

Ej. Suit No. 336 of 2014
CNR NO. WBPS01-000550-2014

Order No. 68
Dated 27.03.2024

Today is fixed for hearing of the applications dated 22.11.2023 filed by the plaintiff under Order-1, Rule-10(2) of CPC and Under Order-6, Rule-17 of CPC.

Both sides are present by filing Haziras.

Defendant has filed written objections against the captioned applications today before this Court.

Now, in presence of both sides the above petitions are taken up for hearing one by one.

Firstly the application Under Order-1, Rule-10(2) of CPC is taken up for hearing.

FACTUAL MATRIX ::

This is a suit for eviction and recovery of khas possession filed under the provision of WBPT Act, 1997 on various grounds as enumerated in Section 6 of the said Act by specifically stating that one Mahadeb Mullick, since deceased, was the recorded tenant in respect of the suit premises and on his demise the original defendants of the instant suit became tenants in common in respect of the suit premises including original defendant no. 1 Kali Rani Mullick who was the widow of the original recorded tenant Mahadeb Mullick.

Subsequently, said Kali Rani Mullick died intestate on 26.02.2020 and her name has been expunged from the cause title of the plaint. Moreover, out of all the original defendants i.e. the defendant nos. 1 to 8, only original defendant no. 3 Ashoke Kumar Mullick who was one of the sons of the original recorded tenant appeared in the present suit and filed his written statement and the other defendants never appeared and the suit proceeded exparte against them vide order dated 13.01.2015.

However, due to bonafide mistake and mis-instruction given by the previously appointed Advocate, the legal heirs of original defendant no. 3 Dilip Kumar Mullick and original defendant no. 5 Uttam Kumar Mullick have been substituted whom the plaintiff does not consider necessary parties in the present suit and accordingly the petition under Order-1, Rule-10(2) of CPC has been filed for striking out the name of present defendant nos. 2 & 4 who are the substituted legal heirs of original defendant nos. 3 & 5.

The contesting defendant no. 3 namely Ashoke Kumar Mullick has filed written objection against the application on carpet by stating that the petition is absolutely misconceived and the same has no basis at all and accordingly the defendant has prayed for rejection of the instant application.

I heard both sides.

Perused the petition and other materials on record.

Considered.

On careful reading of the plaint, it appears that the defendants of the instant suit have been categorized as tenants-in-common in respect of the suit premises being the legal heirs of the original recorded tenant Mahadeb Mullick, since deceased and out of all the original defendants nos. i.e. 1 to 8 only one defendant named above, appeared and contested the suit and by order dated 13.01.2015 the suit started proceeding exparte against defendant nos. 1 to 3 and 5, 7 & 8. It is matter of record that during the pendency of the instant suit, the widow of the recorded tenant i.e. the defendant no. 1 died and her name was expunged on the prayer of the plaintiff. Similarly, original defendant nos. 3 & 5 also died and her legal heirs have been substituted as substituted defendant no. 2 and 4 on the basis of the prayer of the plaintiff.

Now, the plaintiff has taken the plea that he desires to expunge the name of defendant nos. 2 & 4 as they are not necessary or proper party in the present suit. The plaintiff being the master of the suit is the Dominus-litis and it is the prerogative of the plaintiff to choose the persons whom he desires to implead as defendant as he does so at his own risk/peril.

This being the situation, this Court is of the view that the plaintiff has filed the petition captioned above fully knowing about it's consequence and I find no impediment to allow the said petition of the plaintiff.

Hence, it is,

ORDERED,

That the petition dated 22.11.2023 under Order-1, Rule-10(2) of CPC is hereby allowed on contest but without any order of cost. Let the names of present defendant nos. 2 & 4 namely Tulika Das and Sharmila Mullick be struck out from the cause title of the plaint at the risk of the plaintiff.

BC to give note in the cause title of the plaint accordingly.

Now the petition under Order-6, Rule-17 of CPC dated 22.11.2023 filed by the plaintiff is taken up for hearing.

FACTUAL MATRIX ::

This is a suit for eviction and recovery of khas possession filed under the provision of WBPT Act, 1997 on various grounds as enumerated in Section 6 of the said Act by specifically stating

that one Mahadeb Mullick, since deceased, was the recorded tenant in respect of the suit premises and on his demise the original defendants of the instant suit became tenants in common in respect of the suit premises including original defendant no. 1 Kali Rani Mullick who was the widow of the original recorded tenant Mahadeb Mullick. The plaintiff has claimed to serve an ejectment notice u/s 6(4) prior to the institution of the instant suit upon all the original defendants.

Now it is stated by the plaintiff under the application for amendment that after the death of the original tenant Mahadeb Mullick in the year 1987 and his widow Kali Rani Mullick who was impleaded as original defendant no. 1 died during the pendency of the instant suit on 26.02.2020 and her name has been expunged. It is specifically stated that the plaintiff only accepted one Goutam Mullick, original defendant no. 2 as the tenant after the demise of the recorded tenant and he never appeared in the suit and the suit is running exparte against him. It is further stated that after the death of the original tenant Mahadeb Mullick and his widow Kali Rani Mullick, one of their sons namely Ashoke Kumar Mullick, present defendant no. 3 has been occupying the suit premises most illegally as his right has already ceased by application of the provision of Section 2(g) of the WBPT Act, 1997 soon after expiration of five years from the death of the recorded tenant Mahadeb Mullick in the year 1987 and, as such, he is an illegal and trespasser in the suit property.

It is specifically claimed that the above facts came into light subsequently during the pendency of the instant suit on appointing a Senior Advocate which could not be incorporated in the original plaint due to ignorance of law. Hence, the application under Order-6, Rule-17 of CPC seeking necessary amendment with regard to the above fact in the pleadings of the plaintiff by deleting the existing pleading to that effect.

The Ld. Advocate for the plaintiff placed reliance on a decision reported in **2022(4) ICC 341 CAL** in support of his contention that whether right of tenancy of the defendant continuing as joint tenants even after the death of the original tenant and his wife, the amendment to that effect is necessary to determine the real question in controversy between the parties.

The contesting defendant no. 3 Ashoke Kumar Mullick raised vehement objection against the application for amendment by stating that the instant petition is not maintainable in law as the same will change the nature of the original suit and give rise to a new case altogether, if allowed, which is not permissible under law. Accordingly, he has prayed for rejection of the instant application.

Hd. Both sides.

Perused the petition and other materials on record.

Considered.

At the very outset, before plunging into the merit of the instant application, I find it extremely important to recapitulate few factual aspects involved in the present case for better understanding of the situation.

The plaintiff has filed the instant suit against original defendant nos. 1 to 8 who are all legal heirs of the original recorded tenant Mahadeb Mullick, including his widow Kali Rani Mullick by specifically treating all of them as tenants-in-common in the suit premises after the demise of Mahadeb Mullick in the year 1987. The suit has been filed in the year 2014 by serving ejectment notice u/s 6(4) of the WBPT Act, 1997. Out of all the original defendants only present defendant no. 3 named Ashoke Kumar Mullick appeared after receiving summon and only he contested the instant suit by filing written statement and has also filed applications u/s 7(1) & 7(2) of the WBPT Act, 1997.

It is matter of record that the widow of the recorded tenant Kali Rani Mullick has died during the pendency of the instant suit on 26.02.2020. Presently, all the defendants are the off-springs of the recorded tenant Mahadeb Mullick and only defendant no. 3 who is one of the sons is contesting the suit and the suit is running exparte against the other defendants vide order dated 13.01.2015.

Now, the plaintiff has come up with the application on carpet stating interalia certain facts, which are sought to be inserted into the existing pleading. What are those facts ?

It is sought to be incorporated that the plaintiff only accepted the other son of the original tenant namely Goutam Mullick as their tenant by creating a fresh tenancy in his favour after the demise of the original tenant Mahadeb Mullick. As such, the contesting defendant no. 3 Ashoke Kumar Mullick who is another son of said Mahadeb Mullick is an illegal occupier and trespasser in the suit premises.

In the above premises, it becomes absolutely apparent that the plaintiff has though claimed all the defendants as tenants-in-common in the suit premises but by way of the present amendment he desires to introduce absolutely a new fact regarding creating of fresh tenancy in favour of only one of the sons of the original tenant i.e. Goutam Mullick against whom the suit is already running exparte. Simultaneously, the plaintiff has made out a case of application of the provision of Section 2(g) of the WBPT Act, 1997 against the other defendants of the instant suit subsequent to the death of the widow of the recorded tenant Kali Rani Mullick.

There is no doubt that application of the provision of Section 2(g) of the WBPT Act, 1997 occurs by operation of law from the time of death of the original tenant and his spouse after the expiration of five years. That being so, when all the present

defendants are the off-springs of the recorded tenant Mahadeb Mullick, the provision of Section 2(g) of the Act cannot possibly operate against only some of them i.e. all the defendants excepting defendant no. 1 Goutam Mullick as prayed for by the plaintiff under the application u/O-6, Rule-17 of CPC.

In this regard, it is therefore noted that the fact and circumstances of the decision relied upon by the plaintiff is completely different from the present case as in the said case the question of application of the provision of Section 2(g) of the Act arose in case of all the legal heirs after the demise of the original tenant and his widow. As such, the said decision would not be applicable under the fact and circumstances of the present case.

It goes beyond saying that, in order to decide the merit of an application for amendment of pleading the proposed amendment is to be placed into the watertight compartment of Order 6 Rule 17 CPC. It consists of two parts, the **first part** is discretionary (**may**) and leaves it to the Court to allow amendment at any stage of proceeding, while the **second part** is imperative (**shall**) and enjoins the Court to decide all the amendment that are necessary to decide the dispute between the parties. The matter does not stop here, **proviso to Order 6 rule 17 CPC** speaks that, no amendment shall be allowed after commencement of trial unless the party seeking amendment satisfy the Court that despite due diligence he could not produce the fact before the Court.

In this regard, I find it very much important to refer to a decision reported in 2015 (4) ICC SC 127 in the case of M/s. Revajeetu Builders and Developers -vs- M/s. Narayanswami and Sons and Others, wherein the Hon'ble Apex Court laid down certain basic principles which ought to be taken into consideration while dealing with an application for amendment:-

“67. On critically analyzing both the English and Indian Cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

- 1) *Whether the amendment sought is imperative for proper and effective adjudication of the case?*
- 2) *Whether the application for amendment is bonafide or malafide?*
- 3) *The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.*
- 4) *Refusing amendment would in fact lead to injustice or lead to multiple litigation.*

- 5) *Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and*
- 6) *As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of the application.”*

Therefore, keeping into mind the above proposition of law if I consider the existing pleading of the plaintiff in the light of the amendment application, it appears that the plaintiff by deleting the case of tenancy-in-common of all the defendants is trying to make out a new case of creation of fresh tenancy in favour of defendant no. 1 Goutam Mullick thereby applying the provision of Section 2(g) of the Act against the other defendants which will definitely change the nature of the present suit from an ejectment suit under a special statute i.e. West Bengal Premises Tenancy Act, 1997 into a suit for eviction under the General Law as against all other defendants when a valuable right has already accrued to the contesting defendant no. 3 who has already presented his defence case as one of the tenants-in-common long after the demise of the original recorded tenant Mahadeb Mullick in the year 1987.

Therefore, in the case in hand, it appears from the materials on record that the plaintiff is trying to make out absolutely a new case by way of the proposed amendment and he is trying to blow hot and cold at the same time by introducing the provision of Section 2(g) of the WBPT Act, 1997 only against some of the off-springs of the recorded tenant thereby keeping some other off-spring aside at his own whims.

Thus, in my considered view, the present amendment does not seem to be a bonafide one and appears to be the result of after thought of the plaintiff which is not permitted under law.

In the case of **Life Insurance Corporation of India -vs- Sanjeev Builders Pvt. Ltd and Another** reported in **2022 LifeLaw SC 729** as relied upon by the plaintiff the Hon'ble Supreme Court has specifically held that all amendments are to be allowed which are necessary for determining the real question in controversy **provided it does not cause injustice of prejudice to the other side**. The Hon'ble Court has further held that prayer for amendment is generally required to be allowed **unless by the amendment, the other side loses a valid defence**.

In the present case, contesting defendant no. 3 Ashoke Kumar Mullick has all along contested the suit by admitting himself to be one of the tenants-in-common and has filed written statement to that effect and if the present amendment conferring the right of tenancy only in respect of defendant no. 1 by creation

of a subsequent tenancy, is allowed, the same will cause prejudice to the defendant and will give rise to a new case.

Considering the above, this Court is of the view that the petition seeking amendment of the plaint is not maintainable in law in its present form and accordingly I am inclined to reject the same.

Hence, it is,

ORDERED

That the application for amendment of plaint dated 22.11.2023 is hereby considered and rejected on contest but without cost.

Fixing 10.07.2024 for peremptory hearing of the suit.

Dictated and corrected by me:

Judge

**Smt. Sudipa Banerjee
(J.O. Code: 01148)
Judge, 3rd Bench
Presidency Small Cause Court,
*Calcutta.***