

(1983) 06 CAL CK 0027
In the Calcutta High Court
Case No : Civil Rule No. 3653 of 1983

Hiralal Roy and Others

APPELLANT

Vs

Smt. Mati Rani Ghosh and Others

RESPONDENT

Date of Decision : 23-06-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 6 Rule 17, Order 6 Rule 18

Citation : AIR 1984 Cal 151

Hon'ble Judges : Arun Kumar Janah, J

Bench : Single Bench

Advocate : B.K. Panda, Sukumar Sen and Rathindra Nath De, for the Appellant;
P.K. Dutta, Anath Nath Mondal and Animesh Kanti Ghosal, for the Respondent

Judgement

Arun Kumar Janah, J.—In this Rule the petitioners are challenging an order dated July 15, 1981 passed by the Munsif, Second Additional Court. Alipore, in Title Suit No. 63 of 1975 which was instituted by the opposite party 1 against the petitioners as well as the opposite parties 2 and 3 for declaration of title to certain lands and for recovery of possession thereof. The said suit was decreed by the trial court but on appeal the lower appellate court remanded the suit to the trial court on the ground that after remand the plaintiff should be given an opportunity to amend the plaint so that the suit may not fail on the technical ground that the plaintiff had not asked for recovery of possession in respect of a portion of the land which in the opinion of the lower appellate Court was not in possession of the plaintiff. After the suit went back to the trial court, the plaintiff filed an application for amendment of the plaint on June 3, 1981 pursuant to the liberty given by the lower appellate court. The said application was allowed by the trial court on June 10, 1981 and the following order was passed:

"Ordered that the petition under Order 6 Rule 17 dated 21-3-1981 is allowed on contest. Plaintiff is directed to pay Rupees 51/- to the defendant as costs of the amendment dated 15-7-1981, in default, his petition shall stand rejected....."

2. Mr. Dutt, learned Advocate for the opposite party No. 1 raised a preliminary objection that the amendment was allowed by order No. 269 dated June, 10, 1981, but the order challenged in this Rule is order dated July, 15, 1981 which is only an order directing the order to be carried out and therefore the present application u/s 115, Civil P. C. on which this Rule has been issued is not maintainable.

3. There is considerable force in the preliminary objection raised by Mr. Dutt and this is sufficient to dispose of the Rule. But since the matter has been argued before me on merits. I wish to decide the Rule on merits as well

4. Mr. Panda, learned Advocate for the petitioners, has contended that the order of the lower appellate court was passed on December, 23, 1980 and therefore the plaintiff-opposite party No. 1 ought to have filed her application for amendment of the plaint within 14 days from that date under Order 6 Rule 18, Civil Procedure Code. The plaintiff-opposite party 1 not having filed her application within 14 days from the date of the judgment of the lower appellate court, the present application filed on March 21, 1981 for amendment of the plaint is barred by limitation.

5. In so far as this contention of Mr. Panda is concerned, it is sufficient to state that the order passed by the lower appellate court was not one under Order 6 Rule 17 of the Code and therefore Order 6 Rule 18 can have no application in this case. There was no application filed by the plaintiff before the lower appellate court under Order 6 Rule 17 of the Code. The lower appellate court gave an opportunity to the plaintiff to amend the plaint instead of dismissing the suit on the ground that recovery of possession of a portion of the suit land was not prayed for by the plaintiff. This order made by the lower appellate court was obviously one u/s 107 and Order 41 Rule 23 Civil P. C. In this case therefore the point raised by Mr. Panda that the application for amendment of the plaint filed before the trial court was barred by limitation cannot be accepted.

6. Certain decisions were cited before me by the learned Advocate for the respective parties and those are reported in Nareshchandra Chinubhai Patel Vs. The State of Gujarat, : Nritya Gopal Nandi Vs. Gour Mohan Adak, and Major S.S. Khanna Vs. Brig. F.J. Dillon, . It is, however, not necessary for me to discuss those decisions in detail for the purpose of deciding the present case. Moreover, the present petitioners not having challenged the order of remand passed by the lower appellate court and having accepted that order and having obtained the benefit under the order as would appear from Annexure-A to the affidavit-in-reply filed on behalf of the opposite party I in reply to the affidavit-in-opposition filed by the opposite party 2 cannot at the stage challenge the order of amendment granted by the trial court.

7. This Rule is accordingly discharged, but in the circumstances of the case, I make no order as to costs.

8. This order is made without prejudice to the rights and contentions of the

opposite party 2 in the pending second appeals.