

(2007) 12 MAD CK 0231

In the Madras High Court

Case No : C.R.P. (PD) No. 1692 of 2006 and M.P. No. 1 of 2006

A. Anandhkumar, Partner of A.S. Distributors

APPELLANT

Vs

K.C. Annamalai Gounder, A. Sakthi and A.S. Distributors

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(5), Order 6 Rule 17
Limitation Act, 1877 — Section 22
Limitation Act, 1963 — Section 21
Partnership Act, 1932 — Section 25

Citation : (2008) 1 LW 1023

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : T.R. Rajaraman, for the Appellant; K.A. Muthukrishnan, for R1, for the Respondent

Judgement

A. Kulasekaran, J.—The first defendant in O.S. No. 255 of 2004 on the file of District Judge, Vellore is the revision petitioner herein. The

Plaintiff/first respondent herein has filed the said suit for recovery of a sum of Rs. 6,17,400/- together with future interest. Pending suit, the first

respondent herein has taken out an application in I.A. No. 99 of 2005 to implead the third respondent herein, which was allowed on 12.10.2006.

Challenging the said order in I.A. No. 99 of 2005, the present revision petition has been filed.

2. Mr. T.R. Rajaraman, learned Counsel appearing for the petitioner submitted that the Court below erred in allowing the implead petition and the

reasons assigned for the same are against the settled provisions of law; that the court below failed to note that the first respondent by filing implead

petition has taken away the rights vested with the partnership firm by passage of

time, which is impermissible in law; that the court below failed to advert to the provisions of limitation where the period of limitation in the suit for recovery of money on promissory note is only three years from the date of execution of the promissory note, hence, the claim as against the third respondent herein is barred since it was not arrayed as a defendant within the said period; that in any event, the court below ought not to have allowed the implead petition and prayed for allowing of this revision petition. In support of his contention, the learned Counsel appearing for the petitioner relied on the below mentioned decisions:

i) Radhika Devi Vs. Bajrangi Singh and others, wherein in Para Nos. 5 and 6, the Honourable Supreme Court held thus:

5. We find no force in the contention of the appellant. No doubt, the amendment of the plaint is normally granted and only in exceptional cases

where the accrued rights are taken away by amendment of the pleading, the Court would refuse the amendment. This Court in *Laxmidas*

Dahyabhai Kabarwala v. Nanabhai Chunilal Kabarwala (SCR at p.582) held thus:

It is, no doubt, true that, save in exceptional cases, leave to amend under Order 6, Rule 17 of the Code will ordinarily be refused when the effect

of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. But this rule can apply only when

either fresh allegations are added or fresh reliefs sought by way of amendment. Where, for instance, an amendment is sought which merely clarifies

an existing pleading and does not in substance add to or alter it, it has never been held that the question of a bar of limitation is one of the questions

to be considered in allowing such clarification of a matter already contained in the original pleading. The present is a fortiori so. The defendants

here were not seeking to add any allegation nor to claim any fresh relief which they had prayed for in the pleading already filed.

6. In that case, this Court considered the cross-objections to be treated as a cross-suit since no alteration was being made in the written statement

to treat it as a plaint originally instituted. The amendment which was sought to be made was treated to be clarificatory and, therefore, this Court

had upheld the amendment of the written statement and treated it to be a cross-suit. The ratio therein squarely applies to a fact situation where the

party acquires right by bar of limitation and if the same is sought to be taken

away by amendment of the pleading, amendment in such circumstances would be refused. In the present case, the gift deed was executed and registered as early as 28-7-1978 which is a notice to every one. Even after filing of the written statement, for 3 years no steps were taken to file the application for amendment of the plaint. Thereby the accrued right in favour of the respondents would be defeated by permitting amendment of the plaint. The High Court, therefore, was right in refusing to grant permission to amend the plaint.

ii) (The Tiruchengode Taluk Co-operative Society Ltd v. M. Kulasekaran and Anr.) 2005 4 LW 178 wherein a learned single judge of this Court held in Para No. 12, thus:

12. The suit had been filed for permanent injunction restraining the defendant from preventing the plaintiff from using North-South road on the western side of his property. Subsequently, the suit is sought to be amended for mandatory injunction directing the defendant society to remove the existing stone pillars and barbed wires. It has been alleged that on 17.12.1992, the Defendant Society had erected stone pillars and fences around the suit property. In Para-8 of the counter statement filed by the proposed party, it is alleged that there was a barbed wire fencing and Banyan tree and telegraphic post and also municipal ditches and culvert are situated. If the proposed party is to be impleaded as per Order 1, Rule 10 (5) CPC, the proceedings against that person added as a Defendant shall be deemed to have been taken only on the service of summons. u/s 21 of the Limitation Act, addition of the defendant, the suit as regards him, shall be deemed to have been instituted when he was so made as a party. It is relevant to note that when the proposed party/Taluk Society has purchased the northern portion on 26.10.1990, it would not be proper or legal to implead the proposed party Taluk Society as a defendant in the suit in 2002 since the claim as already become barred by limitation. The trial court has also not considered the application for impleading in the light of Section 21 of the Limitation Act and Order 1 Rule 10(5) C.P.C.

3. Mr. K.R.A. Muthukrishnan, learned Counsel appearing for the first respondent submitted that the petitioner and the second respondent herein are defendants in the suit; that they have been carrying on business as Partners of the third respondent herein and executed promissory note; that in

the said suit, they have taken a plea that the suit promissory note was executed for the partnership firm and the partnership firm ought to have been impleaded as a party, but not impleaded; that in view of the above stand taken by the petitioner and the second respondent herein, to avoid complications, it has become necessary to implead the third respondent firm; that the bar of limitation cannot be made applicable in so far as the said dispute is concerned; that the court below rightly allowed the application to implead the third respondent herein and prayed for dismissal of the revision petition. In support of his contention, the learned Counsel for the first respondent relied on the decision of the Honourable Supreme Court reported in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, wherein in Para No. 18, it was held thus:

18. The High Court has relied on Section 25 of the Partnership Act, 1932 for the purpose of holding the partners as individuals liable to meet the tax liability of the firm. Section 25 provides that every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. A firm is not a legal entity. It is only a collective or compendious name for all the partners. In other words, a firm does not have any existence away from its partners. A decree in favour of or against a firm in the name of the firm has the same effect as a decree in favour of or against the partners. While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of the firm. This principle cannot be stretched and extended to such situations in which the firm is deemed to be a person and hence, a legal entity for a certain purpose. The Karnataka Sales Tax Act, with which we are concerned, also gives the firm a legal status by treating it as a dealer and hence a person for the limited purpose of assessing under the Sales Tax Act. It was, therefore, held by a three-Judge Bench in Commissioner of Sales Tax, Madhya Pradesh, Indore and Others Vs. Radhakrishnan and Others,) (A) firm in a partnership and a Hindu undivided family are recognised as legal entities and as such proceedings can only be taken against the firm or undivided family as the case may be. Neither the partners of the firm nor the members of the Hindu undivided family will be liable for the tax assessed against the firm or the undivided Hindu family.

4. This Court carefully considered the argument of the counsel for both sides. The Partnership Act, 1932 defines Partnership as the relation, which subsists between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Similarly, firm is also defined in the said Act as persons who have entered into partnership with one another are called collectively a firm. The firm is not a legal entity, separate or distinct from the partners. A firm means only a compendious description of the individuals, who composed the firm. A firm as such is not entitled to enter into partnership with another firm or individuals. As a firm is not a legal entity, there cannot be a partnership of firms but when two firms combine, the legal effect is that individuals in the two firms become partners. For the purpose of Income Tax, a firm can be assessed as a entity, distinct and separate from its members notwithstanding the fact a firm like an association of persons is for the purpose of assessment treated as a separate entity, which is not a legal person having a corporate character distinct from that of its members.

5. Order 30 of CPC permits suit to be brought against firms, the summons may be issued against the firm or persons, who are alleged to be partners individually and the suit further proceeds only against the firm when a decree is passed against the firm, which is capable of being executed against the property of partnership and also against partners.

6. In the case on hand, the first respondent herein has filed the suit against the petitioner and the second respondent herein on the ground that the suit promissory note has been executed by them as partners of the firm namely A.S. Distributors. The petitioner herein alone filed his written statement contending that he and the second respondent herein were carrying on business in the name and style of A.S. Distributors; that the execution of the suit pronote in favour of the first respondent is denied; that the suit pronote was cooked up for the purpose of filing the suit; that the plaintiff/first respondent herein is the son of the second respondent and that the suit was filed collusively; that assuming the pronote was executed for partnership firm, then the firm is a necessary party and for non-joinder of the firm, the suit is liable to be dismissed. In view of the said plea taken by the petitioner herein in his written statement, the plaintiff/first respondent herein has filed an application to implead the firm as a party

stating that the omission to include the firm is due to mistake made in good faith and the firm shall be deemed to have been impleaded from the date

of institution of the suit and bar of limitation cannot be made applicable. The said application was opposed by the revision petitioner herein,

however, the court below allowed it. Aggrieved by the said order of the trial court, the first defendant alone filed the present revision petition.

7. Now we look into Section 21 of Limitation Act as well as Order 1 Rule 10 (5) CPC, which runs as follows:

Section 21 of Limitation Act is as follows:

21. Effect of substituting or adding new plaintiff or defendant.- (1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or

added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may

direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during

the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

Order 1 Rule 10 (5) CPC is as follows:

10 (5) Subject to the provisions of the Indian Limitation Act, 1877, Section 22, the proceedings as against any person added as defendant shall be

deemed to have begun only on the service of the summons.

8. Section 21 of Limitation Act says the suit as regards the newly added plaintiff or defendant shall be deemed to have been instituted when he was

so made a party. Rule 10 (5) of Order I CPC says subject to the provisions of the Indian Limitation Act, Section 22, the proceedings as against

any person added as defendant shall be deemed to have begun only on the service of summons. Proviso to Section 21 of Limitation Act confers

inherent power to the Court and it calls for the satisfaction of the Court that the omission to implead a new plaintiff or defendant was bonafide or

due to a mistake made in good faith. No finding by the court below about the bonafide or due to a mistake made in good faith but it found the

firm/third respondent is a necessary party. In other words, no indication in the impugned order it exercised inherent power as contemplated in the

proviso to Section 21 of Limitation Act to say that the firm be deemed to have been impleaded on any earlier date or from the date of filing of the

suit. Hence, it should be concluded that the suit as regards the firm/third respondent, be deemed to have begun only on the service of the summons.

The order of the trial court allowing the implead petition is modified to the extent indicated above.

9. The Civil Revision petition is partly allowed in the above terms. No costs. Consequently, connected miscellaneous petition is closed.