

(2007) 02 CAL CK 0024
In the Calcutta High Court
Case No : C.O. No. 4345 of 2006

Md. Mohibuddin

APPELLANT

Vs

Jame Dey

RESPONDENT

Date of Decision : 22-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116(3), 144

Citation : (2007) 2 CHN 645

Hon'ble Judges : Arun Kumar Bhattacharya, J

Bench : Single Bench

Advocate : Mansoor Alam and Kavita Rani, for the Appellant;

Final Decision : Dismissed

Judgement

Arun Kumar Bhattacharya, J.—Being aggrieved by the order dated 01.09.2006 passed by the learned Civil Judge (Jr. Div.), 2nd Court, Asansol in T.S. No. 1/99 allowing the prayer of the plaintiff/O.P. for amendment, the defendant/petitioner has come up before this Court in revision.

2. The plaintiff/O.P. instituted the said suit for declaration and permanent and mandatory injunction contending that he is the owner of "A" schedule property where he has been residing since the time of his predecessor by making a pucca boundary wall leaving vacant space on all sides as per municipal rules. The land of the defendant/petitioner is located towards the northern side, and apart from the plaintiffs left out space, there is a vacant land of about 4 ft. x 5 ft., described in schedule "B", being used by the plaintiff openly and peacefully as his passage for ingress and egress since the time of his predecessor and thus he has acquired title there to by adverse possession. All on a sudden on 31.10.98 the defendant started foundation over the said piece of land for the purpose of encroaching the same by making a pucca wall sun shed in the ground floor and balcony on the first floor. At the instance of the plaintiff a proceeding u/s 144 / 107 / 116(3) Cr. PC was drawn up against the defendant. Thereafter the above suit was filed. The suit was dismissed by the learned Trial Judge without any decision as to whom

the property belongs, for which and for other reasons, the learned Court of Appeal below remanded the suit for retrial after framing an additional issue and giving the parties an opportunity to adduce additional evidence, pointing out the defence contention that the suit is not maintainable without prayer for recovery of khas possession. The plaintiff filed an application for amendment of the plaint by way of describing the area of "B" schedule property which was lacking, as pointed out by the learned Court of Appeal, and adding the prayer for recovery of possession etc. which was allowed by the impugned order.

3. It was contended by Mr. Alam, learned Counsel for the petitioner, that the proposed amendment would change the nature and character of the suit which will involve retrial of the case of new footing.

4. When the Appellate Court orders remand with certain directions to the Lower Court, the amendment which should be allowed must relate and be consequential to the plea directed, and any new plea altogether different which is not raised at the initial stage cannot be raised. Here, the suit was sent back on remand for fresh adjudication with certain directions. Over an indefinite suit property no effective decree can be passed, and as such identification of the disputed property is necessary for proper adjudication of the suit which will be beneficial to both the parties. It is to be borne in mind that it is open to a Court including a Court of Appeal to do complete justice between the parties.

5. It is a guiding principle of amendment, that generally speaking, all amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceeding or of correcting any defect or error in any proceeding". The rules of procedure are intended to be a hand-maid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules and procedure. The Court always allows amendment unless it is satisfied that there was mala fide or the blunder had caused injury to the opponent which could not be compensated by costs. However negligent or careless may have been the first omission and however late the proposed amendment, it may be allowed if no injustice is caused to the other side, as was held in the case of J.J. Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, . Even very defective pleadings may be permitted to be cured so as to constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional Court-fees or of costs of the other side are complied with except of course if lapse of time has barred the remedy of newly constituted cause of action, as was observed in the case of Ganesh Trading Co. Vs. Moji Ram, . Similar observations finds place in the case of B.K.N. Narayana Pillai Vs. P. Pillai and Another, where it was held that the delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake, which, if not fraudulent, should not be made any ground for rejecting the application for amendment of plaint or written statement. In the present case, the proposed amendment will not change the

nature and character of the suit in any way since it was a suit for declaration and injunction and will remain a suit for declaration and injunction with an additional prayer for recovery of possession. So, the above contention of the learned Counsel for the petitioner is not at all tenable.

6. Accordingly, the present application being devoid of any merit be dismissed in limine.

7. Urgent xerox certified copy of the order, if applied for, be supplied to the learned Counsel for the petitioner as expeditiously as possible