

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2017

CORAM

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.754 of 2015
and
C.M.P.Nos.4508 and 4509 of 2017

Jarina Begum ... Appellant/Appellant/Defendant

vs

Kamariya Begum ... Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.100 of 2010 dated 29.02.2012 on the file of the Additional Sub Court, Mayiladuthurai confirming the judgment and decree passed in O.S.No.191 of 2008 on the file of the District Munsif Court, Sirkali dated 28.07.2010.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.A.Muthukumar

JUDGMENT

The defendant is the appellant in a suit for permanent injunction and for recovery of possession in respect of the second item of the suit properties.

2. The case of the plaintiff is that the suit properties originally belonged to the grandfather of her husband, i.e. Mohammed Ibrahim. He executed a settlement deed on 12.03.1961 settling the suit properties in favour of his son Abdul Sukur. The said Abdul Sukur had two sons, namely, Abusalih and Abdul Jamil. The plaintiff is the wife of the said Abusalih. It is further stated that the brother of Abusalih, namely, Abdul Jamil originally gifted his share in favour of Abusalih. Thus Abusalih became the owner of the entire suit properties. The defendant, who is the Eastern neighbour, had encroached the plaintiff's property by 2 feet and put up a wall to a height of 4 feet. In the process, the appellant also tried to demolish the Eastern main wall of the plaintiff and also cut and removed one coconut

tree. Hence, the suit was filed initially for permanent injunction with respect to item No.1 of the suit properties and subsequently, the plaint was amended by including the prayer for recovery of possession in respect of the item number 2 as the encroachment was subsequent to the suit.

3. Resisting the suit, by filing the written statement, the defendant had contended that the suit was not maintainable by the plaintiff, as she is not the original owner of the property as only her husband is the owner of the suit properties. The defendant also had raised the usual contentions denying the title of the plaintiff and oral gift pleaded by the plaintiff, etc. The defendant also claimed adverse title to the suit properties, besides contending that the plaintiff had acquiesced to the act of the defendant in putting up the construction.

4. Before the trial Court, the plaintiff examined herself as P.W.1 and one more witness was examined as P.W.2 and Exs.A1 to A5 were marked. On the side of the defendant, defendant was examined as DW.1 and two more witnesses were examined as DW.2 and DW.3 and Exs.B1 to B4 were marked. Apart from these documents, Exs.C-1 to C-4 were marked as Court documents.

5. The trial Court, on a consideration of the evidence available on record and the arguments advanced by the learned counsel for the parties, decreed the suit finding that the plaintiff had proved the title. So far as the encroachment alleged is concerned, the same was also found to have been proved based on Exs.C1 to C4. The said judgment and decree of the trial Court was confirmed by the lower Appellate Court. Aggrieved by the same, the above Second Appeal has been filed by the defendant.

6. At the time of filing of the appeal, the following Substantial questions of law were framed:

1. Whether the respondent who is admittedly not the owner of suit property is entitled to maintain suit for recovery of possession without production of any authorization or Power of Attorney by the alleged original owner?

2. Whether the plaintiff in the suit for recovery of possession is entitled to succeed without proving his title?

7. It is the specific case of the defendant that the plaintiff, who is the wife of Abusalih, cannot maintain the suit in the absence of a Power of Attorney by the original owner. It is stated that only an authorised agent can represent a party and an authorised agent means a person holding a Power of Attorney. When admittedly, the plaintiff is only the wife of

the real owner, she cannot maintain the suit merely because she has been administering the suit properties. After the appeal was admitted and the questions of law were formulated, the respondent had filed C.M.P.Nos.4508 and 4509 of 2017 for amending the cause title in the plaint in O.S.No.191 of 2008 by showing Abusalih represented by Power Agent Kamariya Begum instead of showing only Kamariya Begum and to receive the Power of Attorney and mark as an Exhibit.

8. Learned counsel appearing for the appellant contended that when the objection was raised even in the written statement, the plaintiff had not taken any steps to rectify the mistake. Merely because the plaintiff was managing the suit properties, it will not automatically entitle her to maintain the suit. Hence, it is argued that the suit has to be dismissed as not maintainable.

9. The learned counsel for the appellant had placed his reliance in the case of VIDYABAI AND OTHERS vs PADMALATHA AND ANOTHER (2009) 2 SCC 409, wherein it has been held that unless, inspite of due diligence, the parties could not have raised the matter before the commencement of the trial, one should not be allowed to amend the cause title. Reliance was placed on Paragraph 19 of the said judgment, which is as follows:-

"19. It is the primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. "

10. The above case relates to an amendment of written statement after commencement of trial. The defendant in the said case had sought to amend the written statement and produce additional documents after the issues were framed, proof affidavits were filed and date was fixed for cross examination. However, in the case on hand, it is only the cause title which is now sought to be amended. There is a difference in the amendment made, when it relates to the pleadings and the amendment only in the cause title.

11. Learned counsel appearing for the respondent/plaintiff contended that the suit is originally filed only for bare injunction and the possession of the plaintiff was not denied by

the defendant. Any one who is in possession can file a suit for injunction against anybody excepting the true owner. Therefore, so far as the relief of injunction is concerned, at the time of filing of the suit, the suit filed as it is, was maintainable by the plaintiff, who is the wife of the original owner of the property, namely, Abusalih. However, it is argued by the learned counsel for the appellant that when it is a suit for recovery of possession, unless the original owner files the suit in the absence of any Power of Attorney, the same cannot be entertained.

12. On the contrary, the learned counsel appearing for the respondent/plaintiff contended that it is only a mis-description of the plaintiff in the plaint, which is only a curable defect and the amendment sought for will not cause any loss to the other side, as it is only substituting the name of the plaintiff. Reliance was also placed on the decision of the Supreme Court in the case of JAI JAI RAM MANOHAR LAL vs NATIONAL BUILDING MATERIAL SUPPLY, GURGAON [AIR 1969 SC 1267], wherein in Paragraph 5, it has been held as follows:-

"5. The order passed by the High Court cannot be sustained. Rules of procedure are intended to be a handmaid 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 of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. In Amulakchand Mewaram v. Babulal Kanlal, 35 Bom LR 569=(AIR 1933 Bom 304), Beaumont, C.J., in delivering the judgment of the Bombay High Court set out the principles applicable to cases like the present and observed:

"..... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no

doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

In *amulakchand Mewaram's* case, 35 Bom LR 569=(AIR 1933 Bom 304) a Hindu undivided family sued in its business name. It was not appreciated at an early stage of the suit that in fact the firm name was not of a partnership, but was the name of a joint Hindu family. An objection was raised by the defendant that the suit as filed was not maintainable. An application to amend the plaint, by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs, was rejected by the Court of first instance. In appeal the High Court observed that a suit brought in the name of a firm in a case not within Order 30, Civil Procedure Code being in fact a case of misdescription of existing persons, leave to amend ought to have been given.

13. As held in the above case by the Hon'ble Supreme Court, the plaintiff is only the wife of the original owner. Now, by filing the application to amend the cause title to substitute the name of her husband, it will not cause any prejudice to the other side, as the plaint was not filed originally by a non-existing person. Therefore, it cannot be stated that the original plaint filed by the wife as plaintiff, is not a plaint in law. It was only a mis-description of the party and not of a party who is non-existing. The original plaintiff is a person who is existing and she is the wife of the original owner. Therefore, when the name of the plaintiff is only a mis-description, the same can be corrected in law. In the above said circumstances, it is always open to the Court to allow the amendment of the plaint to enable a proper description of the plaintiff to appear in the plaint in order to assist the Court in determining the real question or issue between the parties. The power to allow amendment of the pleadings under Order VI Rule 17 of C.P.C, itself is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. In this case, as contended by the learned counsel for the respondent, the suit was instituted with a mis-description of the original plaintiff. Now, the amendment application has been filed. The plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted.

14. The argument of the learned counsel for the appellant is that proviso to Order VI Rule 17 CPC which says that no

application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial, would apply only when the pleadings are sought to be amended. In this case, the amendment of the name of the plaintiff is only a mis-description and a curable defect. Other than the name being substituted, there is no additional pleadings being introduced by the plaintiff causing any injustice or prejudice to the appellant.

15. The proviso is imperative and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties. Therefore, the test is to decide as to whether an amendment is necessary to decide the real dispute between the parties. As stated earlier, since it is only a mis-description of the name of the plaintiff, the same can be allowed and such amendment in no way would cause any prejudice to the appellant/defendant. When there are no alterations in the pleadings or in the cause of action, the mis-description of the name of the plaintiff would not take away the right of the plaintiff, when admittedly, there is no other valid points raised on the merits of the case. Hence, this Court is inclined to allow the said C.M.P.Nos.4508 and 4509 of 2017. Accordingly, C.M.P.Nos.4508 and 4509 of 2017 are allowed.

16. On the merits of the case, though an attempt was made to assail the findings of the lower appellate Court, the same was in vain. It was endeavoured to state that the plaintiff was not the exclusive owner of the suit property but she was only a tenant-in-common. However, the appellant was not successful in establishing the same. Other than the above hyper-technical objections, the learned counsel for the appellant could not object to the findings in the judgment and decree passed by the Courts below.

17. Thus, the questions of law raised are answered against the appellant.

18. In fine, the Second Appeal is dismissed. No costs.

s/d-
Assistant Registrar(CS VIII)

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Sub-Assistant Registrar

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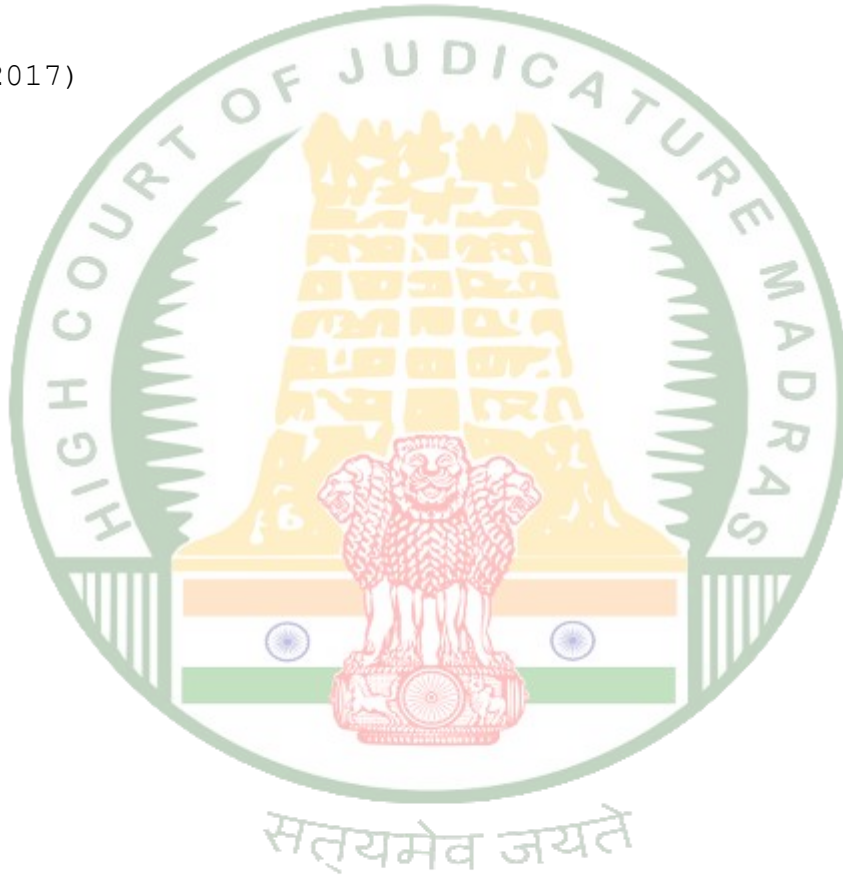
1. The Additional Sub Court, Mayiladuthurai
2. The District Munsif Court, Sirkali

+1 cC to Ms.S. Sounthar, advocate sr 71282.

+1 Cc to Ms.A. Muthukumar, Advocate sr 71520.

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and C.M.P.Nos.4508 and 4509 of 2017

CNR (CO)
SP (13/11/2017)



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