

EJECTMENT SUIT NO. :- 45 OF 2012
(CNR No. WBPS01-000073-2012)
(JO CODE No. WB01229)

Order no. - 89
Dt. 03.08.2023

Today is fixed for hearing of the petition dated 24.03.2021 under Order 6 Rule 17 of CPC read with Section 151 of CPC filed by the plaintiff.

Both parties file hazira.

Plaintiff is appeared in person.

The case record is taken up for hearing of the petition dated 24.03.2021 filed by the plaintiff under Order 6 Rule 17 of CPC read with Section 151 of CPC.

Heard the plaintiff who submitted that the instant suit was filed by Joyabati Sadhukhan and during the pendency of this suit said Joyabati Sadhukhan has been died on 11.12.2017 and prior to her death she published her last Will and testament on 9th December – 2017 and appointed the present plaintiff as executor of her estate and the present plaintiff filed an application before the Ld. Judge, 4th Bench, City Civil Court, Calcutta for grant of probate of the said Will being case no. O.C. – 03 of 2019 and the said case is till pending before the Ld. Bench and now the plaintiff wants to incorporate the ground of reasonable requirement of the suit premises for his own use and occupation and also for his family members and the proposed amendment as sought for is very much required for getting proper relief before the court in the instant suit and the amendment as sought for do not change the nature and character of the suit and hence, prayed for passing necessary order.

The plaintiff files original electric bill showing that he used to reside over the premises no. 6/6B, Sachin Mitra Lane, Kolkata – 700003.

Ld. Advocate also cited a decision reported in **1979(2) CLJ 426** and submitted that even before probate is obtained an executor can institute action but no decree can be passed in such an action so long as the probate is not granted.

He also cited a decision reported in **1979(2) CLJ 325** and submitted that it was held by the Hon'ble Court that suit was not instituted by the executors for establishing their right as executors to the estate of a deceased but the suit had been instituted by the testatrix herself on a cause of action available to her and the executors being in possession of the property of the testatrix by virtue of the said will were legal representatives within the meaning of section 2(11) of the Code of Civil Procedure and although the will was not probated they were entitled to be substituted as representatives of the deceased plaintiff.

Heard Ld. Advocate for the defendant who after written objection and submitted that the instant application is not maintainable and Joyabati Sadhukhan, since deceased had filed the instant suit against the defendant and the said plaintiff since deceased had been examined and also cross-examined in part on commission at her residence and after demise of her, present plaintiff has filed an application for substituting his name as sole-executor on the basis of alleged Will and the plaintiff has allegedly executed a Will in his favour and has manufactured the alleged Will to grab the property since the original plaintiff never executed any Will during her lifetime and the plaintiff has no legal right to file the instant application and the proposed amendment is illusory and liable to be rejected.

Considered. Perused the instant application, written objection and other materials on record and the decisions of the Hon'ble Court.

On perusal of the same, it is an admitted fact that the original plaintiff Joyabati Sadhukhan has been died and as per averments of the plaintiff, it appears that one Will was executed by her appointing the present plaintiff as executor of the said Will and the present plaintiff has preferred an application before the Ld. 4th Bench, City Civil Court, Calcutta for granting probate in his name.

It also appears that the present plaintiff use to reside at the suit building.

On perusal of the decision of the Hon'ble Court, it was held by the Hon'ble Court that even before the probate is obtained and executor can institute action but no decree can be passed in such action so long as the probate is not granted.

In the instant case, it is stated that the proceeding of a grant of probate of the Will of the deceased plaintiff has already been instituted and if the petitioner succeeds in proving grant of probate in his favour in the said proceeding, then the suit will be filed disposed off in accordance with law.

It also appears that the instant suit was not instituted by the present plaintiff but the suit was instituted testatrix herself on a cause of action available to her and the executor being a possession of the property of the testatrix by virtue of the said Will is the legal representative within the meaning of the Section 2(11) of the CPC and the requirement of the present plaintiff should be bonafide and the proposed amendment as sought for by the plaintiff to add the ground of reasonable requirement of the suit premises for their own use and occupation and also for their family members.

It is submitted by the Ld. Advocate of the alleged Will was manufactured by the present plaintiff and this court has no jurisdiction to decide whether the said Will was granted in favour of the plaintiff or not and one probate case is pending before the appropriate court.

Considering the above made observations and also perusing the decisions of the Hon'ble Court, I am of considered view that the amendment as sought for by the plaintiff will not change the nature and character of the suit and the plaintiff will be succeeded if the probate of Will will be granted in his favour and at this stage, there is no embargo to reject the prayer of the plaintiff for amendment of plaint.

Accordingly, the instant application for amendment of plaint is hereby allowed on contest.

Hence, it is

ORDERED

that the petition dated 24.03.2021 under Order 6 Rule 17 of CPC read with Section 151 of CPC filed by the plaintiff is hereby allowed on contest.

Plaintiff is hereby directed to file amendment plaint within the statutory period.

Defendant is at liberty to file additional W.S. if any.

Fix 21.09.2023 for filing of amended plaint and additional W.S. by the defendant, if any.

[Dictated and corrected by me]

Sd/-
(Manabendra Nath Ghosh)
Judge, Bench – II,
Presidency Small Cause Court,
Calcutta.

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