

Order No. 28 dated 24.07.2017

Today is fixed for hearing of petition dated 07.02.2017.

Both parties filed their respective haziras.

The defendant filed a written objection against the application under Order 6 rule 17 of C.P.C. filed by the plaintiff.

Copy served objection raised. Let it be kept with the record.

Ld. Advocates for the parties are present.

Now the petition under Order 6 rule 17 read with 151 of C.P.C. dated 07.02.2017 is hereby taken up for hearing and passing necessary order.

By filing the instant application under Order 6 Rule 17 read with Section 151 of C.P.C. the plaintiff stated that after the institution of the instant suit the defendant No. 1 illegally and forcefully by violating the order of injunction had constructed the 'A' schedule shop room over 112 sqft land of 'Kha' schedule property. The petitioner further submitted that the defendant No. 2 in conspiracy with the defendant No. 1 had constructed the 'B' schedule shop room of brick made wall having tali shade upon the 112 sqft land of 'Kha' schedule property. Hence they compelled to file this instant application and want to incorporate the prayer of mandatory injunction in respect of 'A' & 'B' schedule property and for recovery of khas possession. The Ld. Advocate for the plaintiff submitted that the facts of the proposed amendment are subsequently happened during the pendency of this suit. He further submitted that the proposed amendment is formal in nature and very much necessary for determining the real question in controversy and if the amendment petition is allowed the nature and character will not change in the original suit.

By filing the written objection the defendant raised vehement objection and submitted that the instant application of the plaintiff under Order 6 Rule 17 of C.P.C. is liable to be rejected with cost. The Ld. Advocate for the defendant submitted that the instant application is a result of afterthought and liable to be heeded by law of limitation. He further submitted that the plaintiff by filing this instant petition wants to incorporate false and manufactured facts in their plaint and thereby trying to make out a third case. In their written objection the defendant submitted that the application under Order 6 Rule 17

of C.P.C. is barred by the law of limitation and as such the same is liable to be rejected on contest. In the course of hearing the Ld. Advocate for the defendant submitted that, since the plaintiff did not take the leave of the Court under Order 8 Rule 9 of C.P.C. the instant application under Order 6 rule 17 is liable to be rejected with cost. In order to support his contention, he relied upon the decision of the Andhra Pradesh High Court reported in ICC 1997(4), in the case of Gorantla Kondalarayudu vs. Marvel Organics, Hariprasad Nagar, Chirala and ors., wherein the Hon'ble A.P. High Court was pleased to hold that order 8 rule 9 should not be confused by reading together that it is aims only additional written statement by way of pleadings because the expression therein is that "no pleading subsequent to written statement shall be filed meaning thereby both plaint and written statement. In that context, pleadings and additional pleadings in Order 8 Rule 9 include the additional plaint also which can be either called as rejoinder or the reply in its real consequences. By referring this judgment of Hon'ble A.P. High Court the Ld. Advocate for the defendant submitted that the instant petition is liable to be rejected for want of taking leave of the Court under the provision of Order 8 Rule 9 of C.P.C.

The very language of Order 8 Rule 9 is that "no pleading subsequent to the written statement of a defendant other than by way of a defense to set-off or counter-claim shall be presented except by the leave of the Court." Order 6 of the Code of Civil Procedure clearly stated that a pleading include both plaint and written statement. The expression "no pleading" as mentioned in Order 8 of Rule 9 also include both plaint and written statement or the additional plaint and additional W.S. Hence, technically the plaintiff is also required to take leave of the Court as per Order 8 Rule 9 for filing an amendment application under Order 6 Rule 17 of C.P.C. On the other hand it is the established principles of law of equity that look into the intention rather form. In my considered view, since as per the plaintiff the proposed fact of the amendment application are happened during the pendency of this suit, he has filed the instant application to amend his plaint by incorporating the fact of his amendment application. In my considered view, the parties of the suit may be permitted to amend or alter their pleading in order to adjudicate the real point of controversy of the suit subject to the condition as provided in Rule 17 of Order 6. Further, in my considered view mere allowing of application under Order 6 Rule 17 does not ipso facto mean that the same is proved. The plaintiff has to prove the case by standing upon his own legs. In Sunil & Basant Architect and Consulting Engineers vs. Tata Chemical Ltd. reported in AIR 1999 Kerala 88 it was held that subsequent pleading is made only for denying and clarifying the fact stated

in the written statement. Fresh cause of action or fresh case is not to be brought up by filing a replication.

When a plaint is to be amended, the Court must grant leave to the defendant to file an additional written statement that means leave to reply to the portion amending the plaint. Hence the defendant will be given liberty to file their additional written statement to raise their reply to the portion amending the plaint by way of this instant application. In my considered view it is always upon to the plaintiff to bring to the notice of the Court subsequent events by way of rejoinder unless and until such rejoinder or additional pleadings sets up a plea inconsistent with the pleadings of the original plaint. Herein the instant suit, this Court does not find that the proposed fact of the amendment application sets up a plea inconsistent with the pleadings of the original plaint. Hence considering the discussion made in the preceding paragraph, I am of the view to allow the instant application of the plaintiffs with a cost of Rs.100/- payable to the defendant.

Hence it is,

ORDERED

That the petition under Order 6 Rule 17 read with Section 151 of C.P.C. filed on 07.02.2017 is hereby considered and allowed on contest without any order as to costs.

Fix _____ for filing of amended plaint and the filing of additional written statement by the defendant.

D/C by me

*C.J.(Jr.Divn)
Amta, Howrah*

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