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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on 30.08.2018

Pronounced on : 18.09.2018

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRP (MD) No.1991 of 2016

and

CMP (MD) No.9361 of 2016

Hemanakumar

... Petitioner

Vs.

1.D.Melvinkumar

2.Vasantha

3.Rani

... Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 09.08.2016 in I.A No.513 of 2015 in O.S No.593 of 2008 on the file of the Principal District Munsif Court, Nagercoil, Kanyakumari District.

For Petitioner

: Mr.V.Meenakshisundaram
for Mr.D.Nallathambi

For Respondents

: Mr.H.Arumugam for R1
No appearance for R2 & R3

ORDER

The plaintiff in O.S No.593 of 2008 on the file of the Principal District Munsif Court, Nagercoil, Kanyakumari District is the revision petitioner herein. The suit was filed for the relief of permanent prohibitory injunction restraining the first defendant and his men and agents from disturbing the plaintiff's peaceful possession and enjoyment over the plaint schedule property. The plaintiff filed I.A No.513 of 2015 for amending the plaint. In the affidavit filed in support of I.A No.513 of 2015, the plaintiff submitted that he filed the injunction suit on the strength of a settlement deed No.1812 of 2008, dated 08.05.2008, executed by the second defendant in his favour and that he has come to know that the said settlement deed has been cancelled. Since certain subsequent documents have been executed, the plaintiff thought it necessary to seek three additional declaratory reliefs. In particular, he wanted declaration of his right to title, possession and enjoyment over the suit property as per the settlement deed dated 08.05.2008. He also contended that the cancellation deed dated 04.06.2008 would not bind him. The third declaratory relief that was sought was that the sale deed dated 07.10.2008 executed by the second defendant in favour of the first and fourth defendants is illegal, null and void. The court below by order dated 09.08.2016 dismissed the said I.A. Questioning the same, this civil revision petition has been filed.

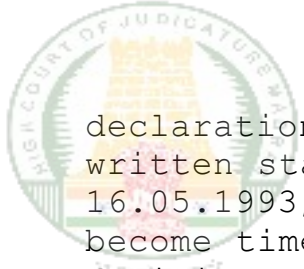


2. Heard the learned counsel on either side.

3. At my express request, Shri.R.Vijayakumar, the learned counsel also made elaborate submissions with regard to the issues that arose for consideration in this civil revision petition. All the three counsel, namely, Shri.R.Vijayakumar, Shri.V.Meenakshisundaram and Shri.H.Arumugam filed their written submissions. I must place on record my sincere appreciation as well as gratitude to all the three learned counsel for the thoroughness with which they discharged their professional duties.

4. The facts first. The revision petitioner is the plaintiff. He sought the relief of permanent injunction based on the settlement deed dated 08.05.2008. The suit was filed on 24.10.2008. The contesting defendants filed their written statement on 30.04.2009 not only denying the title of the plaintiff but also asserting their title on the strength of the cancellation deed dated 04.06.2008 and a subsequent sale deed dated 07.10.2008. The trial commenced and when the case was posted for cross examination of D.W 1 on 23.03.2015, I.A No.513 of 2015 was filed by the plaintiff under Order 6 Rule 17 of CPC to include the aforesaid declaratory prayers. The contesting defendants opposed the application on the ground that the proposed amendment to include the declaratory reliefs will be barred by limitation. There was also no due diligence on the part of the plaintiff and therefore, the requirements set out in the proviso to Order 6 Rule 17 of CPC is not satisfied in this case. The court below held that the proposed amendment is barred by limitation. The cause of action first arose 30.04.2009 when the contesting defendants filed their written statement not only denying the plaintiff's title but also asserting their title over the suit property. The declaratory relief should have been sought for within three years therefrom.

5. Shri.H.Arumugam, the learned counsel for the first respondent submitted that the issue on hand is clearly and squarely covered by the decision of the Hon'ble Supreme Court reported in **2015 (6) CTC 562 (L.C.Hanumanthappa vs. H.B.Shivakumar)**. The Hon'ble Supreme Court was also concerned with the case of a suit for permanent injunction. In the said suit, namely, O.S No.1386 of 1990 filed before the City Civil Court, Bangalore, the plaintiff averred that he is the absolute owner, and in lawful possession and enjoyment over the suit property. In the written statement filed on 16.05.1990, the defendant not only referred to his suit filed in O.S No.1650 of 1990 but also put the plaintiff on notice that he denied the plaintiff's title to the suit property. The case had a chequered history. Those developments need not detain us. The fact remains that the Hon'ble Supreme Court finally held that the right to seek



declaration of title first arose on 16.05.1990 when the original written statement clearly denied the plaintiff's title and that by 16.05.1993, the suit based on declaration of title would have become time barred. The Hon'ble Supreme Court followed an earlier decision reported in **2011 (9) SCC 126 (Khatri Hotels Private Limited and anr vs. Union of India and anr.,)**. The learned counsel for the first respondent therefore wanted this Court to simply apply the aforesaid judgment of the Hon'ble Supreme Court to the case on hand and dismiss this civil revision petition.

6.The learned counsel Shri.R.Vijayakumar as well as Shri.V.Meenakshi Sundaram would submit that this Court should rather look at the earlier precedents and not go by Hanumanthappa's case. This was because Section 27 and Article 65 of the Limitation Act were not considered. The learned counsel placed reliance on the decisions reported in 2000 (3) SCC 460, 2007 (14) SCC 183, 2002 (7) SCC 559, 2015(6) CTC 562 (SC), 1992 (2) MLJ 425 (DB), 1995 (1) MLJ 570, 2014(2) MWN (Civil) 643, 2016 (3) ILR (Kerala) 98 (DB), AIR 2014 SC 1745 and 2017 (3) CTC 170.

7.It was also pointed out that the Hon'ble Kerala High Court held in the decision reported in **2016 (3) ILR (Kerala) 98 (DB)**, that article 58 is the residuary article for matters not falling within Article 56 and 57 of the Limitation Act. Article 58 will apply only to a suit for declaration simpliciter. In the 1963 Limitation Act, the Articles in the first schedule are arranged in accordance with the subject matter as per the recommendation of the 3rd report of the Law Commission. Hence, this Court should look to Part-V of the first schedule alone as it deals with immovable property.

8.In the Schedule to the Limitation Act, 1963, there are two divisions. The first division deals with suits while second division deals with applications. In the first division, there are as many as 10 parts. Part I deals with suits relating to the accounts. Part II deals with suits relating to contracts. Part III deals with suits relating to declarations. Part IV deals with suits relating to decrees and instruments. Part V deals with suits relating to immovable property. Part VI deals with suits relating to movable property. Part VII deals with suits relating to Tort. Part VIII deals with suits relating to Trusts and Trust Property. Part IX deals with suits relating to miscellaneous matters and Part X deals with suit for which there is no prescribed period. In other words, Part X, is the residuary article. The learned counsel Shri.R.Vijayakumar and Shri.V.Meenakshisundaram would contend that each part is a comprehensive one. Hence, for a suit relating to a declaration of title with regard to immovable property, only Part V can be looked into and not any other part.



9. The learned counsel also referred to Section 27 of the Limitation Act, 1963. Section 27 of the Limitation Act reads as under :

"27. Extinguishment of right to property : At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

They would therefore contend that if Article 58 is applied, then the plaintiff would lose his title at the expiry of three year period from the date on which the title is disputed by the defendant. However, as per Section 27 of the Limitation Act, the right of the person to any property would get extinguished only at the determination of the period limited for instituting a suit for possession. Hence, the right of the plaintiff to the property continues upto a period of 12 years from the date of denial/dispute of the title by the defendant. The defendant cannot acquire title at the expiry of three year period from the date of denial of the plaintiff's title. The defendant can prescribe title only after the expiry of 12 years period and that too if the possession is adverse. Therefore, if Article 58 is applied, the title to a property will be left hanging after the expiry of three year till the completion of 12 years. This could never have been the legislative intent. The firm contention of both the counsel namely, Shri.R.Vijayakumar and Shri.V.Meenakshisundaram is that if the plaintiff is in possession of the property and files a suit for permanent injunction initially and later seeks to introduce a prayer for declaration of title even then Article 65 alone is applicable and not Article 58. To further emphasize their point, the learned counsel portrayed the following picture.

"A person out of possession would have 12 years period (Article 65) to seek declaration of title, but a person in possession would lose his title at the end of 3rd year from the date of denial of title by the other party (Article 58). This would make a party in possession to be in a more disadvantageous position than the party who is not in possession. This would not have been the intention of the legislature."

10. Shri.V.Meenakshisundaram, the learned counsel for the revision petitioner also raised another pertinent contention. It is true that the standard of due diligence has been prescribed in the proviso to Order 6 Rule 17 of CPC. But then, the power to permit amendment flows from the substantive provision namely, Section 153 of CPC. The scope of this power cannot be whittled down. In this regard, he placed reliance on the decision of the Madras High Court reported in 2015 - 4 - L.W 233.



11. Though elaborate arguments have been advanced covering all the aspects, I am of the view that the scope of controversy lies within a narrow compass. According to the contesting respondent, the issue has to be decided with reference to the **Hanumanthappa's** case based on Article 58 of the Limitation Act. The learned counsel for the revision petitioner would on the other hand contend that the relevant Article to be invoked is Article 65 and not Article 58. It was laid down way back in the year 1934 by a Full Bench of the Allahabad High Court in the decision reported in **A.I.R 1934 Allahabad 661 (Jawahar Lal vs. Mathura Prasad)** that each article has to be interpreted according to the particular language employed in that article and ordinarily irrespective of somewhat similar language employed in other articles.

12. Now, let us see, if Article 65 will come to the rescue of the revision petitioner. Article 65 will apply if the suit is "for possession of immovable property or any interest therein based on title". In **U.N.Mitra's Law of Limitation and Prescription** (14th Edition - Justice S.S. Subramani whose contribution to this High Court is unforgettable and who passed away very recently), the following proposition of law has been formulated :

"For Article 65 to apply, the relief sought should be possession. A suit for possession is not necessarily a suit for physical possession. An interest in immovable property does not in many cases admit of physical possession. Possession by receipt of rent as well as actual occupation is possession within the meaning of this Article."

If the relief sought for in the suit is not one for possession, Article 65 cannot have any application.

13. In the present case, the suit is one for declaration and permanent injunction. It is clearly not a suit for possession. If Article 65 is applied to a suit for injunction merely because it pertains to immovable property, then this Court would be committing a gross violence on the plain language of the Article. The arguments advanced on the side of the revision petitioner will have to be rejected on this simple ground, namely, since the suit on hand though based on title is not one for possession, Article 65 has no application whatsoever.

14. There is a decision rendered by a three Judges Bench of the Hon'ble Supreme Court reported in **AIR 1961 SC 808 (C. Mohammed Yunus vs. Syed Unnissa)**. Plaintiffs 1 and 2 in Suit No. 156 of 1937 in the Court of District Munsif at Chengalpattu sought declaration and an injunction restraining the defendant from



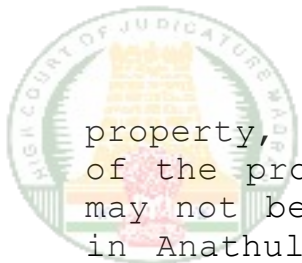
interfering with their right. The Hon'ble Supreme Court held that a suit for declaration of a right and an injunction restraining the defendant from interfering with the exercise of that right is governed by Article 120 of the Limitation Act (old Act). Article 120 of the old Act states that the period of six years for suits for which no period of limitation is provided elsewhere in the schedule begins to run when the right to sue accrues. In **Khatari Hotels Private Limited's** case, the language of Article 58 of the present Act was compared with the text of Article 120 of the repealed Act (1908 Act). It may be asked in this context whether Article 120 of the repealed Act of 1908 found its reincarnation only in Article 113 of the new Act and not as Article 58. It is for the academically inclined to reflect more on this.

15. Though this Court has already decided to uphold the order passed by the court below by holding that Article 65 of the Limitation Act is not attracted since the suit on hand is not one for possession, I am inclined to concur with the submission of the learned counsel Shri.R.Vijayakumar and Shri.V.Meenakshi sundaram, that Article 58 will have application only when the subject matter of the suit is one for declaration simpliciter.

16. Just as water will partake the colour and shape of its ambient conditions, the Article that will govern declaratory relief will be the one that is applicable to the other larger relief which is sought in the same suit. A suit for injunction is obviously governed by Article 113 of the Limitation Act. Article 113 of the Limitation Act states that the period of three years for any suit for which no period of limitation is provided elsewhere in the schedule begins to run when the right to sue accrues.

17. If Article 58 is applicable, time will begin to run when the right to sue first accrues. But the expression "first" is absent in Article 113. But, that may not make much of a difference. If the declaratory relief is sought together with the relief of possession, then obviously Article 65 would be applicable in which event the limitation period will be 12 years. The suit on hand being one for the relief of injunction, I have to necessarily apply the ratio laid down by the Hon'ble Supreme Court in the decision reported in **AIR 1961 SC 808 (C.Mohammed Yunus vs. Syed Unnissa)**.

18. It was argued that the plaintiff can get over the situation by computing the fee on one-half of the market value of the property. Section 27 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 states that in a suit for injunction- where a relief is sought with reference to any immovable property and where an issue is framed regarding plaintiff's title to the



property, fee shall be computed on one-half of the market value of the property. But, I am afraid that such a course of action may not be available. This is because the Hon'ble Supreme Court in Anathula Sudhakar Vs. P.Buchi Reddy (2008) 4 SCC 594 held as follows :

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"13.3.Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction."

19.As regards the arguments advanced in the light of Section 27 of the Limitation Act, I am of the view that there is a way out. CPC enables the plaintiff to couch his prayers in the alternative also. He can seek the relief of possession in the alternative. In which case the amendment cannot be said to be time barred as Article 65 will come into play. The plaintiff who initially filed a suit for injunction and who omits to seek amendment for incorporating the prayer for declaration within three years from the date when the defendant denied his title, can overcome the limitation bar by seeking the alternative prayer for recovery of possession. That is a penalty that a plaintiff in possession will have to pay for not having been diligent.

20.But, in this case, the plaintiff has not chosen to do so. Therefore, the order passed by the court below is sustained and this Civil Revision Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(AS)

/True Copy/

Sub Assistant Registrar(CS-I)

To

The Principal District Munsif,
Nagercoil, Kanyakumari District.

+1cc to Mr.D.Nallathambi, Advocate Sr.No.85141

+1cc to Mr.H.Arumugam, Advocate Sr.No.85573

SKM

VB/RSK/SAR1/17.10.2018/7P/4C