

14.09.2015**CO 3386 of 2015**Court No. 02
Item No. SL-23
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(PARTLY ALLOWED)

Munsilal Rai
Vs.
Amar Nath Sen & Anr.**Mr. Sovan Mukherjee, Advocate**

.....for the Petitioner

Mr. Dilip Kumar Maity, Advocate**Mr. P.K. Sen, Advocate**

.....for the Opposite Parties

The instant revisional application is directed against an order no. 101 dated June 24, 2015 passed by the learned Civil Judge (Senior Division), First Court, Barasat in Title Suit No. 72 of 2001 by which an application for amendment of the plaint is allowed at the argument stage.

The plaintiffs/opposite parties filed a suit for recovery of possession from the trespassers. Admittedly the trial of the suit is complete and it was posted at the argument stage. From the defendant's side, a serious exception is taken on the description of the property in the schedule appended to the plaint.

It is submitted by the petitioner that the property is not sufficiently described which is the requirement under Order 7 Rule 3 of the Code of Civil Procedure and, therefore, the suit must fail. It is further argued that the prayer for mandatory injunction on the basis of the facts constituting the cause of action before the institution of the suit cannot be allowed to be incorporated at the time of an argument which would virtually invite the parties to *de novo* trial. It is further stated that such prayer having barred by law of limitation should not be allowed to be incorporated by way of an amendment. Lastly it is submitted that the right which accrued to the defendant cannot be taken away by permitting the amendment to be carried out in the plaint after a gap of so many years.

To buttress the aforesaid submission the reliance is

placed upon a judgment of the Apex Court in case of **J. Samuel & Ors. Vs. Gattu Mahesh & Ors. reported in (2012) 2 WBLR (SC) 350** and a judgment of this Court in case of **Thakur Sree Sree Iswar Bondeswar Mahadeva & Anr. Vs. Arunabha Hazra & Ors. reported in 2015 (1) ICC 538.**

The learned Advocate of the opposite parties, submits that the amendment being formal in nature and the suit having instituted in the year 2001 cannot stand in the way of allowing the amendment which does not change the nature and character of the suit. It is further submitted that there is no fetter on the part of the Court to allow such amendment to be carried out in the pleading if it is necessary for the purpose of determination of the disputes.

In reply, the learned Advocate of petitioner invited the attention of this Court to the observations made in paragraph 15 of the judgment rendered by the Apex Court in **J. Samuel & Ors. (supra)** and submits that that after the commencement of trial the Court should not have allowed the application for amendment at the stage of argument.

The enabling provision of Order VI Rule 17 of the Code of Civil Procedure empowers the Court to permit the party to amend or alter the pleading at any stage of the suit if the same is necessary for determination and/or adjudication of the disputes involved therein. The stage of the suit has not been defined which necessarily imbibe within itself the date on which the plaint is presented till the judgement. Even the appellate Court can exercise such power as the appeal is a continuance of the lis and cannot be treated to have ended because of the judgment having delivered by the Trial Court. However, the appellate Court should have been more cautious in permitting the party to amend the pleading at the appellate stage as it may sometime displace the other side to

his disadvantages having emerged successful from the Court of first instance.

The instant suit has been instituted for recovery of possession treating the petitioner as trespasser. Order VII Rule 3 of the Code postulates, where the subject matter of the suit is immovable property, the plaint shall contain the description of the property sufficient to identify it and should also specify the boundaries and the numbers.

Admittedly, the plaint does not contain the boundary and sufficient description. There is no penal consequences provided for non-inclusion of the sufficient description of the property. Furthermore, the defendant against whom a claim for recovery of possession as trespasser is made is defending such possession being aware of the property occupied by him. Mere insufficient description and/or mis-description of the property when both the parties are aware about their respective rights cannot act as a deterrent on the part of the plaintiffs in succeeding to prove his case made out in the plaint. No doubt a belated application for amendment not only be considered in the perspective of being necessary for the adjudication but if any right accrued to the other side the same should also be borne in mind. If the other side can be compensated in monetary terms, the Court may allow the amendment by imposing costs as condition precedent.

The Apex Court in case of ***J. Samuel & Ors. Vs. Gattu Mahesh & Ors. (supra)*** was considering where a suit for specific performance for an agreement of sale of an immovable property was filed. It appears that the necessary requirement of readiness and willingness as provided under Section 16(C) of the Specific Relief Act was not incorporated and was sought to be incorporated at the stage of trial. The suit was filed in the year 2004 and the Apex Court applied the

proviso inserted to Order VI Rule 17 of the Code as a fetter on the part of such a recalcitrant plaintiff to have the plaint amended at the stage of argument. The decision of the Supreme Court is clearly distinguishable on the factual matrix inasmuch as in the said case the suit was instituted after the amendment having brought in Order VI Rule 7 of the Code by CPC (Amendment) Act, 2002.

Section 16 of the CPC (Amendment) Act, 2002 clearly indicates that the pleadings filed before the commencement of such amendment Act shall not be governed and guided by the Amended Act as Order VI Rule 17 of the Code has been clearly indicated therein.

Since the suit was instituted prior to the said Amendment Act having come into force and in view of Section 16, the proviso to Order VI Rule 17 cannot be made applicable. This Court feels that the judgment of the Supreme Court rendered on such count cannot help the petitioner.

So far as the Coordinate Bench's decision in the case of ***Thakur Sree Sree Iswar Bondeswar Mahadeva (supra)*** is concerned, the Court again took note of the proviso inserted to Order VI Rule 17 of the Code, which could be discern from paragraph 5 thereof and proceeded to dismiss the application for amendment. The facts emanates therefrom shows that the suit instituted therein was in the year 2003.

Therefore, the ratio laid down in both the above reports cannot strictly applied in the facts and circumstances of the present case.

It is undeniable that the plaintiffs who ought to have promptly apply for amendment, have committed delay in taking out the same, more particularly, at the stage of argument. Something more than the mere correction of the

description of the property in the schedule of the plaint is prayed by way of such amendment. There is no explanation, far to speak of sufficient explanation, has been given in the said application. Certain facts, which were within the knowledge of the plaintiffs/opposite parties, cannot be permitted to be incorporated in the plaint in the absence of any plausible explanation.

So far as the description of the schedule of the property is concerned, this Court feels that it would neither take away any right of the defendant nor shall invite the *de novo* trial and, therefore, should be allowed.

It is no doubt true that a considerable delay has been caused in filing the said application and the rights of the defendant can be protected by imposing costs.

These Court, therefore, modifies the impugned order to the extent that the amendment sought to be incorporated and indicated in paragraphs 1 to 3 of the schedule of the amendment, should not have been allowed by the Trial Court.

However, this Court indicates that the proposed amendment sought to be incorporated and indicated in paragraph 4 of the schedule of amendment is allowed.

The plaintiffs/opposite parties are permitted to amend the plaint strictly in terms of paragraph 4 of the schedule of amendment and the amended copy of the plaint shall be filed within a fortnight from date. The petitioner is permitted to file the additional written-statement, if he so feels, within a fortnight from the date of service of the copy of the amended plaint.

The Trial Court is directed to proceed with the suit in accordance with law.

The application for amendment is thus partly allowed as indicated above subject to the payment of costs assessed at Rs.10,000/- to be paid to the learned Advocate-on-record of the plaintiff/opposite party appearing before this Court within a weeks from date. In default of the payment of costs, the application for amendment shall be treated to have been dismissed and the Trial Court shall thereafter, proceed as if the Court has not permitted the plaintiffs/opposite parties to amend the plaint.

The revisional application is **disposed of**.

Urgent Photostat Certified copy of this order be given to the parties, if applied for, upon compliance of necessary formalities.

(Harish Tandon, J.)