

(2015) 11 MAD CK 0020

In the Madras High Court

Case No : C.R.P.(PD) No. 118 of 2010 and M.P. No. 1 of 2010

J. Vijayakumar

APPELLANT

Vs

K. Srinivasan

RESPONDENT

Date of Decision : 23-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 34, Order 6 Rule 17, Order 7 Rule 11, 34

Citation : (2015) 11 MAD CK 0020

Hon'ble Judges : R. Mala, J.

Bench : Single Bench

Advocate : R. Sugumaran, for the Appellant; M. Kamalanathan, for the Respondent

Final Decision : Allowed

Judgement

R. Mala, J.—Civil Revision Petition is filed against the fair and decreetal order dated 20.11.2009 made in I.A. No. 15334 of 2009 in O.S. No. 1782 of 2008 on the file of the II Assistant City Civil Judge, Chennai.

2. Learned counsel for the revision petitioner submitted that the revision petitioner herein as a plaintiff filed a suit for recovery of money due on promissory note and also creation of equitable mortgage. At the time of filing suit, even though the revision petitioner has mentioned all the pleadings in respect of creation of equitable mortgage in the body of the plaint, but in the prayer column of the plaint, no specific prayer for preliminary decree for mortgage has been mentioned. So the revision petitioner/plaintiff has filed an application in I.A. No. 15334 of 2008 for amending the plaint. The amendment sought for by the revision petitioner does not constitute any new cause of action. But the trial Court without considering the same, dismissed the application, against which, the present revision petition has been preferred by the plaintiff/revision petitioner.

3. It is further submitted by the learned counsel for the revision petitioner/

plaintiff that in the plaint itself, the revision petitioner has specifically stated that this is the suit for mortgage, but he has filed the suit under Section 34 C.P.C. instead of filing under Order 34 C.P.C., which deals with the suit for mortgage. The misquoting of provision of law is not a ground for dismissal. To substantiate his arguments, he relied upon the decision of the Apex Court reported in Abdul Rehman and Another Vs. Mohd. Ruldu and Others, , wherein it has been held that the amendment, which is necessary, for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. Hence, he prayed for allowing the revision petition.

4. Resisting the same, learned counsel for the respondent/defendant submits that the revision petitioner/plaintiff has filed a simple suit for recovery of money due on promissory note. If the suit is for mortgage, he has to file the suit under Order 34 C.P.C. instead of Section 34 C.P.C. The second limb of argument is that the suit has been filed on 02.01.2008, the amendment application was filed only on 29.08.2008 and deposit of title deeds on 03.01.1996. So the plaintiff ought to have filed the amendment application on or before 02.01.2008. It shows that on the date of filing amendment application, the prayer has been barred by limitation. To substantiate his argument, he relied upon the decision of the Apex Court reported in K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, , which has been followed by the Apex Court in another judgment reported in Voltas Limited Vs. Rolta India Limited, and the same has been followed by this Court in S. Kuppusamy Vs. P.K. Subramani, P.K. Kandasamy, P.K. Kumaravel and P.K. Loganathan, . Therefore, he prayed for dismissal of the revision petition.

5. Considered the rival submissions made on both sides and perused the typed set of papers.

6. The revision petitioner herein as a plaintiff filed a suit for recovery of money due on promissory note stating that the defendant/respondent herein has borrowed a sum of Rs. 2,00,000/- from the plaintiff and executed a promissory note on 03.01.1996 promising to repay the said sum with interest at the rate of 18% per annum. In para-3 of the plaint, it was stated that "as security for the due repayment of the said loan amount, the defendant deposited the title deeds belonging to his property". Further it was stated that "the defendant by his letter dated 05.01.1996 also confirmed the deposit of title deeds with the plaintiff in respect of the aforesaid borrowing with intent to create an equitable mortgage in favour of the plaintiff ". The plaint pleadings prima facie proves the creation of equitable mortgage. It is true, creation of equitable mortgage has been mentioned in the cause of action in para-6 of the plaint. But whereas in the prayer column, it was mentioned that the suit is for recovery of money and not for preliminary decree for mortgage. The suit for mortgage has to be filed within 12 years. Here, the suit has been filed after three years before 12 years as if the suit is for recovery of money due on mortgage.

7. It is pertinent to note that the respondent/defendant has filed an application in I.A. No. 12465 of 2008 for rejection of plaint under Order VII Rule 11 of C.P.C. on the ground that the suit filed by the plaintiff is a money suit in simplicitor and as such barred by limitation and the same was dismissed, against which, a revision has been preferred by the defendant in C.R.P. No. 4330 of 2008, which was also dismissed on 15.09.2009.

8. The only point to be decided is that whether the amendment sought for by the revision petitioner/plaintiff is liable to be allowed or to be rejected? It is well settled dictum of the Apex Court that while allowing the amendment application, the Court has to decide that whether the amendment is necessary for deciding the real questions in controversy between both the parties.

9. Now it is appropriate to consider the following decision relied upon by the learned counsel for the revision petitioner:

(i) In Abdul Rehman and Another Vs. Mohd. Ruldu and Others, , in para-15, it is held as follows:

"15. We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties."

Even though promissory note is dated 03.01.1996 and deposit of title deed is dated 05.01.1996, the suit has been filed only on 02.01.2008 within 12 years. So the suit has been filed as if the suit for recovery of money due on mortgage not under simple promissory note.

10. Furthermore, on perusal of para-3 and cause of action in para-6 of the plaint, it reveals that the plaintiff has stated about the creation of mortgage and he has also given memo of calculation showing the mortgage amount. Merely because the revision petitioner/plaintiff has filed the suit under Section 34 C.P.C. instead of filing the suit under Order 34 C.P.C., it will not take away the valuable right of the plaintiff. It is well settled dictum of the Apex Court that misquoting of provision of law is not a ground for dismissal of the application. In such circumstances, argument of the learned counsel for the respondent that the amendment is barred by limitation does not merit acceptance. As already stated that the averments made in the plaint would show that the suit is filed for recovery of money due on mortgage.

11. At this juncture, it is appropriate to consider the following decisions relied upon by the learned counsel for the respondent:

(i) In K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, , in para-3 and 4, it is held as follows:

"3. Shri Santosh Hegde, learned senior counsel for the petitioners, has contended that the petitioners have not come forward with any new plea. They have set out all the material allegations and their claims in the plaint. What they are seeking for is only a formal relief which, though not originally asked for, the omission does not preclude the petitioners to file the application under Order 6 Rule 17 seeking for the amendment of the plaint. The relief is really founded upon the facts set out in the plaint and it is the subsequent knowledge about permission granted by the Charity Commissioner for alienation, which required the amendment. We find that the contention is not tenable.

4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years to elapse from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent."

In the above decision, a suit for bare injunction has been filed, during pendency of the same, after seven years, they filed an application for amendment of plaint for specific performance. The Honourable Apex Court has held that as per Article 54 of the Limitation Act, already 7 years has been lapsed, so the suit is barred by limitation and amendment is denied.

(ii) The above decision has been followed by the Apex Court in another judgment reported in *Voltas Limited Vs. Rolta India Limited*, , wherein para-29 and 30 are extracted hereunder:

"29. Mr. Nariman, learned senior counsel, has also contended that the counterclaims filed before the learned arbitrator is an elaboration of the amount stated in the notice and, in fact, it is an amendment of the claim of the respondent which deserved to be dealt with by the learned arbitrator. In this context, we may refer with profit to the ruling in *K. Raheja Constructions Ltd. Vs. Alliance Ministries and others*, , wherein the plaintiff had filed a suit for permanent injunction and sought an amendment for grant of relief of specific performance. The said prayer was rejected by the learned trial Court. A contention was canvassed that the appellant had not come forward with new plea and, in fact, there were material allegations in the plaint to sustain the amendment of the plaint. The Court observed that having allowed the period of seven years to elapse from the date of filing the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963 any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent. The said principle has been reiterated in *South Konkan Distilleries and Another Vs. Prabhakar Gajanan Naik and Others*,

and Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Others, .

30. In *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*, , while laying down some basic principles for considering the amendment, the Court has stated that as a general rule the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

(iii) The above decision has been followed by this Court in *S. Kuppusamy Vs. P.K. Subramani, P.K. Kandasamy, P.K. Kumaravel and P.K. Loganathan*, , in para-4, it has been held as follows:

"4. The main objection of the revision petitioner is that the powers conferred under Order VI Rule 17 seeking to amend the plaint cannot be resorted to annul the available right of limitation accrued on the revision petitioner/defendant in the suit. The learned counsel placed reliance on the decision of the Apex Court reported in *K. Raheja Constructions Ltd. Vs. Alliance Ministries and others*, , wherein it is held thus,

"... Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accrued to the respondent."

The above decisions are not applicable to the facts of the present case, because amendment of prayer is ultimately sought for in the year 2008 itself. As already stated that in the body of the plaint, creation of equitable mortgage has been mentioned, but in the prayer column only, it was not mentioned. In view of the same, amendment sought for is not barred by limitation.

12. Considering the aforesaid facts and circumstances of the case along with the decisions, I am of the view, the trial Court without considering the above aspects erroneously dismissed the application. But there is a lapse on the part of the revision petitioner/plaintiff and that should be compensated by payment of costs to the respondent, who has been forced to contest both in the trial Court and this Court. Accordingly, this Civil Revision Petition stands allowed on payment of costs of Rs. 10,000/- to the respondent/defendant.

13. In fine, the Civil Revision Petition stands allowed on payment of costs of Rs. 10,000/- (Rupees Ten thousand only) to the respondent/defendant, on or before 14.12.2015, failing which, the Civil Revision Petition shall stand dismissed. Call the matter on 15.12.2015 for reporting compliance.