

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.06.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP (PD)No.3394 of 2014

and

M.P. No.1 of 2014

1. S. Jayalakshmi
2. S. Balaji
3. S. Vijayakumar

... Petitioners

versus

1. Kesavan
2. Mahadevan
3. Munusamy
4. Sekar
5. Ramesh

... Respondents

Civil Revision Petition filed under Article 227 of Constitution of India, set aside the order and decreetal order passed in I.A. No.246 of 2014 in O.S. No.83 of 2008, dated 25.06.2014 on the file of the District Munsif Court, Ponneri, Thiruvallur District and consequentially allow the same with cost.

For petitioners

: Mr.M.L.Ramesh

For respondents

: Mr.A.E. Ravichandran

ORDER

The instant revision has been filed challenging the order dated 25.06.2014 passed in I.A. No.246 of 2014 in O.S. No.83 of 2008 by the learned District Munsif, Ponneri, Tiruvallur district.

Brief facts leading to the filing of the instant Civil Revision Petition are as follows :-

2. The petitioners are the plaintiffs in the suit O.S. No.83 of 2008. Originally, they filed a suit against the respondents, who are the defendants for a bare injunction restraining the respondents from interfering with their peaceful possession and enjoyment of the suit schedule property. A written statement has been filed by the first respondent and the remaining respondents have adopted the written statement filed by the first respondent in the said suit, wherein they have stated that on 12.07.1979 Shanmugam Mudali and his children entered into an agreement for sale in respect of the suit schedule property with the first respondent's/first defendant's father Kanniappa Naicker. Subsequently, a sale deed dated 29.09.2008 for the suit schedule property was executed in favour of the 4th respondent. Issues were also framed and the trial got commenced before the Trial Court. The oral evidence on the side of the petitioners got completed and thereafter, the respondents side evidence commenced and the petitioners also cross examined the respondents witness in the suit. According to the petitioners, only at the time of cross examination, they came to know that the sale deed, dated 29.09.2008 for the suit schedule property was executed in favour of the 4th respondent. It is seen from the affidavit filed in support of I.A. No.246 of 2014 in O.S. No.83 of 2008 that the

petitioners came to know about the execution of the sale deed, dated 29.09.2008 for the suit schedule property executed in favour of the 4th respondent only during the time of cross examination.

3. In the aforesaid circumstances, the petitioners sought for an amendment of the plaint filed in O.S.No.85 of 2008 seeking to include the relief of declaration and injunction to declare the sale deed, dated 29.09.2008, executed in favour of the 4th respondent (registered as Document No.7125 of 2008 at SRO, Ponneri) as null and void. In the affidavit filed in support of I.A. No.246 of 2014, the petitioners have stated that the suit was posted for trial in the special list on 12.08.2013 and on behalf of the petitioners, their power Agent Gopi filed the proof affidavit and marked the plaint documents as Exhibits. Subsequently, two more witnesses were examined as PW2 & PW3 and the Trial Court closed the evidence on the side of the petitioners / plaintiffs. It is also stated that on behalf of the respondents / defendants, the first defendant filed the proof affidavit (DW1) and marked the documents with objections. At the time of cross examination, the defendants denied the title and possession of the petitioners / plaintiffs regarding the suit property and they claimed ownership of the suit schedule property by virtue of the sale deed, dated 29.09.2008 executed in favour of the 4th respondent. It is further stated by the petitioners that the alleged vendors who executed

the sale deed in favour of the 4th respondent do not have any right or title over the suit property and no document has been filed by the respondents/ defendants to prove the vendors title and possession. The petitioners have stated that the alleged sale deed, dated 29.09.2008 in favour of the 4th respondent/4th defendant is hit by *Doctrine of Lis pendens* under Section 52 of Transfer of Property Act. With these averments, the petitioners have filed I.A. No.246 of 2014 in O.S. No.83 of 2008.

4. A counter affidavit has also been filed by the respondents /defendants to I.A. No.246 of 2014. In the counter affidavit, they have denied that the sale agreement, dated 12.07.1979 was fabricated by them only for the purpose of defending the suit. They have also made a categorical statement in their written statement that they are taking steps to get the sale deed executed from their vendor, pursuant to the sale agreement, dated 12.07.1979. They have further stated that the petitioners has got the knowledge about the sale deed, even before trial, i.e. in the year 2009 itself, hence, the petitioners should have sought for an amendment of the plaint in the year 2009 itself, but they have filed the application seeking for an amendment only in the year 2014, that too after the commencement of trial. It is their case that no proper reasons have been given by the petitioners for not filing the amendment application before trial.

5. The Trial Court by its order dated 25.06.2014 dismissed I.A No.246 of 2014 in O.S. No.83 of 2008 filed by the petitioners seeking for an amendment of the plaint on the ground that the petitioners filed the amendment application at the fag end of the case and being a post trial amendment, the petitioners have not pleaded in their affidavit that in spite of due diligence they could not seek for amendment, before trial. The Trial Court has also observed that the relief claimed by the petitioners is barred by limitation, since the petitioners have got knowledge about the sale deed, dated 29.09.2008 at the time of enquiry in the injunction petition itself. Aggrieved by the dismissal of I.A. No.246 of 2014 in O.S. No.83 of 2008, the instant Civil Revision Petition has been filed under Article 227 of the Constitution of India.

Submissions of the learned counsels

6. Heard Mr.M.L.Ramesh, learned counsel for the petitioners and Mr.A.E. Ravichandran, learned counsel for the respondents.

7. Originally, the suit was filed for bare injunction by the petitioners/plaintiffs against the respondents / defendants restraining the respondents / defendants from the interfering with the peaceful possession and enjoyment of the suit schedule property by the petitioners /plaintiffs. Admittedly only during the pendency of the suit, the 4th

respondent / 4th defendant got a sale deed executed in his favour, which was registered on 29.09.2008 as document No.7125 of 2011 at SRO, Ponneri. It is the contention of the petitioners that the sale deed executed in favour of the 4th respondent / 4th defendant is in respect of the suit schedule property. It is also their case that they are the absolute owners of the suit schedule property. But the same is denied by the respondents/ defendants and they are also claiming ownership of the same suit schedule property. During the pendency of the suit, an injunction application was filed in I.A. No.281 of 2008 by the petitioners / plaintiffs, wherein the respondents/ defendants have marked the alleged sale deed, dated 29.09.2008 as Ex.R2. The said sale deed was marked as an Exhibit in the said I.A. on 18.12.2009.

8. It is the contention of the learned counsel for the respondents that having got the knowledge of the sale deed, dated 29.09.2008 as early as in the year 2009 itself, prior to the commencement of the trial, the petitioners have not pleaded in their affidavit that in spite of due diligence they did not seek amendment of the plaint at the earliest. But instead they have filed the application under Order 6 Rule 17 CPC, only after the commencement of trial, that too, after closing of evidence on the side of the petitioners / plaintiffs side and at the time when the petitioners / plaintiffs cross examined the respondents / defendants.

9. However, it is the contention of the learned counsel for the petitioners that the petitioners / plaintiffs came to know about the alleged execution of the sale deed, dated 29.09.2008 in favour of the 4th respondent only after the petitioners cross examined the respondents and therefore, they have filed the application within time and it is their case that they have given satisfactory reasons for not having filed the amendment application, before trial.

10. The learned counsel for the petitioner drew the attention of this Court to the judgment of the Hon'ble Supreme Court in the case of **Rajesh Kumar Aggarwal and others vs. K.K.Modi and others** reported in **(2006) 4 SCC 385** and in particular, he referred to paragraphs 17 and 18 of the said judgment. According to him in an identical case, where the cause of action arose during the pendency of the suit, the Hon'ble Supreme Court held that the proposed amendment ought to have been granted because the basic structure of the suit has not been changed and that there was mere change in the nature of relief claimed.

11. Paragraphs 16, 17, 18 of the said judgment relied upon by the learned counsel for the petitioner is hereby extracted hereunder :-

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the

purpose of determinin the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

12. Applying the principles laid down in the judgment referred to supra, the learned counsel for the petitioner would contend that the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. According to him in the instant case, admittedly the sale deed was executed in favour of the 4th respondent only after the suit was filed by the petitioners / plaintiffs and therefore, the test laid down by the Judgment of the Hon'ble Supreme Court referred to supra has been satisfied by the petitioners.

13. However, the learned counsel for the respondents would rely upon the judgment of the Hon'ble Supreme Court in the case of ***Rajkumar Gurawara (Dead) through Lrs. vs. S.K. Sarwagi and Company Private Limited and another*** reported in **(2008) 14 SCC 364** and in particular referred to paragraphs 13, 16, 18 of the said judgment, which is reproduced hereunder :

13. To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso.

16. As rightly observed by the High Court, it is explicit from the written statement filed by D-1 that the plaintiff was made known of the fact that the Government issued order transferring mining lease held by A.P. Mineral Development Corporation in favour of M/s.Sarwagi and Co. Pvt. Ltd. (D-2) and the leased lands are in possession and enjoyment of M/s.Sarwagi & Co. Pvt. Ltd. As rightly pointed out by the learned counsel for the contesting respondent, in spite of the plaintiff being put in knowledge of the act of the person in possession of the suit property did not choose to implead the said M/s.Sarwagi & Co. Pvt. Ltd. (D-2) which came on record on its own application as D-2 in the suit. It is clear that in spite of reply notice and specific plea taken in the written statement of D-1, the plaintiff did not choose to take steps to get the plaint amended suitably and instead allowed the suit to go on and examined the witnesses on his behalf and cross-examined the witnesses produced by the defendants. Only during the stage of arguments, the plaintiff came up with an application under Order 6 Rule 17 seeking amendment of the pleadings.

18. Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation. The plaintiff not only failed to satisfy the conditions prescribed in proviso to Order 6 Rule 17 but even on merits his claim is liable to be rejected. All these relevant aspects have been duly considered by the High Court and rightly set aside the order dated 10-3-2004 of the Additional District Judge.

14. Relying upon the said judgment, the learned counsel for the respondents / defendants would submit that the petitioners have not satisfied the requirements as laid down by the Hon'ble Supreme Court in the above referred judgment.

Discussion :

15. Admittedly, the alleged sale deed has been executed on 29.09.2008, subsequent to the filing of the suit. Originally the suit was filed by the petitioners / plaintiffs for bare injunction. But subsequent to the filing of the suit, the respondents / defendants in their written statement had pleaded that the 4th respondent had entered into an agreement for the purchase of the suit schedule property. Further, during the pendency of the suit, an injunction application I.A. No.281 of 2008 was also filed by the petitioners/plaintiffs, seeking for an injunction

restraining the respondents / defendants from interfering with their peaceful possession and enjoyment of the suit schedule property. As seen from the records, in IA No.246 of 2014, the subject sale deed, dated 29.09.2008 was marked as Ex.R2 on the side of the respondents / defendants. However, the petitioners did not choose to file an amendment application seeking to amend the plaint in the year 2009 itself, when the said I.A was filed by them seeking for an injunction, pending disposal of the suit. However, it is their case, as seen from I.A. No.246 of 2014 in O.S. No.83 of 2008 only after commencement of trial, they came to know about the alleged sale deed dated 29.09.2008, that too, only during the cross examination of the respondents / defendants witness by the petitioners / plaintiffs i.e. only in the year 2013.

16. This Court has perused and examined the impugned order. As seen from the impugned order, the Trial Court has rejected the application for amendment on the ground that no due diligence has been explained by the petitioners / plaintiffs for having not filed the amendment application before trial and has also observed that the amendment application is barred by the law of limitation, as it has been filed by the petitioners after more than four years from the date of the knowledge of the alleged sale deed executed in favour of the 4th respondent. Further, the Trial Court has also observed that the petitioners have also not

explained in their affidavit filed in support of I.A. No.246 of 2014, the reasons for not filing the application before trial.

17. However, as seen from the affidavit filed in support of I.A. No.246 of 2014 in O.S. No.83 of 2008, the petitioners case is that they came to know about the alleged sale deed only during the time of cross examination of the respondents / defendants witness i.e. only in the year 2013. But it is the case of the respondents / defendants that the petitioners were aware of the sale deed, dated 29.09.2008, executed in favour of the 4th respondent as early as in the year 2009 itself, when I.A. No. 281 of 2008 was filed by the petitioners / plaintiffs seeking for an injunction pending disposal of the suit restraining the respondents / defendants from interfering with their peaceful possession and enjoyment of the suit schedule property. The question whether the petitioners/plaintiffs were aware of the execution of the sale deed in the year 2013 itself when I.A.No.281 of 2008 was filed or only at the time when the respondents witness was cross examined by the petitioners/plaintiffs can be decided only after trial, based on the oral and documentary evidence let in by both parties.

18. As rightly observed by the Hon'ble Supreme Court in the case of **Rajesh Kumar Aggarwal and others vs. K.K.Modi and others**

reported in **(2006) 4 SCC 385**, relied upon by the learned counsel for the petitioners, while deciding the amendment applications after trial, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. In the instant case, if the petitioners /plaintiffs is able to establish before the Trial Court that they are the absolute owners of the suit schedule property and if the amendment application is found to be a genuine one and the contention of the petitioners that they came to know about the alleged sale deed only during the cross examination of the respondents / defendants witnesses and their contention that the respondents / defendants do not have any right over the suit schedule property and the alleged sale deed dated 29.09.2008 executed in favour of the 4th respondent is found to be correct at a later stage, then the petitioners / plaintiffs will be deprived of their legitimate rights over the suit schedule property, if the amendment application is not allowed in their favour as the said amendment seeks for a declaration that the alleged sale deed executed in favour of the 4th respondent is null and void. Applying the real controversy test, as laid down by the Hon'ble Supreme Court in the decision reported in **(2006) 4 SCC 385 (Rajesh Kumar Aggarwal and others vs. K.K.Modi and others)**, this Court is of the considered view that the Trial Court ought to have allowed the amendment application and ought to have decided the

plea of limitation in the suit as a preliminary issue, if so raised by the respondents/ defendants in the suit.

19. In the considered view of this Court, the petitioners / plaintiffs having already initiated a suit against the respondents/ defendants, no prejudice would be caused to the respondents / defendants, if the amendment application is allowed, as the relief sought for in the amendment application filed by the petitioners/ plaintiffs is necessary for the Court to decide the real controversy and dispute between the parties.

20. However, considering the fact that the respondents/defendants have taken the plea of limitation and the Trial Court has also accepted the same in the impugned order, the said issue is left open and if the respondents/ defendants are so advised, they can raise the same as a preliminary issue and the said issue will have to be decided by the Trial Court, as and when an application is filed by the respondents / defendants, raising the limitation issue as a preliminary issue. Further, the Trial Court is also directed to frame the limitation issue as an additional issue, apart from issues already framed in the suit, before adjudicating the suit.

21. The learned counsel for the respondents / defendants had referred to a decision of the Hon'ble Supreme Court in the case of **Rajkumar Gurawara (Dead) through Lrs. vs. S.K. Sarwagi and Company Private Limited and another** reported in **(2008) 14 SCC 364**. The said judgment is not applicable to the facts of the instant case, as it is the contention of the petitioners that they came to know about the alleged sale deed, dated 29.09.2008 in favour of the 4th respondent only after trial and only during the cross examination of the respondents/ defendants witness. Further in the instant case, the petitioners have stated that only due to the execution of the sale deed, dated 29.09.2008, in favour of the 4th respondent / 4th defendant, subsequent to the filing of the suit, it necessitated the petitioners/ plaintiffs to file an amendment application. Therefore, the conditions laid down in the said judgment referred to supra relied upon by the learned counsel for the respondents has been satisfied by the petitioners / plaintiffs while seeking for an amendment. However, the averments contained in the affidavit filed in support of I.A. 246 of 2014 has to be tested by the Trial Court based on the oral and documentary evidence let in by the petitioners /plaintiffs in the suit.

Conclusion :

22. For the foregoing reasons, this Court directs the following:-

a) the impugned order, dated 25.06.2014 in O.S. No.83 of 2008 is hereby set aside and Civil Revision Petition is allowed and the petitioners/plaintiffs are directed to carry out the amendment as prayed for in I.A. No.246 of 2014 in OS. No.83 of 2008, after paying the required court fee.

b) However, the issue of limitation raised by the respondents / defendants in I.A. No.246 of 2014 is left open and the Trial Court is directed to frame an additional issue of limitation in the suit, before proceeding with the continuation of the trial in the suit and if the respondents/defendants raises the issue of limitation as a preliminary issue, if so advised by filing an interlocutory application, the same shall be decided by the Trial Court in accordance with law.

c) Considering the delay in filing the amendment application and considering the fact that the amendment application has been filed by the petitioners /plaintiffs, during trial and also considering the fact that the suit is of the year 2008, the petitioners will have to be mulcted with costs. In the considered view of this Court, this Court imposes costs of Rs.10,000/- (Rupees ten thousand only) to the petitioners for allowing I.A. 246 of 2014 in O.S. No.85 of 2008 seeking for an amendment, which is payable to the respondents, within a period of two weeks from the date

of receipt of a copy of this order, failing which the Civil Revision Petition shall stand automatically dismissed.

23. With the aforesaid directions, the Civil Revision Petition stands disposed of. Consequently, connected miscellaneous petition is closed.

20.06.2019

Note to office : Issue order copy on 26.06.2019

Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
vsi2

To
The District Munsif Court,
Ponneri, Thiruvallur District.

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