

(2007) 04 MAD CK 0102

In the Madras High Court

Case No : CRP (PD) No. 523 of 2007 and M.P. No. 1 of 2007

D. Mohan

APPELLANT

Vs

Mr. N. Kuppan @ Durai, Ms. I. Navaneetha Rani, Mr. A.N.
Annamalai and The Sub Registrar

RESPONDENT

Date of Decision : 03-04-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 15
Limitation (Amendment) Act, 1976 — Section 26
Limitation Act, 1963 — Article 54

Citation : (2007) 3 MLJ 335

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : S.Y. Masood and M.S. Govindarajan, for the Appellant; S.D. Vimalanathan, for R.1, Navaneetha Rani, for R. 2 and A. Sumathy, for R. 3, for the Respondent

Final Decision : Dismissed

Judgement

S. Ashok Kumar, J.—Aggrieved over the order of the learned Principal District Judge, Thiruvallur, made in I.A.No:167 of 2006 in O.S. No. 40 of 2006, this Civil Revision Petition is filed.

2. The brief facts of the case are as follows:

The petitioner is the second defendant in the suit. The suit property belongs to the second defendant. On 23.4.1995, the second defendant executed a power of attorney in favour of the first defendant to deal with his property. In pursuance of the said power of attorney, the first defendant entered into an agreement of sale with the respondents 1 and 2, the plaintiffs on 15.7.1996 by paying Rs. 10 Lakhs as advance. Thereafter, periodical payments to a total amount of Rs. 17,25,000/= have been paid upto 14.9.2002. Since the defendants failed to execute the sale deed, the plaintiffs filed the present suit for specific performance.

3. The petitioner has not yet filed his written statement. But he filed an application under Order 7 Rule 11(d) CPC to reject the Plaint on the following grounds (i) that the plaintiffs earlier filed another suit on 29.11.1999 and abandoned the same and therefore the present suit is barred under Order 23 Rule 1(4) CPC; (ii) the suit is barred by Article 54 of the Limitation Act. On these two grounds, the petitioner, second defendant wants the Plaint to be rejected.

4. For easy reference, Order XXIII, Rule 1(4) as well as Order VII Rule 11(d) are extracted hereunder:

Order XXIII Rule 1(4):

Withdrawal of suit or abandonment of part of claim: (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

(2) x x x x x

(3) x x x x x

(4) Where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

Order VII, Rule 11(d):

11. Rejection of Plaint: The plaint shall be rejected in the following cases:

(a) xx xx xx xx (b) xx xx xx xx (c) xx xx xx xx (d) Where the suit appears from the statement in the plaint to be barred by any law

5. Mr. S.Y. Masood and M.S. Govindarajan learned Counsels appearing for the revision petitioner would contend that the earlier suit was filed on 29.11.1999 and the same was abandoned and therefore the present suit would not lie. They would also contend that as per the terms and conditions of the sale agreement, the sale deed should have been executed within Eleven months of the agreement, but the limitation period is over and therefore, the suit is barred by limitation as held in Article 54 of the Limitation Act.

6. Per contra, Ms. Navaneetha Rani, second plaintiff, party-in-person would contend that the Plaint filed on 29.11.1999 is not a suit, the said Plaint was returned for insufficient court fee and because of the compromise talks between the defendants and the plaintiffs the Plaint was not represented and that does not mean that the plaintiffs have abandoned their claim. She would further contend that upto 14.9.2002, the first defendant has been receiving sale considerations and so far a total sale consideration of Rs. 17,25,000/= has been

paid by the plaintiffs and they would also contend that they are ready at any time to pay the balance sale consideration as per sale agreement.

7. I gave my anxious consideration to rival contentions of both sides. I am of the opinion that the petitioner has misled himself about "What is Plaint? and What is Suit?. Suit is not defined in the Code. `Plaint" is a written statement of facts which will give cause of action against other side. A `suit" is instituted by presenting a plaint as per Section 26 CPC. A plaint presented in Court may be returned for several reasons, like, insufficient court fee, lack of jurisdiction, not enclosing sufficient number of copies in of the Plaint, gaps not filled up, verified and not signed etc., A plaint which is returned does not become a suit by itself. Unless a suit is registered and numbered, a Plaint does not become a suit. That is why in Section 27 of the Code of Civil Procedure, it is mentioned as follows:

27. Summons to defendant-- Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed "on such day not beyond thirty days from the date of institution of the suit.

8. In AIR 1922 Cal 234, (Surendra Prasad v. Aftabuddin), it is categorically mentioned that "until the plaint is registered and numbered, it cannot be held that a suit has been duly instituted and until the same is done, there is no `opposite party" to whom notice can go". A plaint becomes a suit only when firstly it has been registered and numbered.

9. In AIR 1917 Cal 852 (Brij Kumar v. Majlis Sahai), a Division Bench of the Calcutta High Court held thus:

Until a Court has determined whether or not a plaintiff should be permitted to sue as a pauper, there is no suit before the Court, and, therefore, it has no jurisdiction to make an order for the attachment of defendant's property before judgment under O.38 CPC before the plaintiff's application for leave to sue in forma pauperis is judicially determined.

10. In AIR 1952 Mys 76, it has been reiterated as follows:

in the course of proceedings relating to the application for permission to sue in forma pauperis, before an order registering the case as a suit is passed, an order for temporary injunction cannot be passed u/s 94(c), read with Order 39 CPC. According to the words employed in O.39, the order is possible only if there is a "suit". Since permission to sue as pauper has not been granted, it cannot be said that there is a suit pending.

11. In AIR 1982 Notes of Cases 61 (Kerala), the Kerala High Court held as follows:

Section 15 of the Code provides that every suit shall be instituted in the court of the lowest grade competent to try it. And Section 26 provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may

be prescribed. Reading the two provisions together, it is clear that presentation of a plaint before a court not competent to try the suit will not be "institution" of the suit within the meaning of Section 15, and that representation of the Plaint, after return, before the competent court will be institution of the suit within the meaning of Section 26. Section 97(2)(k) of Amendment Act 104/76 speaks of suits, appeals and proceedings "instituted or filed" before the commencement of Section 31, the reference must necessarily be to institution or filing before a competent court; presentation of a plaint before a court not competent to try the suit will not amount to institution or filing, even if the terms "filed" in Section 97(2)(k) were to govern suits also.

12. In an extreme case in *Dalmia Cement (Bharat) Limited Vs. Uthandi alias Peria Uthandi*, wherein the plaintiff originally filed a suit against three persons and withdrew it with liberty to file a fresh suit. Subsequently he filed a suit against the same three persons, but got it dismissed as not pressed before summons were served on the defendants. Third time he filed the suit against one of the defendants and in that context, S. Sardar Zackeria Hussain, J., has held that since cause of action is alive, the dismissal of the earlier suit as not pressed cannot be said as an abandonment of the entire suit or part of the suit claim and as such no permission is necessary to file a fresh suit and the third suit is maintainable. In that context it has been held as follows:

14. The only other question for consideration is as to whether the suit O.S. No. 182 of 1984, subject matter of the Second Appeal is hit under Order 23 Rule 1(4) C.P.C. Admittedly, the plaintiff filed the suit O.S. No. 697 of 1976 for permanent injunction against the defendant and two others and that suit was dismissed as withdrawn with liberty to file a fresh suit on the same cause of action, as per order in I.A. No. 344 of 1978 under Ex.A-5 dated 26.7.1978. Thereafter, the plaintiff filed another suit O.S. No. 1604 of 1982 before filing the suit O.S. No. 182 of 1984, subject matter of this appeal, for declaration, permanent injunction, possession and mesne profits, against the defendant and two others and even before summons were served on the defendants, that suit was dismissed as not pressed, which is explained by P.W.1 that since the other two defendants in that suit handed over possession of the portion encroached by them that suit was dismissed as not pressed and thereafter, the suit O.S. No. 182 of 1984, subject matter of this appeal, was filed for the very same relief of declaration, possession and mesne profits against the defendant alone. Therefore, the defendant has raised a plea in the additional written statement that since the suit O.S. No. 1604 of 1982 filed by the plaintiff in respect of the same property against the defendant and 2 others for declaration of its title and possession, was dismissed as not pressed on 25.1.1983 and as such, the dismissal of the suit O.S. No. 1604 of 1982 is a bar to the suit O.S. No. 182 of 1984, subject matter of this second appeal, under Order 23 Rule 1(4) C.P.C.

15. The Order 23 Rule 1(4) says thus:

Withdrawal of suit or abandonment of part of claim: (1) At any time after the

institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

(2) x x x x x

(3) x x x x x

(4) Where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

Strictly speaking Order 23 Rule 1(4) C.P.C. is not applicable to the fact of the present case since, the suit O.S. No. 1604 of 1982 filed before the suit O.S. No. 182 of 1984, subject matter of this second appeal, was only dismissed as not pressed even before the defendant entered appearance after receiving summons and since the suit or part of the suit was not abandoned by the plaintiff.

Xx xx xx xx xx 17. But the learned Counsel for the respondent/defendant relied on the following decisions:

(1) Laxmidas Ramji Vs. Lohana Bai Savita Tulsidas and Others, , in which it is held that where under Order 23 Rule 1 C.P.C. permission only granted to withdraw the suit and there was no specific prayer to file a fresh suit, such withdrawal is a bar for fresh suit.

(2) Papinayakanahalli Venkanna and Others Vs. Janadri Venkanna Setty (by Lrs.), , in which it is held thus:

The permission to withdraw from suit with liberty to institute a fresh suit contemplated under Order 23 Rule 1(4) is required to be specifically granted by an order if so requested by the plaintiff.

Where the memo for the withdrawal of petition filed by the petitioner contained the words "the petition is not pressed for the present", it could not be said that petitioner had made a request for permission as contemplated under Order 23 Rule 1(4) and the same was granted by the Courts.

(3) M/s. Upadhyay and Co. Vs. State of U.P. and Others, , in which it is held by the Supreme Court that under Order 23 Rule 1(3) C.P.C. there is ban for filing fresh suit if the suit is withdrawn without seeking permission for purpose of filing fresh suit.

But, here also before filing the present suit, subject matter of this appeal, the earlier suit O.S. No. 1604 of 1982 filed against the defendant and two others was dismissed as not pressed before the summons were served on the defendant and before their appearance. The said decisions relied on by the learned Counsel for

the respondent/defendant are not applicable to the facts of the present case. Therefore, the dismissal of the suit O.S. No. 1604 of 1982 as not pressed cannot be said as abandonment of the entire suit or part of the suit claim and as such no permission is necessary to file fresh suit.

18. Since O.S. No. 1604 of 1982 was dismissed as not pressed before the defendants were served with summons and in that view Order 23 Rule 1(4) C.P.C. is not applicable and therefore, the suit O.S. No. 182 of 1984 is not hit under order 23 Rule 1(4) C.P.C. It follows the judgment of the first appellate Court being erroneous is to be set aside.

13. This is an extreme case where the suit has been filed and got it dismissed as withdrawn even without liberty to file a fresh suit. The only point is that notice was not served on the defendants. But this is a case in which the Plaint which was returned was not even represented and the reasons for not representing the Plaint are given in Paragraph 8 of the Plaint that there were talks of compromise and therefore, the plaintiffs did not represent the Plaint. Therefore it is clear that when the earlier plaint was returned and not represented, it has not attained the status of a suit. Therefore, the contention of the petitioner that under Order XXIII Rule 1(4) CPC the plaintiffs have abandoned their claim earlier by filing a Plaint and therefore they are precluded or barred from filing a new suit is not sustainable.

14. The learned Counsel for the petitioner pressed into service the decisions reported in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 . But these are all cases in which the suits were duly instituted and the questions involved were whether the suits were hit by limitation. Some of the decisions relate to matters wherein Section 26 CPC have been dealt with regard to duly instituted suits by mere presentation of plaints. Therefore, the facts of the cases relied upon by the counsel for the petitioner are entirely different and the same are not applicable to the facts of the present case since all the above cases refer to suits. But, it is pertinent to note that Section 27 CPC deals with "duly instituted" suits for issue of summons. Thus it is clear that What is "suit" is a Suit which has been "duly instituted" and not a mere presentation of the Plaint which has been returned for certain defects. The petitioner has misunderstood himself by treating a Plaint as a Suit.

15. The next contention of the petitioner is that the suit is barred by limitation. In this context it is relevant to consider whether in an application filed under Order 7 Rule 11(d) CPC, the Court can go into the question of limitation? Whether a suit is barred by limitation is a mixed question of fact and law. As far as this case is concerned, the petitioner wants to invoke Article 54 of the Limitation Act, according to which, the limitation period is within three years from the date of agreement. But the agreement was extended by the parties on receiving payments now and then and as such as found in this case payments have been received upto 14.9.2002. Therefore the three years period of limitation for filing of the suit is available upto 13.9.2005. But the suit is filed

even as on 13.5.2005. Therefore, if the part payment of sale consideration till 14.9.2002 is held to be proved, it cannot be said that the suit is barred by limitation.

16. As far as this case is concerned, as rightly relied on by the second plaintiff in 2006 5 SCC 658 (Balasarala Constructions (P) Ltd. v. Hanuman Seva Trust and Ors.), suits could not be dismissed as barred by limitation without proper pleadings, framing of issue of limitation and taking of evidence. This Court time and again held that limitation is a mixed question of fact and law and a Plaint cannot be rejected on such mixed question of fact and law. Therefore, the contention of the petitioner to reject the plaint do not sustain.

17. In *Kasthuri and Ors. v. Baskaran and Anr.* reported in 2004 2 L.W. 429, M. Karpagavinayagam, J., as he then was, has held that in cases where a reading of the Plaint shows that there is no arguable case for the plaintiff, the plaint can be rejected. But in cases where there is a doubt as to whether the Plaint can be rejected or not, or whether the plaintiff has got arguable case or not, in such circumstances, the benefit must go to the plaintiff. This view has been taken by the learned Judge relying upon the Judgment of the Bombay High Court reported in AIR 1999 Bombay 161. In that context it has been held as follows:

19. It is settled law as held by various Courts that where on the face of the Plaint, a suit appears to be barred by any law, the Court shall dismiss the suit. But where it does not so appear, but requires further consideration or, in other words, if there be an doubt or if the Court is not sure and certain that the suit is barred by some law, the Court cannot reject the Plaint under Clause (d) of Order 7 Rule 11 of CPC.

20. In this context, it would be relevant to quote the observation made by the Bombay High Court in AIR 1999 Bom 161, with which I entirely agree. The observation is as follows:

It is settled law that the Plaint can be rejected as disclosing no cause of action if the court finds that it is plain and obvious that the case put forward is unarguable. The phrase "does not disclose a cause of action" has to be very narrowly construed. Rejection of the plaint at the threshold entails very serious consequences for the plaintiff. This power has, therefore, to be used in exceptional circumstances. The court has to be absolutely sure that on a meaningful reading of the plaint it does not make out any case. The plaint can only be rejected where it does not disclose a cause of action or where the suit appears from the statements made in the plaint to be barred by any provision of the law. While exercising the power of rejecting the plaint, the Court has to act with utmost caution. This power ought to be used only when the court is absolutely sure that the plaintiff does not have an arguable case at all. The exercise of this power though arising in civil procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the plaintiff, whose Plaint is to be branded as an abuse of the process of the court.

This jurisdiction ought to be very sparingly exercised and only in very exceptional cases. The exercise of this power would not be justified merely because the story told in the pleadings was highly improbable or which may be difficult to believe.

18. In *J. Lili Jabakani and Others Vs. T.A. Chandrasekhar*, , this Court held as follows:

9. The other contentions raised on behalf of the petitioners are that the Court fee paid is not in accordance with law and if the Suit is valued as per the sale consideration shown in the documents, the Court has no jurisdiction, are also raised only for rejection, for the reason that in the plaint averments, the sale deeds itself are disputed as an outcome of the fraud played by the petitioners herein, in the sense, no consideration has been passed, as stated in the sale deeds, because of the collusion of the petitioner and the first defendant-Shanmugam. The same being a disputed question of fact, cannot be taken as a point for rejection of the plaint at the threshold.

Xx xx xx xx 12. In the same Judgment of Saleem Bhai, referred to supra, the Supreme Court has held that for the purpose of deciding the Application filed under Rule 11 of Order 7 of the Code of Civil Procedure, the averments in the Plaint are germane and the plea taken by the defendant in the written statement would be wholly irrelevant at that stage. The said decision was rendered, as in that case, the Application filed under Order 7, Rule 11 of the CPC has not been disposed off on the ground that the written statement has not been filed and directed the defendant in the Suit to file his written statement. That order was confirmed by the High Court and while deciding an Appeal against that orders, the Supreme Court observed that the Application can be filed at any stage of the suit and non filing of the written statement would not preclude the Trial Court from considering the Application under Order 7, Rule 11 of the Code of Civil Procedure, particularly, in that case, the Application has been filed under Sub-clauses (a) and (d) of Rule 11 of Order 7 CPC. That is not the facts of the present case.

Therefore, from the above decisions, it is clear that a suit can be maintained and cannot be rejected so long as averments disclose cause of action or raises questions fit to be decided by court, unless, ex facie it is barred by any law.

19. Before parting with the case, I would like to comment that sudden boom in real estate has shaken the honesty and conscience of the people. On the one side, there is a spurt in filing of suits on the strength of fabricated sale agreements and Wills said to have been executed by the grand fathers and great grand fathers who have suddenly risen from their graves. On the other hand, people who made commitments by entering into sale agreements, because of the greed for more money, want to go back from their commitment and assurance and thus the dispute continues culminating in litigations.

20. As far as this case is concerned, there is no dispute that the petitioner/2nd defendant executed a power of attorney in favour of the first defendant/third

respondent. The fact that the third defendant entered into a sale agreement with the plaintiffs and received payments is also not in dispute. As already held, the failure to represent the plaint which was filed earlier is not a bar to file the present suit since the cause of action is alive and the period of limitation is also not over. The contention of the petitioner/second defendant that the plaintiffs have abandoned their claims and the present suit not maintainable as per Order 23 Rule 1 (4) CPC is not sustainable. The other contentions that the suit is barred by limitation is also not sustainable. The law is well settled that to decide whether a plaint is to be rejected, the averments in the plaint alone are germane and the plea taken by the defendant will be wholly irrelevant at that stage. While exercising the power of rejecting the plaint, the court has to act with utmost caution. Such jurisdiction ought to be very sparingly exercised and only in very exceptional cases. The exercise of this power would not be justified merely because the story told in the pleadings was highly improbable or which may be difficult to believe. In cases where a reading of the Plaint shows that there is no arguable case for the plaintiff, the plaint can be rejected. But in cases where there is a doubt as to whether the Plaint can be rejected or not, or whether the plaintiff has got arguable case or not, in such circumstances, the benefit must go to the plaintiff. Further, in this case, even in the counter filed in I.A.No:596 of 1998 in the earlier suit O.S.No:191 of 1998, the petitioner herein has categorically admitted his willingness to perform his part of the contract by executing a sale deed. The said admission amounts to an admission of the execution of the power of attorney executed by him in favour of the first defendant in the present suit, who entered into a sale agreement with the plaintiffs.

21. For the reasons stated earlier, I do not find any reason to interfere with the order of the learned Principal District Judge, Thiruvellore, and the Civil Revision Petition is dismissed. The sale agreement is of the year 1996. Hence a direction is issued to the learned Prl.District Judge, Thiruvellore, directing that the suit itself may be disposed of on merits and according to law within a period of Six months from the date of receipt of a copy of this order.

22. Consequently, connected M.P., is also dismissed. No costs.