



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 05.05.2017
CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

C.R.P(PD) (MD) No.2132 of 2015

and

M.P(MD) No.1 of 2015

1.Rengarajan
2.Venkatesh Mathavan

.. Petitioners/
Plaintiffs

Vs.

1.Rajendran
2.Padma

.. Respondents/
Defendants

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the fair and decretal order dated 11.08.2015 made in I.A.No.313 of 2015 in O.S.No.43 of 2014 on the file of the District Munsif Court, Thiruvaiyaru.

For Petitioners : Mr.K.Guhan
For Respondents : Mr.G.Maruthiah

ORDER

This revision petition is filed praying to set aside the fair and decretal order dated 11.08.2015 made in I.A.No.313 of 2015 in O.S.No.43 of 2014 on the file of the District Munsif, Thiruvaiyaru.

2.Heard the learned counsel appearing for the revision petitioners and the learned counsel appearing for the respondents.

3.This revision petition is directed against the dismissal of the application filed by the plaintiffs to amend the plaint under Order 6 Rule 17 of C.P.C.

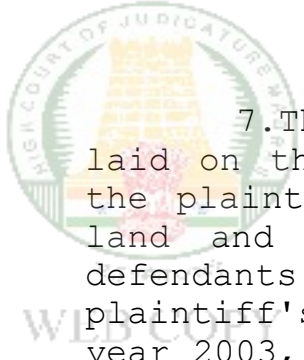
4.The brief facts of the case is that the revision petitioners, who are the plaintiffs, have filed the suit for bare injunction against the respondents herein on the ground that the suit schedule property was allotted to the plaintiffs, as per the partition took place between the brothers on 12.10.1966. As per the partition deed, the 'C' schedule property, which is now the subject matter of the suit, was allotted to the first plaintiff. On 02.01.2009, the first plaintiff has settled the property in favour of the son who is shown as second plaintiff. While so, the first defendant, misusing the power of attorney document given in 1966 by the first plaintiff and his brother in the year 2003, has alienated the suit property in favour of his wife on 30.01.2009, knowing fully well that a week ago the first plaintiff



has settled the property in favour of his son, the second plaintiff. Since, there was a threat of trespass and illegal encroachment, initially suit for bare injunction was filed. But, later in the course of cross examination, having found that the property has been transferred to the second defendant by misusing the power of attorney document issued in favour of the first defendant, it has now become necessary to amend the plaint by including the reliefs of declaration and possession.

5.The said petition for amendment has been opposed by the defendants on the ground that the petition for amendment is not maintainable after commencement of trial. The plaintiff has not disclosed any cause of action for seeking relief of possession. While filing the injunction suit itself, it was made known to the first plaintiff that he has executed the power of attorney after receiving full consideration and also given possession to the first defendant. Pursuant to the power of attorney, he has sold the property to his wife on 30.01.2009. Having made known about this fact even while replying to the pre-suit notice, the plaintiff ought to have filed composite suit for all the reliefs whatever he thought fit and entitled. Having failed to claim the reliefs of declaration and possession at the inception, the present amendment petition to include the reliefs of possession as well as the declaration of title is unsustainable under Proviso to Order 6 Rule 17. Further, the defendants will be put grave prejudice if such an amendment is allowed, since the relief of declaration is barred by the limitation.

6.The said contention of the respondents/defendants has been accepted by the Trial Court and the Trial Court has dismissed the application. Aggrieved by the said order of dismissal, the plaintiffs have filed this revision petition on the ground that the relief sought is not barred by limitation. Though, it was filed after commencement of trial, in the circumstances stated by the revision petitioners, amendment ought to have been allowed. The fraudulent act of misusing the power of attorney document and creating a sale deed in favour of his own wife by the first defendant, has come to light only during the examination of the first defendant. The very fact that after the settlement of the property in favour of the second plaintiff by the first plaintiff on 02.01.2009, which has been registered on 23.01.2009, the first defendant knowing about the settlement, has made use of the defunct power of attorney document and had created sale deed in favour of his wife one week later, that is on 30.01.2009. Since, the said fraudulent transaction has come to light in the course of the cross-examination of the defendant (D.W.1), it is just and necessary to permit the plaintiffs to carry out the amendment sought. Further, there is also an error in the extent of the suit sought. Hence, the same should be amended for proper identification.



7. The facts of the case is that originally the plaint was laid on the premise that the property is owned and possessed by the plaintiffs whereas the defendant trying to trespass into the land and occupy it by force. The consistent stand of the defendants is that they were cultivating tenants under the plaintiff's father and they continued to be in possession. In the year 2003, a power of attorney was executed by the first plaintiff after receiving full sale consideration. While so, on 30.01.2009, the first defendant has sold the property to the second defendant on the strength of the power of attorney executed by the first plaintiff. Though this fact was made known to the plaintiffs by way of a reply to the pre-suit notice and also in the written statement, the plaintiffs have chosen to amend the plaint and include the reliefs of declaration and possession only after the commencement of the trial. Further as pointed out by the Trial Court, the revision petitioners herein have not even disclosed when and how the defendants have taken possession of the property. Nowhere in their petition, they have mentioned date or circumstances under which the defendants have taken possession of the property. When the suit was originally filed on the premise that the plaintiffs are in possession of the property and their peaceful possession is likely to be disturbed by the defendants, all of a sudden, the plaintiffs have thought fit to amend the prayer after the commencement of the trial. Order 6, Rule 17 of C.P.C. reads as under:

"Amendment of pleadings: The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided 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".

8. Catena of Judgments would say that even after commencement of trial, if the Court deems fit and necessary to permit amendment of the pleadings even after the commencement of trial, if it will not prejudice to the defendants and the relief sought is not barred by limitation.

9. The learned counsel for the revision petitioners has cited some of those Judgements which are listed as under:

(i) (2009) 10 Supreme Court Cases 626 [Surender Kumar Sharma V. Makhan Singh].

(ii) (2015) 4 Supreme Court Cases 182 [Mount Mary Enterprises V. Jivratna Medi Treat Private Limited].

(iii) (2015) 5 L.W. 761 [Kaleeswaran V. Uma].

(iv) 2009 (3) CTC 522 [UCO Bank, Chetpet Branch V. Nest Tours & Travels P.Ltd., rep. by its Director, Ram and Others.



10. In all these Judgements, the underlying principle is that amendment can be allowed in any stage, provided the character of the suit and limitation are not affected or altered.

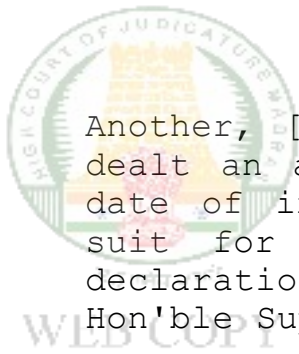
11. In the case in *Surender Kumar Sharma V. Makhan Singh* cited supra, the Hon'ble Supreme Court had an occasion to consider belated plea for amending the plaint and whether prayer for amendment of plaint allowed will change the nature and character of the suit. In so far as, belated prayer for amendment is concerned, the Hon'ble Apex Court has held under:

"As noted herein earlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e., the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment".

12. In so far as the second principle whether the amendment if allowed will change the nature and character of the suit, in the case in hand, the real controversy between the parties is in respect of the suit property which admittedly stands in the name of the plaintiffs and the defendant's father was a cultivating tenant under the plaintiffs. While the plaintiffs claim that the possession is with them and had filed the suit for injunction, the contra case of the defendants is that as a cultivating tenant, they are in possession of the property for years together and the possession is not with the plaintiffs. Further, by virtue of power of attorney document executed by the first plaintiff in favour of the first defendant, the first defendant has sold away the property to the second defendant. Therefore, altering the suit for bare injunction into suit for title and recovery of possession, amounts to changing the nature and character of the suit prejudicing the defendants.

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13. In an identical situation, when the matter was taken up to the Hon'ble Supreme Court in *Sampath Kumar V. Ayyakannu* and



Another, [(2002) 7 SCC 559], where, the Hon'ble Supreme Court has dealt an application for amendment made after 11 years from the date of institution of the suit to convert through amendment a suit for permanent prohibitory injunction into the suit for declaration of title and recovery of possession. The words of the Hon'ble Supreme Court, which are extracted below:

"The short question arising for decision is whether it is permissible to convert through amendment a suit merely for permanent prohibitory injunction into a suit for declaration of title and recovery of possession.

It is true that the plaintiff on the averments made in the application for amendment proposes to introduce a cause of action which has arisen to the plaintiff during the pendency of the suit. According to the defendant the averments made in the application for amendment are factually incorrect and the defendant was not in possession of the property since before the institution of the suit itself.

In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the Trial Court it was one to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiffs revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.

... ..

... ..

Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-form and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than



those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter case the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment".

14. In this case, the amendment is sought after commencement of trial. Though, the fact of alienation of the suit property by the first defendant to and in favour of the second defendant has been brought to the notice of the plaintiffs as early as in the year 2013, both in the reply to the pre-suit notice and in the written statement, the plaintiff has thought fit to amend the prayer only after commencement of the trial.

15. The apprehension of the defendants is that if the prayer of declaration and possession is included by way of amendment which is barred by limitation, if suit is filed afresh, the right accrued to the defendants will be jeopardized. The amendment once incorporated relates back to the date of suit and therefore a belated plea of declaration and recovery of possession which is otherwise barred by limitation, cannot be entertained through amendment.

16. The learned counsel for the revision petitioners submits that the illegal transaction of the property by the first defendant in favour of the second defendant is only in the year 2009, whereas the suit was filed in the year 2014 and the amendment was sought by I.A.No.313 of 2015 filed on 06.06.2015. Since the relief sought is well within the period of limitation, to avoid multiplicity of proceedings, amendment sought by the plaintiffs ought to have been allowed by the Trial Court.

17. Considering the rival submissions of the respective counsels, as pointed out by the Hon'ble Supreme Court in Sampath Kumar V. Ayyakannu and Another, [(2002)7 SCC 559], by allowing the amendment incorporating reliefs of declaration and possession in the suit filed for injunction, will avoid the multiplicity of legal proceedings. At the same time, if the doctrine of relation back in the context of amendment of pleading is applied, the plaintiff may have the advantage of saving limitation, which cannot be entertained. The answer for that issue is given by the Hon'ble Supreme Court in the same Judgement in In Re Sampath Kumar in the following words:



"An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed".

18. In the recent Judgement of the Hon'ble Supreme Court in L.C. Hanumanthappa represented by his L.Rs. V. H.B. Shivakumar after referring the Judgements of the Hon'ble Supreme Court and High Court dealing Order 6 Rule 17 including Sampath Kumar V. Ayyakannu and Another, [(2002) 7 SCC 559] has concluded as under:

"Applying the law thus laid down by this Court to the facts of this case, two things become clear. First, in the original written statement itself dated 16th May, 1990, the defendant had clearly put the plaintiff on notice that it had denied the plaintiff's title to the suit property. A reading of an isolated para in the written statement, namely, para 2 by the Trial Court on the facts of this case has been correctly commented upon adversely by the High Court in the judgement under appeal. The original written statement read as a whole unmistakably indicates that the defendant had not accepted the plaintiff's title. Secondly, while allowing the amendment, the High Court in its earlier judgement dated 28th March, 2002, had expressly remanded the matter to the Trial Court, allowing the defendant to raise the plea of limitation. There can be no doubt that on an application of Khatri Hotels Private Limited (Supra), the right to sue for declaration of title first arose on the facts of the present case on 16th May, 1990 when the original written statement clearly denied the plaintiff's title. By 16th May, 1993, therefore a suit based on declaration of title would have become time-barred. It is clear that the doctrine of relation back would not apply to the facts of this case for the reason that the Court which allowed the amendment expressly allowed it subject to the plea of limitation, indicating thereby that there are no special or extraordinary circumstances in the present case to warrant the doctrine of relation back applying so that a legal right that had accrued in favour of the defendant should be taken away.



19. Applying the principle laid down in the above Judgement, even though the plea to amend the plaint has been filed by the plaintiff belatedly, it can be entertained, if such leave will avoid multiplicity of proceedings, provided the plea is not barred by limitation, if the doctrine of relation back is not applied.

20. In this case even if doctrine of relation back is not applied *ex facie* the relief is not barred by limitation. The plaintiff was put to notice about the alienation only on 08.05.2013 through the reply notice of the respondents/defendants. Later, the same has been reiterated in the written statement dated 04.07.2014. The present application for amendment is filed on 06.06.2015, well within the period of 3 years. Therefore, the declaration prayer *prima facie* is not barred by limitation. Therefore, going by the guidelines of the Hon'ble Supreme Court laid down in *Surender Kumar Sharma V. Makhan Singh, Sampath Kumar V. Ayyakannu and Another and L.C. Hanumanthappa (Since dead) Represented by His LRs. V. H.B. Shivakumar*, the plaintiff is entitled to seek amendment of his plaint, provided he established through evidence that the relief is not barred by limitation. Therefore, this Court considers merit in the revision petition. Hence, this revision petition is allowed. The order dated 11.08.2015 passed in I.A.No.313 of 2015 in O.S.No.43 of 2014 by the District Munsif, Thiruvaiyaru, is hereby set aside and the petition is allowed, preserving the right of respondents/defendants, questioning the declaration relief on the point of limitation. For the purpose of reckoning limitation, the amendment permitted shall not date back to the suit and it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed, i.e., 06.06.2015.

21. In the result, this revision petition is allowed with the above said observation. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

/True Copy/

Sub-Assistant Registrar

To

1. The District Munsif , Thiruvaiyaru.

2. The Record Keeper, V.R. Section,

Madurai Bench of Madras High Court, Madurai.

+One cc to M/s.K.Guhan, Advocate, SR.No.55804

mm/smn

RL/4C/8P/MR/SAR3/17.5.2017

ORDER MADE IN
C.R.P (PD) (MD) No.2132 of 2015
and
M.P (MD) No.1 of 2015
05.05.2017