

19.11.2014
S.L.-12(KB)

C.O. 300 of 2013

Bankim Chandra Bachar & ors.
versus
Sri Rathin Bachar & ors.

Mr. Ram Chandra Guchhait
Mr. Safikul Mandal

... For the petitioners.

Mr. Kartick Kumar Bhattacharjee
Mrs. Atreyee De(Ganguly)

... For the opposite parties.

This application under Article 227 of the Constitution of India has been preferred challenging an order dated 2nd December, 2012 passed by the learned 5th Civil Judge (Junior Division) at Howrah in Title Suit No. 138 of 2008.

The broad essential facts which need to be adumbrated for a decision in the instant application are that the petitioner preferred Title Suit No. 138 of 2008 for declaration and permanent injunction against the opposite parties herein and the same was contested by the said opposite parties by filing a written statement.

Subsequent thereto, the trial commenced and in the midst thereof the petitioners herein preferred an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as CPC) and an objection to the same was filed by the opposite parties herein and upon contested hearing the said application for amendment was rejected.

Mr. Guchhait, learned advocate appearing for the petitioners draws the attention of this Court to the averments made in paragraph 4 of the plaint and submits that the facts that the defendants have encroached a portion of the petitioners' land and that on 18th July, 2008 the defendants were attempting to give fencing to the said property have been categorically averred but due to inadvertence, the prayer towards recovery of possession was not incorporated and as such the amendment was sought for through the application filed on 1st February, 2012.

According to Mr. Guchhait the amendment sought for is not inconsistent with the averments made in the plaint. Citing the provisions of Section 34 of the Specific Relief Act, Mr. Guchhait submits that unless the relief by way of recovery of possession, which the plaintiffs

are now seeking to introduce in the plaint is allowed, the suit may not succeed.

In support of his arguments, Mr. Guchhait has placed reliance upon the judgments (2012) 11 Supreme Court Cases 341, 2009(1) CLJ (Cal) 138, (2010) 4 WBLR (Cal) 435, 2011 (1) CLJ (Cal) 515 and 2013(3) CHN (CAL) 98.

Mr. Bhattacharjee, learned senior advocate appearing for the opposite parties submits that there is a contradiction in the averments made in paragraphs 4 and 5 of the plaint inasmuch as on the one hand the petitioners have averred that the opposite parties have encroached upon 7 decimals of land belonging to the petitioners and on the other hand the petitioners have stated that they are in exclusive possession of the property.

Drawing the attention of this Court to the provisions of Section 6 of the Specific Relief Act, Mr. Bhattacharjee submits that the petitioners' claim is not acceptable on the ground of limitation.

According to Mr. Bhattacharjee, the petitioners have not acted with due diligence and that as such the question of allowing the prayer of amendment does not

occasion. In support of his arguments, he has placed reliance upon the judgement reported in (2012) 2 SCC 300.

I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

A perusal of the order impugned reveals that the learned Court below had simply quoted the principles pertaining to grant or refusal of amendment without incorporating any reason towards rejection of the petitioners' claim. There has been no consideration of the averments made in the application for amendment and in the objection filed thereto. The impugned order does not reflect any application of mind and the same is a cryptic one.

However, Mr. Bhattacharjee has drawn attention of this Court to the last four lines of the order impugned and submits that the learned Trial Court in support of its order has given reason to the effect that such amendment is not permissible after the commencement of trial.

In my opinion, the consideration of the order impugned in its totality would reveal that the prayer for amendment has been rejected simply by stating that the

amendment was sought for after commencement of trial without considering the other relevant factors which are essential and necessary.

The proviso to Order 6 Rule 17 of CPC does not create any insurmountable bar in all circumstances and while considering an application for amendment it needs to be ascertained as to whether the controversy can be brought to an end once for all between the parties by the amendment. It is also well settled that Court should not adopt a hyper technical approach and must be liberal in granting the prayer for amendment if by denial thereof the party praying for amendment will suffer irreparable loss and injury.

For the reasons as stated above, the order impugned is set aside and the learned Court below is directed to rehear the amendment application after giving reasonable opportunity of hearing to the parties, preferably within a period of three months from the date of communication of this order.

The revisional application being C.O. No.300 of 2013 is, accordingly, disposed of.

Urgent Photostat certified copy of this order, if applied for, be handed over to the parties on compliance of necessary formalities.

(Tapabrata Chakraborty, J.)