

(1997) 08 CAL CK 0024
In the Calcutta High Court
Case No : C.O. No. 1203 of 1994

Smt. Sakuntala Chakraborty

APPELLANT

Vs

Shiba Prosad Roy and Another

RESPONDENT

Date of Decision : 29-08-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 6 Rule 17

Citation : AIR 1998 Cal 29

Hon'ble Judges : O.P. Sarkar-II, J

Bench : Single Bench

Advocate : Soumya Chakraborty, for the Appellant; S.P. Roy Chowdhury and Priyotosh Mukherjee, for the Respondent

Final Decision : Partly Allowed

Judgement

O.P. Sarkar-II, J.—This is an application u/s 115 of the CPC directed against the Order No. 12 dated 7-7-1994 passed by the Id. Additional District Judge, 6th Court, Alipore in Title Appeal No. 446 of 1983 arising out of Title Suit No. 14 of 1992.

2. It was a suit for eviction of a tenant and the suit was decreed against which an Appeal was preferred before the Id. I st Appellate Court. When the Appeal was pending the defendant-appellant filed two petitions before the Id. Appellate Court --one under Order 41, Rule 27 of the CPC and the other under Order 6, Rule 17 of the C.P.C. The first one was for taking additional evidence. The second one was for amendment. Both the applications were pending before the Id. 1st Appellate Court, when the defendant-appellant filed a petition before the Id. 1st Appellate Court for disposing of those two petitions at an early date. The petition was taken up for hearing by the Id. Appellate Court and after considering the submissions of both sides, the Id. Appellate Court under Order 6 Rule 17, CPC and that under Order 41, Rule 27 would be heard together with the Appeal itself.

3. On being aggrieved by such order the present Revisional Application has been

filed by the defendant-appellant before this Court.

4. The point to be considered is whether the Id. 1st Appellate Court acted illegally and exercising jurisdiction wrongly in the matter of passing the impugned order.

5. It is undisputed that an application for amendment of the pleadings can be filed at any time before the pronouncement of the judgment. Therefore, right of the petitioner to file petition for amendment of the written statement under Order 6, Rule 17 of the CPC cannot be denied. The Id. Trial Court has also not disputed that right of the present petitioner to file application for amendment even at the Appellate stage and also petition under Order 41, Rule 27 of the CPC. But the Id. Trial Court has deferred the hearing of those two petitions.

6. In this connection, the Id. Advocate for the opposite party has referred to several decisions of the Supreme Court as well as of the High Courts including the High Court of Calcutta. The most important decision is the decision of the Supreme Court reported in Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co., In that reported case, there was also petition for amendment of the pleadings and the High Court rejected that prayer for amendment on the grounds that it will change the nature and character of the Suit. Against that decision the Supreme Court was moved, but the Supreme Court affirmed the decision of the High Court. After careful consideration of the facts of that reported case side by side with the facts of the present case, I feel constrained to hold that the said decision is not attracted to the present case, because of the fact that the petition for amendment was rejected there in the reported decision on merits. But the question before us is not whether there is any merit in the petition for amendment or the petition for additional evidence at the appellate stage; but the dispute centres round the point at what stage those two petitions should be taken up for hearing and disposed of by the Court concerned irrespective of the question of merits of the petitions.

7. So far as the question of adducing additional evidence at appellate stage, I share the views as expressed by the Id. Senior Advocate, Mr. S. P. Roy Chowdhury that the Court could only assess the evidence before it at the time of hearing of the Appeal because without assessing the evidence already on record it cannot be ascertained by the Court concerned what more additional evidence would be necessary or not for proper adjudication of the Appeal. Accordingly; the application under Order 41, Rule 27 of the CPC should be heard along with the Appeal if at the time of hearing it transpires to the Court that some additional evidences are essential for proper adjudication of disputed point between the parties, definitely the Court has power and authority to take additional evidence even at the appellate stage.

8. Regarding the other point i.e. the amendment of pleading under Order 6, Rule 17 of the CPC, I cannot share the views of the Id. Senior Advocate, Mr. S. P. Roy Chowdhury; because, the amendment petition can be moved at any stage and if

there was no merit in the petition itself, the Court has got the liberty to reject that petition at any stage before hearing of the Appeal. In other words, If the Court considers that the proposed amendment will simply introduce a new case and in effect virtually change the nature and character of the case, definitely, the Court can reject such prayer for amendment; but such consideration should be done at the time of hearing the amendment petition and such consideration cannot be a ground to defer the hearing of the amendment petition.

9. It is submitted by the Id. Advocate for the Opposite Parties that if after hearing the amendment petition the Court is pleased to allow the amendment, in that event, the other party can claim to adduce new evidence on the basis of such amendment. If the proposed amendment introduces a new case and changes the nature and character of the suit it will be rejected outright otherwise if the amendment is allowed and if the point introduced by such amendment requires additional evidence to adjudicate that point, definitely, the Court would accommodate the party concerned. But such a consideration, should not be a bar to take up the hearing of the amendment petition prior to the hearing of the Appeal itself.

10. It is true that the decision reported in *The Premier Automobiles Ltd., Bombay Vs. Kabirunissa and others*, is not attracted to the present case also, because of the fact, that the Court concerned in the reported decision took up the application under Order 41, Rule 37, CPC for consideration and disposal after the disposal of the Appeal itself when the Court became functus officio. The fact of the present case is not so, the Appeal is still pending.

11. It has been argued by the Id. Advocate for the Opposite Parties that the decision referred to by the Id. Advocate for the petitioner is a decision "per incuriam" and is a nullity. The reported Full Bench Decision of the Orissa High Court has explained the term that when a decision is given in ignorance of terms of a Statute or a Rule having the force of a Statute or earlier decisions -- the decisions are "per incuriam". The Supreme Court has explained that the expression means "through inadvertence". Whatever it may be, we do not find anywhere that a decision "per incuriam" is a nullity. Because, judgment passed by a High Court or the Supreme Court should not be looked upon as a scrap of paper, only because the Judge has failed to mention the earlier decisions on the points or arrived at incorrect interpretation of the statutory provision. It is proper for every Judge, if possible, to consider the earlier decisions and to take into account the relevant statutory provisions if available at the time of writing out the judgment. But if there is any omission due to ignorance or otherwise, the judgment so passed cannot be thrown to the wind; because that will affect the age old principle of judicial independence. A Judge should not be expected to copy the decision passed by any Judge in a previous decision. A Judge should not act as a rubber stamp of a predecessor. Law is a dynamic subject and it should not be kept in a cloistered shelf. Hon'ble Mr. Justice Krishna Iyer, in his book -- *Judicial Justice -- A New Focus Towards Social Justice* nicely placed the problem.

He has rightly observed in the book that Indian Judges, notwithstanding rhetoric, are guarantors of status-quo as they have inherited a colonial legal culture under which justice as delivered by the Courts would never see the suppressed or tortured Indians who were below the judicial vision. He has deeply lamented that we have, by and large inherited and preserved a system which does little justice and much injustice and he has pointed out that many various reasons responsible for such failure of justice the inaction and short-sightedness of the legislatures are the most important and that the traditional lawyers' illiteracy and the orthodox Judges' ignorance are also to be blamed. He has rightly observed that the Judges are "drawn from a class and raised to a class which is allergic to the socio-economic commitment to the widening poverty sector".

12. Even now after 50 years of independence many lawyers and Judges have a very mechanistic notion of the judicial process. We have still to combat the view that the Judges do not make laws but merely interpret the laws. Emphasis should be given to a professional movement, fuelled by a "people" commitment radicalising both the Bench and the Bar in the direction and destination of a new remedial jurisprudence which will secure the real, social and economic justice. It will not be out of context here to quote from the pathology of Indian legal profession by Mr. Upendra Baxi that in India, unfortunately, consumers of justice have been helpless against the Government as well as against the Judges and the lawyers. The "straight jacket" theory cannot be appreciated as a good principle of justice throughout ages because with the progress of time there is change in social perspective, social and economic outlook and national aspiration. Against that background what was once upon a time a good law interpreted by the Judges of the past cannot enjoy the same status in the modern social and judicial system. Law is a living subject and keeping that progressive views in mind even Pandit Jawahar Lal Nehru did not hesitate to declare in his speech that every new generation should be considered as a new nation and must have the liberty to change the constitution according to the need of that age and aspiration of the nation of that period. Accordingly, the rigidity has got no place in the judicial system. In the American judicial system also the Judges are not only the interpreters of the Statute but they can also add something to the Statute by way of interpretation to mete the social need and to achieve the purpose of justice. Therefore, all the legal principles should be read and interpreted in that light and with the sole aim to mete out justice to those who are in need of it most. Justice should not be detruncated, judicial discretion should not be fettered with the principle of archaic doctrines like "per incuriam" or like.

13. Therefore, considering all the aspects and the submissions of the Id. Advocates of both sides the Revisional Application is allowed in part. The impugned order, so far as the application under Order 6, Rule 17 of the CPC (is) concerned, is hereby set aside. The impugned order so far as the application under Order 41, Rule 27, CPC is hereby affirmed. The Id. Trial Court is directed to take up the hearing of the amendment petition according to law on its merit

giving proper opportunities of hearing to both the parties.