

**(2012) 07 CAL CK 0057**  
**Calcutta High Court**  
**Case No:** C.O. 2937 of 2008

Sankar Kumar Das

APPELLANT

Vs

Basudev Guchait

RESPONDENT

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**Date of Decision:** July 6, 2012

**Acts Referred:**

- Calcutta Municipal Corporation Act, 1980 - Section 411(2)
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27, Order 41 Rule 7, Order 6 Rule 17, 151
- Transfer of Property Act, 1882 - Section 108

**Hon'ble Judges:** Soumen Sen, J

**Bench:** Single Bench

**Advocate:** Jiban Ratan Chatterjee and Mr. Sandip Kr. Tiwary, for the Appellant; Jahar Chakraborty and Mr. A.K. Mondal, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Soumen Sen, J.

The suit filed by the plaintiff for recovery of khas possession, damage and mesne profit was dismissed on contest by the judgment and order dated 17th February, 2005. The plaintiff alleged that the defendant was defaulter in payment of rent since 1984 and violated clauses (m),(o) and (p) of Section 108 of the Transfer of Property Act by installing a very big printing machine without the consent of the plaintiff.

2. The learned trial Judge upon evidence and contested hearing dismissed the suit by recording a finding that it is an admitted position that the suit premises was let out to the defendant for the purpose of running a printing press. The eviction on the ground of default also did not succeed.

3. In the appeal, the petitioner filed two applications namely an application under Order 6 Rule 17 of the CPC for amendment of the plaint and a further application under Order 41 Rule 27 of the CPC for production of additional evidence at the

appellate stage. In the amendment application the petitioner sought to incorporate that at page "3" paragraph "7" sub paragraph 1 of the third line in between the word "big" and "printing" lithograph should be incorporated and sought to introduce that the lithograph printing machine is totally different from printing press and on that basis suggested amendment to paragraph "7" sub paragraph "1" which runs into four sub paragraphs. The plaintiff this time by incorporating lithograph wants to suggest that lithograph printing machine was not permitted to be installed in the suit premises and before installing such machine, no consent was obtained. In paragraph (ic) the plaintiff faintly tried to introduce a case that the plaintiff should be permitted to evict the defendant in view of change of user which is based on the assumption that lithograph printing machine was installed and it is not merely an ordinary printing machine; The said amendment application was dismissed by the appellate Court on the ground that the same if allowed would virtually reverse or affect the findings already arrived at on the basis of the pleadings of the respective parties.

4. This Court agreed with the view expressed by the appellate Court in holding that no court should entertain an amendment of the original pleading at the appellate stage in order to make judgment and decree of the learned trial Court otiose. Even if one accepts for the sake of argument that a heavy printing machine was installed, the plaintiff has already prayed for eviction on the basis of violation of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act and having failed to obtain a decree, the introduction of lithograph printing machine is only an attempt to have a fresh trial on the issues which have already been decided on the basis of the evidence. In fact the purpose of amendment is to reopen the entire matter.

5. The application filed under Order 41 Rule 7 also deserves to be dismissed and has been correctly dismissed by the appellate Court. The fact which is sought to be introduced and in respect whereof the plaintiff prayed for leave to produce additional evidence at the appellate stage was presumably of 1995. It is submitted that the Corporation has issued a notice u/s 411(2) of the Calcutta Municipal Corporation Act and such notice along with the previous notice are required to be brought on record and the plaintiff should be permitted to adduce such additional evidence in order to prove its case. The party cannot claim as a matter of right for production of additional evidence at the appellate stage. Under Order 41 Rule 27, the parties seeking production of additional evidence must establish that notwithstanding the exercise of due diligence such evidence was not within the knowledge or could not after the exercise of due diligence be produced by him at the time when the decree appealed against was passed. The decree was passed in the year 2005. The documents which are sought to be relied upon are presumably of 1983 and 1995. The suit was filed in the year 2004. It is very difficult to accept the explanation given by the plaintiff for allowing the production of such document at the appellate stage. Moreover, as correctly recorded by the appellate Court no specific reference of any of the documents has been given by the plaintiff in its

petition under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure. The points that are sought to be urged in the application for amendment and also for production of additional evidence have been gone into and discussed by the trial Court before pronouncing the judgment. The petitioner by filing the said applications was attempting to have rehearing of the suit. The application for amendment as also for production of additional evidence are completely unmeritorious. The appellate Court on proper appreciation of fact and law dismissed both the applications.

6. The said order does not suffer from any illegality or material irregularity.

7. The application thus fails and is accordingly dismissed.

8. There shall be no order as to costs. Photostat certified copy of the order, if applied for, be given to the parties on usual undertaking.