

(2011) 09 MAD CK 0226

In the Madras High Court

Case No : C.R.P. (PD) No. 2027 of 2011 and M.P. No. 1 of 2011

Chinnu Padayachi and Raja

APPELLANT

Vs

Dhanalakshmi, Senthilnathan and Jeganathan

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Limitation Act, 1963 — Section 22

Citation : (2011) 6 CTC 477

Hon'ble Judges : K. Venkataraman, J

Bench : Single Bench

Advocate : P. Valliappan, for the Appellant; P. Mani, for the Respondent

Final Decision : Allowed

Judgement

1. The defendant in O.S.No.257 of 2008 before the learned Subordinate Judge, Tiruchengode, aggrieved over the order of the said Court, made in I.A.No.376 of 2010, is before this Court by filing the present Civil Revision Petition.
2. The respondents herein, being the plaintiffs in the said suit have filed the same for declaration of their title over the suit property and for Permanent Injunction restraining the petitioners herein from in anyway encroaching on the suit land. In the said suit, they have filed an application in I.A.No.376 of 2010, for amendment of the plaint, incorporating the prayer for mandatory injunction, directing the petitioners herein from removing the construction put up in the common lane. The said application was allowed by the Court below and the present revision is directed against the said order.
3. The learned counsel appearing for the petitioners contended that the amendment which has been sought for by the respondents was barred by limitation on the date, when the application for amendment was filed. Hence, according to the learned counsel appearing for the petitioners, the amendment should not have been allowed by the Court below.

4. On the other hand, the learned counsel appearing for the respondents contended that as per Section 22 of the Limitation Act, it is the continuing offense made by the respondents and hence the question of limitation will not arise at all. On facts also, he has contended that the question of limitation is a mixed question of facts and law, which can be agitated only at the time of the trial of the suit.

5. I have carefully considered the submissions made by the learned counsel appearing for the petitioners and the respondents.

6. The respondents herein have filed the suit against the petitioners on 26.04.2005. An Advocate Commissioner was appointed at the time of moving of the suit and he has filed his interim report on 28.04.2005. Later, the final report was filed by the Advocate Commissioner on 30.09.2005. Even, in the interim report as well the final report filed by the Advocate Commissioner, he has mentioned about the construction put up in the common lane. Thereafter, the petitioners herein filed their written statement on 30.09.2005, wherein they have pleaded that the construction was already made before the filing of the suit. While so, the present application for amendment came to be filed by the respondents on 09.07.2010.

7. The first question that arises for consideration before this Court is whether the time barred relief could be allowed to be incorporated by way of amendment under Order 6 Rule 17 CPC. The second question that arises for consideration is whether the act of the respondents, namely the construction put up in the lane is a continuing offense that has been committed by them, so as to warrant invoking of Section 22 of the Limitation Act.

8. While considering the first issue, as stated already, the suit has been filed on 26.04.2005. The Advocate Commissioner has filed his interim report on 28.04.2005 and filed his final report on 30.09.2005. In his report, the construction put up by the petitioners was set out by the Advocate Commissioner. Admittedly, an application was filed by the respondents on 09.07.2010 for amendment of the pleadings, incorporating the prayer for mandatory injunction. In the affidavit in support of the application, the respondents have stated that after filing of the suit, the petitioners herein have put up the said construction. It is not stated in the affidavit, when such construction was put up, even though it is stated that after filing of the suit, the said construction was put up. Hence, the relief of mandatory injunction cannot be entertained.

9. As per Article 113, in a suit for which no limitation was provided else where in the schedule, the period of limitation is three years. Admittedly, in the case on hand, as stated already, even after the Advocate Commissioner had pointed out that the construction had been put up, the respondents herein have not filed an application within three years from the said dates. On the face of it, the amendment that has been sought for by the respondents appears to be out of

time.

10. The learned counsel appearing for the petitioners relied on the following decisions:

- (i) Shaik Peda Adam and Others Vs. Shaik Adam and Others, .
- (ii) Muni Lal Vs. The Oriental Fire and General Insurance Company Ltd. and another, .
- (iii) Bhagwati Prasad Jalan Vs. Smt. Prem Lata Devi Kedia and Others, .
- (iv) N. Raghotham Rao (died) Per L.R. and Another Vs. M.C.H. and Another, .
- (v) Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, .

11.1. In the Judgment reported in Shaik Peda Adam and Others Vs. Shaik Adam and Others, , the High Court of Andhra Pradesh has held that by way of an amendment, a time barred relief cannot be sought for. Paragraph 15 of the said judgment is usefully extracted here under:

15. In this view of the matter, the relief by amendment was dearly time barred and the lower Court having held so, ought not to have allowed the amendment. That apart, when amendment petition has to be filed within a reasonable period, by no stretch of imagination can it be said that 8 years period is a reasonable period for filing amendment petition. While considering the plea for amendment of pleadings, the delay plays important role and if there is unreasonable and unexplained delay, certainly it is a ground for refusing amendment and in the instant case, such a delay is there and that too accepted by the lower Court. But, the lower Court still allowed the amendment petition without proper application of mind and casually thinking that the illegality can be cured by imposition of costs of Rs.50/-, which is a wrong approach. The lower Court ought to have realised that it was exercising a common law Court jurisdiction and not extraordinary jurisdiction, which is the prerogative of the Courts of Record.

11.2. In the judgment reported in Muni Lal Vs. The Oriental Fire and General Insurance Company Ltd. and another, , the Hon''ble Apex Court has held that a time barred amendment cannot be allowed. Paragraph 6 of the said judgment is usefully extracted here under:

6. On a consideration of this case in its proper perspective, we are of the view that granting of amendment of plaint seeking to introduce alternative relief of mandatory injunction for payment of specified amount is bad in law. The alternative relief was available to be asked for when the suit was filed but not made. He cannot be permitted to amend the plaint after the suit was barred by the limitation during the pendency of the proceeding in the appellate court or the second appellate court. Considered from this perspective, we are of the opinion that the District Court and the High Court were right in refusing the prayer of amendment of the suit and the courts below had not committed any error of law

warranting interference.

11.3. The very same view was taken by the learned Judge in the judgment reported in Bhagwati Prasad Jalan Vs. Smt. Prem Lata Devi Kedia and Others, .

11.4. In the judgment reported in N. Raghotham Rao (died) Per L.R. and Another Vs. M.C.H. and Another, , a very same view was taken by the learned Judge and Paragraph 7 of the said judgment, on which much emphasis was placed, is usefully extracted here under:

7. Thus, even by the date of filing the suit, it was evident to the petitioners that the defendant-corporation was taking positive steps to lay the road on the disputed land. The acts of the Corporation as alleged in the plaint were clear pointers to the petitioners that their alleged rights over the land were being infringed or attempted to be infringed. What is more, the 1st defendant-Corporation in its written statement filed on 14.02.1992 made it clear that the disputed land which was part of the approved lay out was vested in it and earmarked for laying the road. Thus, the right to sue or the cause of action to sue for declaration clearly arose even by the date of filing the suit and at any rate on the date when the written statement was filed by the Corporation. If that is the starting point the relief for declaration cannot be sought for on the date on which the amendment petition was filed. Thus, allowing the amendment will have the effect of enabling the plaintiff to sue for a time barred relief. The lower Court has not committed any illegality in disallowing the amendment on the ground that the amendment, if allowed, will have the effect of permitting the petitioners to sue beyond the period of limitation.

11.5. In the Judgment reported in Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, , the Hon"ble Apex Court has held that the amendment should not cause prejudice to other side which cannot be compensated adequately in terms of money. In the present case on hand, if the amendment is allowed, the petitioners may not be in a position to raise the question of limitation, since the amendment will take back to the date of filing of the suit.

12. On the other hand, the learned counsel appearing for the respondents relied on the following decisions:

- (i) Vol 99 LW 833 Bharathamatha Desiya Sangam Madhavaram v. Roja Sundaram.
- (ii) Pankaja and Another Vs. Yellappa (D) by Lrs. and Others,
- (D) Lrs and Others.

13.1. The judgment reported in Vol 99 Law Weekly 833 Bharathamatha Desiya Sangam Madhavaram v. Roja Sundaram, does not relate to the case where an order was passed under Order 6 Rule 17 CPC. Hence, I am of the considered view that the said decision may not be of any use to the case of the respondents.

13.2. In the judgment reported in Pankaja and Another Vs. Yellappa (D) by Lrs.

and Others, , the Hon"ble Apex Court has held that if granting amendment subserves ultimate justice and avoids further litigation, the same should be allowed and there can be no straight jacket formula for allowing or disallowing amendment of pleadings which depends on the factual background of the case. Paragraph 12 of the said judgment which was emphasized by the learned counsel appearing for the respondents is usefully extracted here under:

12. The law in this regard is also 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 to allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.

In the said decision, the Hon"ble Apex Court has held that there is no absolute rule that in every case where a relief is barred because of limitation, an amendment should not be allowed. However, the Hon"ble Apex Court in the said decision also held that the discretion in such cases depends on the facts and circumstances of the case. Paragraphs 14, 15 and 17 could establish that if limitation is a disputed question of fact and law, then the question of limitation could be relegated at the time of final disposal of the suit.

13.3. However, in the present case on hand, as already held, the respondents have filed an application for amendment, admittedly after 5 years from the date of filing of the report of the Advocate Commissioner who has pointed out about the construction that has been put up in the common lane. Hence, I am of the considered view that there is no disputed question of fact with regard to limitation, which requires to be considered only at the time of final disposal of the matter.

14. Regarding the other contention raised by the learned counsel appearing for the respondents that as per Section 22 of the Limitation Act, if a person continuously breaches or torts, a fresh period of limitation begins to run at every moment of time is concerned, I am of the considered view that it is not a continuous breach, in the present case on hand. What constitute continuous breach was considered by the Delhi High Court in the judgment reported in Faqir Chand (through L.Rs.) Vs. Laila Ram (through L.Rs.), . Paragraph 18 of the said judgment is usefully extracted here under:

18. In the plaint it was averred that this construction was made about 32 months prior to the filing of the suit. There was no specific denial of this particular fact in the written statement but still the court thought it advisable to examine the defendant-respondent in order to clarify his plea with regard to the date in the

construction of the aforesaid tin-shed. At any rate, as the plaintiff-appellant himself had admitted in his testimony about the existence of this tin-shed for more than 3 years prior to filing of the suit the first appellate court was not wrong in taking notice of this admission of fact and then drawing the legal inferences available flowing from such facts.

15. In the given case on hand, it is alleged by the respondents that the petitioners have put up the construction in the common lane. It cannot be considered as a continuous wrong. The construction in the common passage, as held by the Delhi High Court cannot be considered as a continuous breach, which will entitle the respondents to file application for amendment at any point of time, even after the prescribed period of three years, saying Section 22 of the Limitation Act will attract.

16. In view of the above stated position, I am of the considered view that the amendment that has been sought for by the respondents which was allowed by the Court below, is on the face of it is barred by limitation.

17. In the judgment reported in Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others, , the Hon"ble Apex Court has held that if the amendment do not result in causing grave injustice and irretrievable prejudice to the plaintiff in the suit, displacing him completely, the same can be allowed. In the given case on hand, as stated already, the proposed amendment will cause prejudice to the other side, since the other side may not be in a position to raise a plea of limitation, at the final point of time.

18. In the judgment reported in (2010) 7 MLJ 432 S.Sathish v. Dr. Sumathi, this Court has held that if the amendment does not cause prejudice to other parties, the same can be allowed. That is the case where this Court has dealt with the filing of additional written statement. However, the ratio laid therein will also be applicable to the case of amendment under Order 6 Rule 17 CPC.

19. In view of the above stated position, I am of the considered view that the Court below had erroneously allowed the application preferred by the respondents, without considering the question of limitation.

20. In view of the same, the order of the learned Subordinate Judge, Tiruchengode, dated 07.08.2010 made in I.A.No.376 of 2010 in O.S.No.257 of 2008, which is under canvas in the present Civil Revision Petition is liable to be set aside and accordingly set aside.

21. In fine, the Civil Revision Petition stands allowed. Consequently, connected miscellaneous petition is closed. However, no order as to costs.