

(2022) 07 PAT CK 0028

Patna High Court

Case No: Civil Miscellaneous Jurisdiction No. 31 Of 2020

Nirmal Kumar Ambastha

APPELLANT

Vs

Subodh Kumar

RESPONDENT

Date of Decision: July 12, 2022

Acts Referred:

- Code Of Civil Procedure, 1908 - Order 6 Rule 17

Hon'ble Judges: Anil Kumar Sinha, J

Bench: Single Bench

Advocate: Harshwardhan Sahay, Suman Kumar Mishra

Final Decision: Allowed

Judgement

1. Heard learned Counsel for the petitioner-plaintiff and learned Counsel for the respondents-defendants.

2. The petitioner is aggrieved by the order, dated 16.10.2019, passed by the learned Munsif-II, Munger, in Title Suit No. 46 of 2002, by which

the amendment of the written statement filed by the respondents has been allowed.

3. Learned Counsel for the petitioner submits that the petitioner is the purchaser of the part of the suit property from the father of respondents,

along with the right to use the common passage. Since the respondents were obstructing the use of common passage by the petitioner, he filed the

suit for a declaration that the respondents have no right to interfere in the common use and occupation of the suit passage and further sought the

relief of permanent injunction restraining the respondents from demolishing and removing the pipes and connections of the latrine of the house of the

petitioner from the chamber and septic tank lying beneath the suit passage and also from causing any damage or disturbance to the said connection.

4. He further submits that after sixteen years of filing of the suit, the respondents filed an application, under Order VI Rule 17 of the C.P.C., for

amendment of the written statement, in which they sought the following amendment:

â€œ2. That in the last of para no. 10 of the written statement, the following words be written:-

â€œIt is submitted that the house detailed in Schedule No. I of the plaint, house of defendant in the North of suit passage and house of Garib Sao

was constructed in the year 1941 at one time by the father of this defendant on mud and bricks. The plinth is also made from mud and bricks. In

the East of the door of the plaintiff and defendant after 2 feet, septic tank had been constructed upto 10 feet in East-west.

In the middle of passage, there is drain from septic tank running East to West 1½ feet width and 2 feet deep upto main gate and drain at main

road. After 10 feet from East, there are five doors 3 feet width in the house of the defendant open in the common passage and out of which first

two doors started with staircase for first floor for four different apartment. In the south in the common passage, there is common water drain of the

house of the plaintiff and defendant running to the East towards main drain on the road 1½ feet wide and there is supply water connection tap of

defendant also along the side of the above-mentioned drain. There is house constructed over common passage on the first floor East about 20 feet.

It is submitted that all the structures are very old and mud brick built and since before registration of the sale deed of the plaintiff.â€

5. Learned Counsel for the petitioner relied upon the decision of the Supreme Court, in the case of Chander Kanta Bansal v. Rajinder Singh

Anand, reported in (2008) 5 SCC 117 and on the decision of this Court, in the case of Lal Babu Rai and Others v. Ramgaya Rai, reported in

2014 (1) PLJR 48, on the point that after coming into force of the proviso to Order VI rule 17 of the C.P.C., the amendment of the pleadings

cannot be allowed after commencement of trial without considering the jurisdictional fact of due diligence taken by the parties. He also submits that

the amendment application filed by the respondents is mala fide and the same has been filed in order to fill up the lacunae.

6. On the other hand, learned Counsel for the respondents submits that the amendment sought by the respondents is simple in nature and will not change the nature of the suit. He further submits that the petitioner was examined in the suit and after his cross-examination, the respondent realized that certain necessary facts for proper adjudication of the suit be placed before the Court and accordingly the amendment petition has been filed and the same has rightly been allowed by the learned Court below on the ground that the amendment sought by the respondents in the written statement will not change the nature of the suit.

7. In support of his argument, learned Counsel for the respondents relies upon the decisions of the Supreme Court, in the cases of *Mohinder Kumar Mehra v. Roop Rani Mehra and Others*, reported in (2018) 2 SCC 132, and *State of Madhya Pradesh v. Union of India and Another*, reported in (2011) 12 SCC 268.

8. The submission advanced on behalf of the petitioner is that after coming into force of the proviso to Order VI rule 17 of the C.P.C., an amendment can be allowed only in the circumstances the party has satisfied the jurisdictional fact regarding due diligence. In support of his argument, he has relied upon *Chander Kanta Bansal* (supra) and *Lal Babu Rai* (supra).

9. I have heard learned Counsel for the parties and perused the amendment petition. It appears that the jurisdictional fact regarding due diligence has not been stated by the respondents in the amendment petition and the decision relied upon by the respondents, in the case of *State of Madhya Pradesh* (supra), the Supreme Court has also held that if an application is filed after commencement of the trial seeking amendment, it must be shown that in spite of due diligence, such amendment could not have been sought earlier and as such the decisions, relied upon by learned Counsel for the respondents-defendants have no application in the facts of the present case.

10. From perusal of amendment application, it appears that the respondents-defendants, in their application seeking amendment, have not stated

that in spite of due diligence, such amendment could not be sought earlier. The learned Court below, while allowing the amendment petition, has also failed to consider the proviso to Order VI rule 17 of the C.P.C., introduced by way of amendment with effect from 01.07.2002. Admittedly, the suit has been filed on 01.10.2002 and the defendants have filed the amendment petition after sixteen years of filing of the suit and after closure of evidence of the plaintiff in 2016.

11. Upon consideration of conspectus of facts and law discussed herein above, I am of the considered opinion that the learned Court below has committed jurisdictional error and material irregularity in allowing the amendment of the written statement after commencement of trial and without giving the finding on due diligence as per proviso to Order VI rule 17 of the C.P.C. The amendment sought is not bona fide and has been brought to delay the disposal of the suit.

12. In the result, this application is allowed and the impugned order, dated 16.10.2019, passed by the learned Munsif-II, Munger, in Title Suit No. 46 of 2002, is, hereby, set aside.

13. However, there shall be no order as to costs.