
(1990) 08 OHC CK 0036
In the Orissa High Court
Case No : Civil Revision No. 51 of 1990

Nakul Behera and Others

APPELLANT

Vs

Damodar Swain, Tahasildar, Banki

RESPONDENT

Date of Decision : 03-08-1990

Acts Referred:

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

Citation : AIR 1991 Ori 101

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : P.K. Parida, G.S. Nanda, Prasanta Kumar Parida and B. Muduli, for the Appellant; B. Rath, R.C. Rath, S.K. Panda and S. Swain, for the Respondent

Final Decision : Dismissed

Judgement

A. Pasayat, J.—Petitioners are defendants 1 to 3 in a suit filed by opposite party for declaration that he is the owner in possession of the disputed land, for delivery of possession in the event there is dispossession during the pendency of the suit, and for issue of permanent injunction with costs and consequential reliefs. Their prayer for amend-ment under Order 6, Rule 17, Code of Civil procedure, 1908 (in short "the Code") having been refused, this petition has been filed.

2. A short reference to the factual aspect is necessary for disposal of this revision application. Plaintiff claimed that he was in possession of the disputed land on the basis of a lease granted in his favour by the Tahasildar, Banki (defendant No. 4 in the suit and pro forma opposite party in this revision application); the present petitioners have no right, title and interest over the disputed land and were trying to interfere with his possession, necessitating institution of the suit. The present petitioners filed a joint written statement inter alia taking the stand that the land in question was in their continuous possession since 1972-73 and they had applied for lease in respect thereof, which was pending consideration; encroachment cases were pending and the attempt of the plaintiff was to

dispossess them and having failed in his illegal attempt filed the suit mala fide. The suit was filed on 23-4-1986 and was numbered as Title Suit No. 22 of 1986 in the court of Munsif, Banki. Issues were framed and the trial began. The plaintiff has been examined. After examination of the plaintiff was over, the present petitioners sought to amend the written statement by taking the plea that the starting point of possession as stated to be 1972-73 was erroneous, and in reality it was 1952-53; the details of the encroachment cases instituted against them were necessary to be inserted to show their continued possession. The action was objected to by the plaintiff on the ground that the attempt of the defendants was to introduce a new case and cause of action, and their belated application would cause material prejudice to the plaintiff.

3. On consideration of the rival submissions, the learned Munsif by impugned order dated 9-1-1990 refused the prayer. He was of the view that the present petitioners were trying to build up a new case with a different approach which is totally inconsistent with the original pleadings and it would cause serious prejudice to the plaintiff if the amendment sought for is allowed.

4. Assailing the correctness of the order in question, it has been submitted by Mr. P.K. Parida, learned counsel for the petitioner that learned Munsif attached undue importance to the examination of the plaintiff and there is no bar to allow amendment even after examination of the plaintiff and it was erroneously held that a new case was being sought to be introduced, and in any event no material prejudice would be caused to the plaintiff if the amendment is allowed.

Mr. R.C. Rath, learned counsel appearing for the plaintiff-opposite party has rebutted the contentions by submitting that not only was the application for amendment belated, it was an attempt to build up a new case inasmuch as the original plea of permissive possession was being abandoned in favour of a new case of adverse possession which was not permissible to be done by way of amendment, and in any event the plaintiff would be seriously prejudiced and materially affected if the amendment is allowed.

5. On consideration of the rival submissions, I am of the view that the revision application deserves dismissal. Even though as a general proposition it cannot be disputed that an amendment if made bona fide can be allowed at any stage, the facts and the circumstances would vary and much would depend upon the nature of amendment sought to be introduced. Mere delay per se cannot be a ground for refusing the prayer for amendment. The provisions contained in Order 6 Rule 17 of the Code aim at furtherance of ends of justice. The primary consideration which would weigh with the Court while dealing with an application for amendment is to cull out whether intention of the party seeking amendment is mala fide and aimed at delaying the due process of law. If the circumstances prima facie indicate that the other side would not suffer grave injustice or would not be materially prejudiced, the prayer for amendment is to be allowed. If ends of justice will be subserved by allowing the amendment, then the power to allow the same should be liberally exercised, subject to the rider that by amendment

nature and character of the suit is not materially affected or altered, and/or a new case or cause of action is not intended to be introduced. The power to grant amendment of pleadings is intended to serve the ends of justice and is not fettered by any narrow and technical limitation. An amendment in written statement which would not merely open a different or additional approach to the facts already stated but changes the nature of the defence or sets up a new case should not be allowed. (See *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, and *Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co.*,). The amendment under consideration does not merely open a different or additional approach to the facts already stated, but aims at introduction of a new case of adverse possession abandoning the earlier plea of permissible possession from a particular year.. The statement in the application for amendment that mention of the period to be 1972-73 was a clerical or typographical error is hard to swallow. The application was filed on 8-12-1989, whereas the plaintiff was examined as P.W. 1 on 4-12-1989. At that time also (here was even no suggestion to the plaintiff about the possession of defendant Nos. 1 to 3 from 1952-53- On the contrary, suggestion was given that they were in possession since 1972-73. So the prayer to substitute the years has been rightly rejected.

6. Coming to the prayer for introducing the encroachment case nos. in support of the plea of continued possession, it is not necessary to elaborately deal with this aspect. The nature of evidence and the connected materials are not necessary to form a part of the pleadings. If this is a piece of evidence in support of the defendants' case, it is available to be placed on record during trial and therefore, no amendment of the written statement was necessary.

7. The plea that the plaintiff would not be prejudiced materially is not acceptable. The plaintiff will be confronted with an entirely new case of the defendants. Additionally his examination is over. Though in certain Cases even at the argument stage amendments" have been allowed, the facts involved were different. No assistance is available from the decision of this Court in *Kashi Biswanath Dev Vs. Paramananda Routrai and Others*, , on which strong reliance was placed by Mr. Parida, learned counsel for the petitioners, as the decision was rendered on entirely different setting.

8. The revision application as aforesaid is devoid of merit and is accordingly dismissed, but in the circumstances without any order as to costs.