

(2004) 03 KAR CK 0055

In the Karnataka High Court

Case No : R.F.A No. 684 of 1998 C.w R.F.A. No. 685 of 1998

H. Aziz Khan and Others

APPELLANT

Vs

Smt. Muniyamma and Others

RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1963 — Section 42

Citation : (2004) ILR (Kar) 2571 : (2004) 3 KCCR 269 SN

Hon'ble Judges : A.V. Srinivasa Reddy, J

Bench : Single Bench

Advocate : S.R. Krishna Kuma, for the Appellant; K. Somashekar Reddy, for R-1A, Papi Reddy, for R2, for the Respondent

Judgement

A.V. Srinivasa Reddy, J.—These R.EAs are preferred by the appellant (plaintiff in O.S.5653/ 93) against the common Judgment and decree dated 17-9-1993 passed by the XX Addl. City Civil Judge, Bangalore, dismissing O.S.5653/93 and decreeing O.S.7671/91 on its file.

2. Advertence to the parties in the course of this judgment is made with reference to the rank assigned to them in the court-below in O.S.NO. 5653/93.

3. O.S.5653/93 was filed by the plaintiff for a declaration that the plaintiff is the owner of the schedule property by virtue of the sale deed dated 1-4-1982, registered as document No. 16, at pages 219-225 in Volume No. 3573 of Book No. 1 in the office of the Sub-Registrar, Bangalore North Taluk and for a mandatory injunction against the defendants (plaintiff in the other suit) to demolish the illegal construction put on the suit schedule site and also for permanent Injunction against the defendants from interfering with her peaceful possession and enjoyment of the property. The defendant also filed O.S.7671/91 praying a decree of permanent injunction against the plaintiff. The Court- below decreed O.S.7671/91 and dismissed O.S.5653 of 1993. Being aggrieved by the said judgment and decree the plaintiff has filed these appeals.

4. During the pendency of the appeal I.A.No. 3 has been filed by the appellant in. R.F.A 684/98 (plaintiff in O.S.5653/93) praying for amendment of the plaint by including the following para as para 11(a) after para 11 and before para 12 of the plaint in O.S.5653/93:

11(a). The plaintiff submits that alternatively, in the event of this Hon"ble Court coming to the conclusion that the plaintiff is not in possession of suit schedule property, the defendants who are in illegal and unauthorized possession and enjoyment of the property are liable to vacate and hand over possession of the same to the Plaintiff. The Plaintiff is entitled to recover vacant possession of the suit schedule property from the Defendants. Hence the suit for alternative relief of recovery of possession of the suit schedule property from the Defendants."

As any order to be passed by this Court allowing the amendment would have the effect of reopening the entire case determined by the court- below in these suits, the LA. for amendment has been taken up first for consideration and the learned Counsel on both sides were directed to make their submissions on the application for amendment alone.

5. I have heard the submissions made by the learned Counsel on both sides on the merits of the amendment application.

6. The learned Counsel for the applicant Mr. S.R. Krishna Kumar submitted that the applicant is entitled to add the prayer for possession also to the original prayer as the proposed amendment only elaborates the plea of ownership already taken in the plaint and the right of the respondent would in no way be affected because the respondent can take alternate or additional plea and evidence in defence. It is his contention that merely because there is delay in making the application, as no serious prejudice is likely to be caused to the defendants so as to take away any accrued right, the application cannot be rejected.

7. On the other hand Mr. Papi Reddy appearing for the respondents submitted that u/s 42 of the Specific Relief Act where it is shown that the defendant is in possession of the suit property and the plaintiff in the suit does not seek possession of those properties but merely seeks for declaration and injunction, the suit is not maintainable. He also stated that Section 42 of the Specific Relief Act is a bar to such a suit as it takes away the discretion of the Court to the grant of declaratory decree. It is his further submission that in the absence of a prayer by the plaintiff with regard to possession, a right has come to vest in the defendants and such a right cannot be taken away by allowing the amendment. Alternatively, his submission is that even if the amendment is to be allowed, it should be made operative only from the date of presentation of the LA. for amendment and it should not date back to the date of the filing of the suit.

8. Therefore the question that arises for my consideration in this I.A is

Whether the applicant is entitled to succeed in the LA. for amendment? If so,

what order ?

9. The power of the Courts to grant a prayer for amendment is quite wide and it can be exercised at any stage of the proceedings. While it is true that amendment cannot be claimed as a matter of right and in all circumstances, the general rule is that the Courts should be liberal while dealing with the amendment applications. The main factors that decisively assist the Court in reaching a conclusion in the matter of exercising option either in favour or against the grant of a prayer for amendment are spelt out by the Apex Court in *M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.*, . They read:

"It is fairly settled in law that the amendment of pleading under Order 6, Rule 17 C.P.C is to be allowed if such an amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings, subject to certain conditions such as allowing amendment should not result in injustice to the other side; normally a clear admission made conferring certain right on a plaintiff is not allowed to be withdrawn by way of amendment by a defendant resulting in prejudice to such a right of plaintiff, depending on facts and circumstances of a given case. In certain situations a time barred claim cannot be allowed to be raised by proposing an amendment to take away valuable accrued right of a party. However mere delay in making an amendment application itself is not enough to refuse amendment as the delay can be compensated in terms of money. Amendment is to be allowed when it does not cost serious prejudice to the opposite side."

It cannot be disputed on the facts of the present case that the applicant is not seeking for an amendment which would alter the very nature of the suit or the cause of action. By its refusal the plaintiff would be driven to filing a fresh suit for possession thereby leading to multiplicity of proceedings and the possibility of the Courts recording conflicting decisions cannot be totally ruled out. These appeals, even if disposed off, could be appealed against and, therefore, the matter may pend for some more time before the higher forum. If the plaintiff is driven to filing a fresh Suit for the relief of possession alone, the fallout of such an eventuality would be that a lis would continue to pend at the stage of trial between the same parties only regarding possession of the subject-matter when at the same time in regard to all other connected reliefs with regard to the very same subject matter, the parties would await a final decision from the Apex Court in the ultimate appeal, if either of the parties appeal against the judgment in these appeals. Learned Counsel Mr. Papi Reddy submitted that the matters have reached a crescendo and it is too late in the day for the plaintiff to come up with an application for amendment which, if allowed, would amount to permitting the revival of a plea which is time barred. In *RAGU THILAK D. JOHN v. RAYAPPA AND ORS.* (2001) 2 SCC 472 the Apex Court has reiterated the principle that an amendment could not be declined on the ground that it would be barred by law of limitation, by observing:

The amendment sought could not be declined. The dominant purpose of allowing

the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case. The plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for."

The relief sought to be introduced being barred by limitation is not one of the criterion to determine the application because it is at best an arguable point. The plea of limitation could be made an issue after allowing the amendment prayed for. To refuse amendment on the ground that the relief sought to be introduced by the amendment is time- barred would lead to multiplicity of proceedings. In order to avoid such multiplicity of proceedings and for effective adjudication of the controversy between the parties, the amendment sought for is required to be allowed.

10. Learned Counsel Mr. Papi Reddy cited for my consideration the decision in Ram Saran and Another Vs. Smt. Ganga Devi, , wherein the Apex Court held, "where the defendant is in possession of some of the suit properties and the plaintiff in his suit does not seek possession of those properties but merely claims a declaration that he is the owner of the suit properties, the suit is not maintainable." The ratio of the decision is a fairly well-settled proposition of law and if this Court were to decide the appeals on merits there could be no doubt that the appeal would meet with the same fate as that of the suit, based on the principle enunciated in Ram Saran's case. But, the plaintiff has woken up, albeit late, and wants to repair the self- inflicted damage done to her case by her own failure to seek for the relief of possession. Seized as I am with the sole issue as to whether or not this Court, in this appeal, should exercise the option of allowing the amendment, question of going into the maintainability or otherwise of the suit and determining it does not arise. Such an eventuality would arise only if this Court decides against the grant of the prayer for amendment.

11. In the case on hand the plaintiff is not trying to make out a new case. What is being sought is an amendment by way of additional pleadings and an additional prayer elaborating upon the plea of ownership that is already pleaded by the plaintiff in the suit. The general rule to be followed by the Courts in deciding an application for amendment being to see whether it amounts to setting up of a new case or a new cause of action, there can be no impediment for allowing the present application because it only amounts to a different or additional approach to the facts already pleaded by the plaintiff. Mere delay in the making of the amendment application is no ground to refuse an amendment but the Court should take care to see that any right that came to vest in the other side by virtue of the long delay is not taken away by allowing the amendment. One way of ensuring this is to make a departure from the general rule that an amendment dates back to the date of filing of the suit and to direct that the relief sought by the amendment shall be deemed to have been made on the date on which the application for amendment was filed.

12. In the present case the plaintiff has not made any prayer for possession of

the suit-land. The court-below has found that the defendants are in possession and enjoyment of the suit land. In fact the suit of the plaintiff was dismissed on the ground that the plaintiff though not in possession has not made a prayer for possession, despite the fact that the Court-below recorded a finding to the effect that the plaintiff alone is the true owner of the suit schedule property. IN *SAMPATH v. AYYAKANNU AND ANR.* (4) 2002 CCR 2839 SC a suit was filed by the plaintiff for permanent injunction against dispossession. During pendency of the suit the plaintiff was dispossessed. On dispossession the plaintiff filed application seeking -amendment of the plaint to include the relief of delivery of possession. The relief was rejected on the ground of delay and on the ground that it would change the cause of action by the Trial Court and the High Court. Setting aside the concurrent orders thus passed by the Courts below, the Apex Court observed:

"In our opinion, 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 was open to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the trial court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. 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. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings."

Rejection of the prayer in the present case also would have the effect of driving the plaintiff to file a fresh suit for possession. It is here that the submission of Mr. Papi Reddy gains significance as; according to him, the suit having been brought 11 years ago, the defendant has perfected title by way of adverse possession and this right that has accrued to her should not be allowed to be defeated by permitting amendment of the plaint from the date of filing of the suit. It is his submission that in the special facts and circumstances of the case the amendment should be treated as taking effect only from the date of application. The facts in *Sampath Kumar, supra*, are also quite similar to the facts in the present case. Therein also the suit was 11 years old when the application for amendment came to be filed by the plaintiff. In the said suit also a contention was taken by the defendant that an amendment dating back to the date of filing of the suit would take away the right that had accrued to him by virtue of the failure on the part of the plaintiff to make out a prayer for possession though he was not in possession of the suit property. Dealing with the said contention raised by the defendant, the Apex Court observed:

"An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be

deemed to have been brought before the Court on the date on which the application seeking the amendment was filed."

Given the facts in the case, this Court finds that this case is one such where there should be an exception to the doctrine of relation back in the context of amendment of pleading, as application of the general doctrine would cause grave injustice to the defendant by taking away the right of defendant to set up the defence of adverse possession which has come to vest in him. Therefore, this Court is of the considered view that the amendment has to be allowed, but with a clear rider that it would date back not from the date of the filing of the suit but from the date of filing of application for amendment in this Court -i.e., 10-2-2004.

13. For the reasons stated above, I.A.No. 3 is allowed and the appellant-plaintiff is permitted to amend the plaint by inserting para 11(a). As the matter is required to be decided afresh, on the amendment being allowed, the common judgment and decree of the court-below is set aside and the case is remanded to the court-below for fresh disposal in accordance with law. It is made clear that the amendment shall be deemed to have been brought before the court- below on and from 6-2-2004 and not earlier. It would be open - for the defendant to file a fresh or additional written - statement in defence of the plea of adverse possession.