

Abdul Rahim Naskar Vs. Abdul Jabbar Naskar and ors.

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Court : Kolkata

Decided On : Feb-03-1950

Reported in : AIR1950Cal379,54CWN445

Judge : Harries, C.J. and ; Sarkar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115 - Order 6, Rule 17

Appeal No. : Civil Rule No. 1381 of 1949

Appellant : Abdul Rahim Naskar

Respondent : Abdul Jabbar Naskar and ors.

Advocate for Def. : Sarat Chandra Janah and ; Binod Behari Haldar, Advs.

Advocate for Pet/Ap. : Shyama Charan Mitra, Adv.

Judgement :

Harries, C.J.

1. This is a petition for revision of an order of a learned Subordinate Judge refusing to amend a plaint. The plaintiff brought a suit for a declaration of his title in certain land of which he claimed to be in possession. The land was described in Schedule Ka of the plaint and the plaintiff claimed a six anna interest therein. On one reading of the plaint it would appear that the plaintiff claimed an undivided six annas in the plots mentioned in the schedule. But we cannot overlook the fact that

in the body of the plaint he claimed that he had been in exclusive possession of the six annas which had apparently been allotted to him on a partition. Being in exclusive possession of his share suggests that the six annas in the property mentioned in schedule Ka must have been demarcated and therefore his claim was to specific portions of each of the plots mentioned in the schedule.

2. As the case proceeded, the plaintiff realised that it would be necessary to amend the plaint in order to claim specific portions of the plots in question. The learned Subordinate Judge refused to grant the amendment asked for. He says that there is nothing in the plaint to show that the plaintiff possessed any demarcated portion of any of the plots of the suit land. That is true to some extent, but, as I have said, there is also a plea that the plaintiff was in exclusive possession of his share by cultivation and it is impossible to cultivate exclusively six annas of any property unless that share has been demarcated or separated from the remaining ten annas.

3. The learned Judge also points out that in evidence the plaintiff was very vague as to the properties he actually claimed. The learned Judge says that the demarcation now alleged must be regarded as illusory. In other words the learned Judge appears to think that if the plaint was amended and specific portions of each of the plots claimed, the plaintiff could never hope to establish his claim. That however is no ground whatsoever for refusing an amendment.

If the amendment is necessary to decide the real issue between the parties the amendment should be granted, even though the Court may think that the plaintiff or the defendant who seeks the amendment will not be able to establish the facts necessary to support the amendment plea or defence. It seems to me that as the case proceeded justice required that the plaintiff should be given leave to amend the schedule to his plaint so that the Court could decide the real issue in the case; that is whether or not the plaintiff was entitled to portions of these plots which he alleged he had possessed exclusively by cultivation. That being so, if we have power to interfere, I would be inclined in this case to set aside the order of the learned Subordinate Judge and direct him to allow the amendment.

4. It was, however, urged before us that we could not interfere under Section 115, Civil P. C. Whether an amendment should or should not be granted is a matter within the discretion of the Court and it is urged that this Court cannot interfere under Section 115, Civil P. C. with the exercise of such discretion.

5. The very point was considered by a Bench of this Court in *Loke Nath v. Abani Nath* : AIR1934 Cal102 . This was a case decided before the Government of India Act, 1935. A Bench which decided the case held that there is no hard and fast rule that in no circumstances can a discretionary order by a Judicial officer be reviewed either under Section 115, Civil P. C. or under Section 107, Government of India Act or under the combined operation of both. The Bench further held that the Court could interfere where the lower Court had wrongly rejected an application to amend.

6. It might be suggested that the recent pronouncements of their Lordships of the Privy Council are not consistent with this case. But it must be observed that this case deals not only with Section 115, Civil P. C., but with Section 107, Government of India Act, 1919. Courts have held that under Section 107, Government of India Act, 1919, orders in the nature of orders in revision could in proper cases be made. Any right to make such orders however was expressly taken away by the Government of India Act, 1935, which limited the rights of superintendence to what I may describe as purely non-judicial matters. In the new Constitution however that limitation has been removed and the right of superintendence which this Court now has is practically the right it had under the Act of 1919. The position today, therefore, is precisely the same as it was when *Loke Nath's* case : AIR1934 Cal102 was decided, and therefore, it appears to me that we must follow that decision as it is binding on us. We, therefore, must hold that we now can interfere, either under Section 115, Civil P. C. or under powers which we now possess under the new Constitution to superintend the lower Courts.

7. That being so, I would allow this application, set aside the order of the learned Subordinate Judge and remand the case to him, with the direction that he should allow the amendment of the plaint as prayed. An opportunity of course must be

given to the defendants to file amended written statements and then the case will proceed.

8. The Rule is, therefore, made absolute in these terms, but in the circumstances I would direct that costs of this application be costs in the suit.

Sarkar J.

I agree.

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