the plaintiff society to use the said compound and or lawn for the children of the school. It is further averred since the year 1974 when the permission as above has been accorded to the said principal, the students of the plaintiff's society

and the school have been using the said lawn. It is further stated that the plaintiff/ school using and enjoying the said lawn as easement attached to the said premises where the school situates by dint of the permission accorded by the defendant no.1, Karnani Properties Ltd. Now by way of amendment plaintiff sought to incorporate in para 6(a) and 6(b) that the permission granted by the competent person in the year 1974 was extended from time to time. In 6(b) they further sought to incorporate that since the school and the students were facing difficulties in performing their physical activities, the school again wrote a letter on 12.09.2000 addressed to the defendant no.1 with a request to allow the school children to play in the said lawn-cum-playground as usual and upon receiving the said letter dated 12.09.2000, one of the directors of the defendant no.1 by consent letter dated 16.09.2000 again granted permission to use the said playground for the purpose of physical activities of the school children during school hours and they further sought to incorporate that the permission that was granted in 1974 for the welfare and benefit of the students of the school was never withdrawn and is still continuing.

14. Therefore, the proposed amendment sought to be incorporated is merely elaboration of plaint case as mentioned in para 4 onwards in the plaint. It further appears that in the plaint the plaintiff has categorically stated that the cause of action of the suit arose on or about March, 2014, March 16, 2015 at said lawn and it is continuing day by day.

15. Therefore, if the proposed amendment is allowed it would not make out a new cause of action nor it would alter the existing cause of action. In fact in the instant suit the plaintiff by way of proposed amendment has not

sought for any additional relief in the plaint. The suit remains as it was before i.e. for a declaration that plaintiffs have the easement right to enjoy and for injunction restraining defendants/petitioner from using the said lawn by the plaintiff. The statement of the plaintiff that the permission granted in 1974 was renewed in the year 2000 is required to be included in the plaint to adjudicate the matter completely because this might have an impact over the main relief sought for in the suit.

16. In ***Laxmidas Dayabhai Kabrawala Vs. Nanabhai Chunilal Kabarwala and others*** reported in **AIR 1964 SC 11** the Apex Court reiterates the view that it is no doubt true that save in exceptional cases leave to amend under Order VI rule 17 of the Code will ordinarily be refused where the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time but this rule can apply only when either fresh allegations are added or fresh reliefs are sought by way of amendment. Here the amendment is sought, which merely clarifies the existing pleading that the permission to use the lawn/play ground by the plaintiff/school was never withdrawn and still continuing. The proposed amendment does not in substance add to or alter it and therefore the question as to what prevented the plaintiff in producing the said document earlier is not material for adjudication of present Application.

17. It further appears from the order impugned that when the amendment petition was filed, the suit was posted for peremptory hearing though no deposition was recorded. The supreme Court in ***Baldev Singh and others Vs. Manohar Singh and another*** reported in **(2006) 6 SCC 498** has made it clear that commencement of trial as used in proviso to order VI rule 17 of

the Code 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. Subsequently this High Court in the case of ***Shree Shree Iswar Radha Bihari Jew and Shree Shree Iswar Salgram Jew Vs. Malati P.Sony*** reported in **AIR 2019 Cal 131** has made clear observation that 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 its affidavit of evidence or to prove any documents 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 question put in cross examination. In the instant case admittedly that stage had not come when the prayer for amendment was made and therefore the proviso to order VI rule 17 of CPC does not have any application in the present context.

18. Needless to reiterate that circumstances in which amendment of pleading is not permissible has been well settled and it states that amendment that would render suit infructuous or amendment that would introduce a totally different, new and inconsistent case or challenges fundamental character of the suit, the amendment should not be allowed. (***State of M.P. Vs. Union of India and another***, reported in **(2011) 12 SCC 268**). It is equally well settled that the dominant purpose of allowing the amendment is to minimize the litigation. Therefore, the plea that the

issue sought to be incorporated by way of amendment is whether barred by res judicata is arguable at the appropriate stage of the hearing of the suit. But I feel that in the circumstances of the case the plea of res judicata or other issues being disputed question of fact could be made subject matter while framing the issues, after allowing the amendment as sought for.

19. Though learned counsel for the petitioner strenuously argued that inspite of getting several opportunities the plaintiff did not produce any evidence that the permission granted in favour of the plaintiff was subsequently extended in the year 2000 and now by way of proposed amendment at a belated stage, they sought to incorporate said document, which cannot be allowed. Here I am of the view that even if such prayer has been made at a belated stage then also the question that needs to be considered is whether by allowing the amendment, the real controversy between the parties may be resolved or not. A belated amendment prayer to incorporate that the permission was renewed at a subsequent stage also, cannot be refused in the present context, as it is found that for deciding the real controversy between the parties and for doing full and complete justice in the case, the proposed amendment is required to be allowed, on payment of costs, as has been imposed by the court below.

20. In this context it is also to be kept in mind that real controversy tests is the basic and cardinal test. Therefore, whether the plaintiffs averment made in the proposed amendment is correct or not and thereby whether plaintiffs have acquired any right over the suit property by way of casement or otherwise or not, cannot be considered at the stage of disposal of the amendment application. On the contrary in cases like this, the court should

also take notice of all the relevant documents in order to shorten the litigation and to preserve and safeguard the rights of the both the parties in order of sub serve the ends of justice.

21. Therefore I am of the view that the proposed amendment is liable to be allowed and the defendant will have no cause to prejudice, if he is given liberty to file additional written statement. The impugned order by which the court below has allowed the prayer for amendment does not suffer from perversity or impropriety nor court below has committed gross error while allowing the prayer for amendment with cost and therefore the order impugned does not call for interference.

22. C.O. 3895 of 2024 thus stands dismissed. The plaintiff shall file amended plaint along with cost awarded by the court below within a period of three weeks from the date of communication of this order and the liberty is also given to the defendant to file additional written statement if any, within a period of three weeks thereafter.

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

(Dr. AJOY KUMAR MUKHERJEE, J.)