

Title Appeal 148 of 2018

Order No.27

28.06.2023

Both parties are present through their Ld. Advocates.

Today is fixed for hearing of appeal as well as hearing petition dated 08.05.2023 filed by the appellant by way of put up.

Appellants file two applications under order 6 rule 17 of CPC read with order 41 rule 27 and section 151 of CPC for amendment of written statement and another application for appointment of advocate Commissioner under order 39 rule 7 of CPC.

Heard both sides.

At the beginning petition for modification of order dated 13.04.2023 filed by the appellants on 08.05.2023 is taken up for hearing.

Ld. Advocate for the appellants submit that in affidavit in reply against the petition for occupational charge has been stated that the area of the suit property is more or less 500 sq. ft and the appellants are maintaining the same.

It is also stated that the appellants are maintaining the suit property all along since inception of tenancy and prays for consideration and modification of the order dated 13.04.2023.

Ld. Advocate for the respondent vehemently objected the petition and submits that the petition has been served upon the respondent in Court room today but inspite of the same it is submitted that the petition for modification of occupational charge is required to be rejected on the ground that there is no proof that the appellants have made expenses for maintenance of the property. The appellants are utilizing the property unauthorizedly so they are required to pay the occupational charge fixed by this Court and therefore, prays for rejection of the petition.

After hearing both the parties, I have gone through the petition filed by one Nilesh Maheta the constituted attorney of appellant no. 1.

It is seen that the person swearing affidavit and signing the petition is the constituted attorney of appellant no. 1 and not for appellant no. 2.

The petition is filed for modification of order passed in favour of both the appellants. Therefore and on consideration of the petition as well as the considering that the appellants are in occupation of the premises in question, I am of the view that there is no necessity to modify the order already passed vide order no. 25 dated 13.04.2023.

Therefore, the petition for modification of order no. 25 dated 13.04.2023 filed by the appellants is rejected.

Another application for installment payment of arrear of the occupational charge is taken up for consideration.

*It is seen that that the appellants were directed to pay occupational charges @ Rs, **15,000/-** per month within 10th day of English Calender Month in respect of the suit premises till the disposal of the appeal and the occupational charge shall have the effect from 18.01.2022. This Court at the time of passing such order did not utter anything with record to the installment and mode of payment. Therefore, I am of the view that for the ends of justice the prayer for depositing /paying the arrear amount of occupational charge in installment be allowed.*

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*The appellants are directed to pay the arrear occupational charges as ordered in order no. 25 dated 13.04.2023 in five equal installments within 10th day of English Calender Month and the first installment should be cleared along with current occupational charge of Rs. 15,000/- by 10th day of **July, 2023**.*

Another application for amendment of written statement is taken up for consideration.

It is submitted by the appellants that the proposed amendment is a subsequent event and is required to be brought on record. Therefore prays for necessary order or amendment of written statement.

Ld. Advocate for the respondent submits that such type of fact has already been disposed of by the Ld. Trial Court and as such the proposed amendment is required to be rejected.

Perusal of the proposed amendment it is seen that the appellants have not stated the date from when that the defendant appellants came to know about the possession of similar accommodation by the respondent. It is stated that the appellant came to know after passing the impugned judgment and decree during pendency of the instant appeal that the ground floor of the suit building is under lock and key and it is also stated that the same is since October, 2018.

As per the statement of the appellants the proposed fact stated in the amendment occurred during pendency of appeal but this appeal has been filed on 15.11.2018 and since then till this day the appellants did not utter anything about such subsequent change.

Be that as it may the defence of the appellants against eviction remains the same if the proposed amendment is allowed.

It is settled law that amendment of plaint and amendment of written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counter part in law relating to amendment of written statement.

In the instant case, the appellants have stated that the proposed amendment is a subsequent event so I find that the proposed amendment of written statement is required to be allowed.

Amend the written statement as per the schedule mentioned in the petition.

Another application under order 39 rule 7 of CPC is taken up for consideration.

It is seen that the appellants have asserted that during pendency of the instant appeal respondent got possession of another flat with same accommodation of the suit property in the suit building and the local inspection is absolutely necessary to inspect the suit house on the point mentioned in the petition.

Ld. Advocate for the respondent again submits that such inspection has already been completed before the Ld. Trial court to determine the area in possession of the respondent as well as the appellants so there is no requirement to allow the petition.

Upon hearing the parties concern and on perusal of the points mentioned in the petition, it is seen that the questionnaire mentioned in the petition will not

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help to determine the real controversy in dispute. It is the allegation that the similar accommodation in possession of the appellant is under locked and key so if these points be allowed then it will be treated as collection of evidence on behalf of the defendant/appellants. Therefore, I do not find any ground to allow the said application for local inspection. Hence, the petition under order 39 rule 7 of CPC is hereby rejected on contest.

*To **01.09.2023** for hearing appeal and filing amended copy of written statement by the appellants.*

*Addl. District Judge,
3rd Court, Alipre.
WB-00757*