

(2007) 01 MAD CK 0030

In the Madras High Court

Case No : C.R.P. No. 733 of 2006 and C.M.P. No. 7033 of 2006

Chinnammal and another

APPELLANT

Vs

Manickam @ Sellappan and 4 others

RESPONDENT

Date of Decision : 01-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 227

Citation : (2007) 01 MAD CK 0030

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant;

Judgement

P. Jyothimani, J.—The plaintiffs are the revision petitioners and the revision is filed under Article 227 of the Constitution of India. The revision arises from the order passed by the Trial Court in I.A. No. 64 of 2006 in O.S. No. 37 of 2005 filed by the plaintiffs seeking for an amendment to the plaint under order 6 Rule 17 r/w 151 of the Code of Civil Procedure, which was dismissed by the order dated 13.02.2006. The first defendant Manickam @ Sellapan is the husband of the first plaintiff Chinnammal. The second defendant in the suit is the father-in-law of the first plaintiff and father of the first defendant and the third defendant is the brother of the first defendant. There was a partition in the family of Periyanna gounder, namely, the second defendant on 12.10.1985 and there was no division by metes and bounds. The further case of the plaintiff is that the first defendant was married to the first plaintiff and they had no issues for 2 years and when the first plaintiff was conceived afterwards, at the advise of astrologers, the first defendant has compelled the first plaintiff to make abortion on certain surmises and it was in those circumstances the first plaintiff was compelled to leave away from the first defendant along with her son the second plaintiff who was born subsequently.

2. According to the plaintiff, there was the second partition in the family of

Periyanna gounder on 29.05.2001 by which there was a division by metes and bounds and as per the said partition certain portions have been earmarked for the purpose of common use by way of easement. The plaintiffs have filed the suit for partition and claiming 1/2 share to the second plaintiff in respect of item 1 to 3 of the suit properties and 1/6th share in respect of item 4 of the suit property, apart from the maintenance claimed against the first defendant.

3. The defendants have also filed a written statement. Thereafter, the plaintiffs filed I.A. No. 64 of 2006 praying for an amendment of the plaint in respect of the discrepancy of the property showing the common passage. In the affidavit filed in support of the said petition the plaintiffs admit that even in the partition deed dated 29.05.2001 such a common passage has been given and by mistake that was not mentioned in the plaint, even though a reference has been made about the partition deed dated 29.05.2001 in the plaint.

4. It is also the case of the plaintiffs that by omission of such common passage, ultimately even if the second plaintiff gets the partition of his property, he will not be in position to enjoy the same, since he will be prevented even from entering into the property. In those circumstances, the petition came to be filed.

5. The defendants who are the respondents herein have filed the counter affidavit stating that by the amendment the plaintiffs are seeking to introduce a new case. It is the further case of the defendants that without even knowing the particulars about the property, the plaintiffs have filed the suit for partition. After hearing the arguments of both the sides, the Trial Court has dismissed the said application as against which the plaintiffs have filed the present revision petition under Article 227 of the Constitution of India.

6. The Learned Counsel for the petitioners would submit that the purpose of order 6 Rule 17 r/w 151 of the CPC for amendment is to have an effective final disposal in respect of the dispute and therefore, the order of the learned Trial Judge in dismissing the application for amendment will only prevent the effective disposal of the suit in a proper manner. According to him even though in the plaint there is a mention about the second partition deed dated 29.05.2001 in Periyanna gounder's family and it is true that the said partition deed contained clauses by giving easement rights to the parties, especially in favour of the first defendant in the suit from whom the second plaintiff is making a claim being his son and it was by mistake the reference about the said easement right of common passage was omitted to be mentioned and by including that by way of amendment, it cannot be said that a new case is formulated by the plaintiff.

7. It is also his contention that the suit itself is of the year 2005 and in February 2006 itself the present application for amendment was filed and therefore, it cannot be said to drag on the proceedings. In any event according to the Learned Counsel for the petitioners, by allowing the amendment no prejudice was going to be caused to the defendants at all. The Learned Counsel also would rely upon the judgement of the Hon'ble Apex reported in 2002(4) CTC 189 and

judgement of this Court in Thiru Alankadu Immudi Ahora Dharma Sivachariar Aiyra Vaisya Madam Vs. Udumalpet Samayapuram Ayira Vaisya Sangam, and would contend that the learned Trial Judge has wrongly come to a conclusion as if the application has been filed belatedly and there is a lack of bonafide.

8. In the revision petition the respondents have been served and in spite of it no one appeared and the names of the respondents were printed in the cause list.

9. I have heard the Learned Counsel for the petitioners and also perused the entire records in detail including the pleadings and the order of the learned Trial Judge. A reference to the plaint shows that in paragraph 9 of the said plaint, the plaintiffs have specifically stated about the subsequent partition in the family of Periyanna gounder dated 29.05.2001. Even though right has been claimed based on the said partition deed under which according to the plaintiffs, a division has been effected by metes and bounds by which the first defendant gets his right from whom the second plaintiff make a claim in respect of the all the items of properties and with a specific plea in the plaint that the first defendant was allotted B Schedule property into the partition deed dated 29.05.2001, while narrating in the description of the properties in each and every one of the items of the properties, there is no mention about the common passage or easement right. A reference about the said partition deed, which is relied upon by the plaintiffs dated 29.05.2001 shows that itself is sufficient for the purpose of suit for partition, but what is sought to be introduced now by way of amendment is only in respect of the common passages, which are stated to have been earmarked under the said partition deed dated 29.05.2001 and therefore, on the face of it, there is absolutely no difficulty to come to the conclusion that by introducing the amendment by including the common passages as per the partition deed dated 29.05.2001, it can never be said that the plaintiffs are seeking to make out a new case other than what was pleaded originally.

10. The learned Trial Judge however has taken up the issue of delay in filing such a petition for amendment. A reference to the order passed by the learned Trial Judge would show that the amendment petition was filed without assigning the reason for the delay and therefore, the Trial Court found that it is only with the intention of drag on the proceedings, the plaintiffs are filing the present petition for amendment. It is also found as per the order of the learned Trial Judge that the plaintiffs have filed the suit on 04.02.2005 and the suit was posted on 06.02.2006 and after the suit was taken up for trial, the present application for amendment was filed and therefore, the delay is not bonafide. It is for that purpose, the Trial Court has relied upon the judgement of this Court reported in 2005(4) MLJ 333 as narrated by the learned Trial Judge himself. That was a case wherein the revision petitioners sought to include more properties in the suit schedule and there has been a delay and therefore, this Court has come to a conclusion that there was no bonafide in the petition.

11. The learned Trial Judge has also relied upon another judgement of this Court reported in (2005) 4 MLJ 278 and has come to a conclusion that amendment of

pleading is not permissible after commencement of trial and at the stage of the pronouncing of the judgement.

12. As correctly pointed out by the Learned Counsel for the petitioners, the Hon"ble Apex Court in the judgement rendered in Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, while dealing with an amendment petition filed under Order 6 Rule 17 of the CPC has held that the real factor which should be considered for allowing the amendment is for determining the real question in controversy between the parties, provided such amendment does not cause injustice or prejudice to the other side. Therefore, the Hon"ble Apex Court has held that a duty is cast on the Trial Court to decide whether such amendment is necessary to decide the real dispute between the parties. The Hon"ble Apex Court has considered in detail the two portions of order 6 rule 17 of the CPC holding that in respect of the first portion it is discretionary for the court since the term "may" is used and in respect of the second portion it is mandatory or imperative in nature since the term "shall" is used and that is for the purpose of determining the real questions in controversy between the parties.

13. After analyzing the purport of the order 6 rule 17 of the of the CPC which runs as follows:

17. 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.

14. The Hon"ble Supreme Court in the categoric term laid down the law as follows:

15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

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 determining 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.

15. Thus the Hon'ble Apex Court has categorically laid down the law that the cardinal principle of amendment is essentially a rule of justice, equity and it should be exercised in the larger interest of giving full and complete justice between the parties before the court. That was the view taken by the Hon'ble Apex Court even before the said judgement. That was in *B.K.N. Narayana Pillai Vs. P. Pillai and Another*, the Hon'ble Apex Court has held about the concept of amendment on the basis of the concept of justice and to avoid multiplicity of litigation in the following term:

3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation.

16. In yet another judgement, the Hon'ble Supreme Court in *Punjab National Bank Vs. Indian Bank and Another*, while dealing with the duties and powers of the court under order 6 rule 17 of the Code of Civil Procedure, held that that if the amendments sought merely for clarifying the preexisting averments in the plaint, the same has to be allowed except when it is sought to make a new addition and for that purpose the law was laid down that it is the duty of the court to arrive at a conclusion by reading the entire plaint as a whole. After

considering the large number of case laws on the issue the Hon"ble Apex Court has held in paragraph 15, which runs as follows:

A matter already contained in the original pleading can always be clarified and such an amendment should ordinarily be allowed and in such a case the question of bar of limitation would not be attracted.

17. Ultimately, the position has been clearly explained by the Hon"ble Apex court in paragraph 17 as follows:

17. The position that emerges from the decisions referred to earlier is that an amendment would generally not be disallowed except where a time-barred claim is sought to be introduced, there too it would be one of the factors for consideration or where it changes the nature of the suit itself or it is mala fide or the other party cannot be placed in the same position had the plaint been originally filed correctly, that is to say, the other side has lost right of a valid defence by subsequent amendment. We find that no such element is present in the case in hand so as to disallow the amendment in the plaint. No undue advantage is sought to be taken as the claim in terms of dollars is mentioned in the plaint and the relief clause and the defendants are not to be taken by surprise. The amendment only clears the confusion, if any, as to the terms in which relief is sought. It does not revive a time-barred and dead claim, nor changes the nature of the suit. In the facts and circumstances, it cannot be said to be mala fide either.

18. Narrating all the above said case laws M. Karpagavinayagam, J. (as he then was) in the case Thiru Alankadu Immudi Ahora Dharma Sivachariar Aiyra Vaisya Madam, Nerinchipettai, Bhavani Taluk, Erode District Vs. Udumalpet Samayapuram Ariya Vaisya Sangam, rep. by its President No. 5 Thiru Alankadu Immudi Ahora Dharma Sivachariar Aiyra Vaisya Madam Vs. Udumalpet Samayapuram Ayira Vaisya Sangam, has laid down 12 guidelines for the courts to deal with the amendment application under order 6 rule 17, which are as follows:

(1) The general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred.

(2) It is well recognized that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation.

(3) The object of Courts and rules of procedures is to decide the rights of the parties and not to punish them for their mistakes. Further, a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended.

(4) Even though the amendment sought to be made is subject of law of limitation, if the cause of action is not going to be changed, it is open to the affected party to take necessary steps for amendment of the plaint. No doubt, no amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party of lapse of time.

(5) For merely allowing an application for amendment, there is no adjudication of the merits of the amended pleas introduced that the merits of the amended pleas have got to be adjudicated upon after allowing the opposite side to put-forth additional pleadings in answer of the same and that certainly the additional pleadings may take in also the plea of bar of limitation.

(6) By allowing the amendment, no injury or injustice is caused to the other side. No jurisdictional error is also involved in this case because of the amendment being ordered. The amendment application should be allowed, since it is not going to change the nature of the plea nor does it affect the rights of the defendants. The defendants are entitled to put forward all their contentions even after the amendment is allowed.

(7) The question of limitation should not have been decided by the Court below at present, since it is a question to be decided on merits with oral and documentary evidence. At present, we are concerned with the amendment application, which is governed only under Order 6, Rule 17, C.P.C. The amendment application should be allowed, if it is not going to change the nature of suit nor does it affect the rights of the defendants.

(8) 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 is open to the plaintiff to file a fresh suit and that is one of the reasons, which has prevailed with the trial Court. 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.

(9) Where a suit was filed without seeking an appropriate relief, it is a well settled rule of practice not to dismiss the suit automatically, but to allow the plaintiff to make necessary amendment, if he seeks to do so.

(10) 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 prejudice because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases, the question of prejudice to the opposite party may arise and that shall have to be answered by inference to the facts and circumstances of each individual case.

(11) The law in this regard is quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an

amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed.

(12) In regard to the stand of the defendants that the declaration sought by the plaintiffs is barred by limitation, there is dispute and it is not an admitted fact. While the defendants pleaded that under Entry 58 of the Schedule to the Limitation Act, the declaration sought for by the plaintiffs in this case ought to have been within three years when the right to sue first accrued, the plaintiffs contend that the same does not fall under the said entry but falls under entry 64 or 65 of the said Schedule to the Limitation Act, which provides for a limitation of 12 years, therefore, according to them, the prayer for declaration of title is not barred by limitation. In such a situation, where there is a dispute as to the bar of limitation, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea of limitation, being disputed, could be made a subject matter of the issue, after allowing the amendment prayed for.

19. The said judgement of the Hon"ble Supreme Court, pronouncing categorically the legal position in Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, and the entire case law on the subject was again referred by a Full Bench of this Court in the order passed in Hi.Sheet Industries, a partnership firm, carrying on business at 61-D.D.V. Road, Ambur Town, Vellore District Vs. Litelon Limited having its Office at No. 68, Dr. S.H. Sithik Basha Vs. Fazal Ahmed, while dealing with the proviso to order 6 rule 17 of CPC which was introduced in 2002 and also the period of limitation have held, the ultimate test is to safeguard the rights of both parties and sub serve the ends of justice in the following words:

11.11. With great respect to the learned Judges of the Division Bench, we differ in that view. The two latest landmark judgements of the Supreme Court in Baldev Singh Case and Rajesh Kumar Aggarwal case clarify that the point of limitation is immaterial when the Court is called upon to determine the real question in controversy between the parties and in that direction when there is no prejudice caused to the other side. The Supreme Court also clarified that the Court should take notice of the subsequent events and should shorten the litigation to preserve and safeguard, the rights of both parties and subserve the ends of justice.

20. Therefore, the analysis of the entire case laws on the subject as well as the term used in order 6 rule 17 of the CPC shows that it is ultimately to decide and determine the real questions in controversy between the parties, the amendment has to be used, which means that the amendment need not be denied only on the technical ground, for, such denial would only lead to multiplicity of proceedings, which is uncalled for, especially in the present era of docket

explosion.

21. Applying the said legal position to the facts of the present case I have elaborately discussed above, I have no hesitation to come to the conclusion that the amendment sought for is not in any manner altering or affecting the original suit filed by the plaintiff or introducing any new case and by amendment it is only the existence of the common passage, which is available as per the partition deed dated 29.05.2001 is sought to be explained and clarified and therefore, as per the cardinal rules laid down by the Hon''ble Apex Court, this should be taken only as clarificatory in nature and in my considered view there was absolutely no bar on the part of the Trial Judge in considering the same and ought not have rejected only on the technical ground of delay. Even the proviso to Order 6 rule 17 of the CPC has to be read based on the cardinal principles laid down by the Hon''ble Apex Court, namely, to determine the real question in controversy between the parties.

22. On the facts and circumstances of the case, I am of the considered view that order of the learned Trial Judge in rejecting the application for amendment is improper and not in the interest of settling the dispute between the parties on the basis of justice and equity. In view of the same, the C.R.P. stands allowed and the order of the learned Trial Judge passed in I.A. No. 64 of 2006 in O.S. No. 37 of 2005 dated 13.02.2006 is set aside with a direction to the Trial Court to permit the petitioners to make amendment and after giving opportunity to the defendants to file additional written statements and framing the additional issue if necessary and there after proceed with the trial and complete the same expeditiously. No Costs. Consequently, connected C.M.P. is closed.