

(2010) 03 MAD CK 0293

In the Madras High Court

Case No : Original Side Appeal No. 28 of 2008

Kedia Overseas Limited and Alluri Estates (P) Limited

APPELLANT

Vs

Satellite Town Development Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Civil Procedure Code Amendment Act, 2002 — Order 6 Rule 17
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17
Specific Relief Act, 1963 — Section 40(2)
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 42

Citation : (2010) 03 MAD CK 0293

Hon'ble Judges : M. Sathyanarayanan, J;D. Murugesan, J

Bench : Division Bench

Advocate : V. Raghavachari, for P. Valliappan, for the Appellant; G. Rajagopalan, S.C. for R2, for the Respondent

Final Decision : Allowed

Judgement

M. Sathyanarayanan, J.—The plaintiffs in C.S. No. 110 of 2006 are the appellants herein and aggrieved by the dismissal of the application No. 6627 of 2007 filed by them for the relief of amendment of plaint, had preferred this appeal.

2. The facts leading to the filing of this appeal are as follows:

The appellants/plaintiffs filed the above suit against the Respondents herein, praying for the relief of permanent injunction restraining the Respondents/defendants in dealing with the plaint schedule property any manner whatsoever or alienating the same including execution of deeds and registration of the same or sale of the same as estate of the first defendant company and for consequential reliefs.

3. In the plaint, it is averred among other things that the plaintiffs and the second defendant had entered into a Memorandum of Understanding dated 12.08.2005 for the purchase of 116.38 acres of land located at Vallur IV Village,

Minjur Taluk, Tiruvallur District for the sale consideration of Rs. 7,51,50,890/-. The second defendant has subscribed his signature on the said MOU in his capacity as a shareholder as well as on behalf of the first defendant company and the shareholders of the first defendant had authorised the second defendant in this regard. It is further averred in the plaint that though the MOU describes about the proposed acquisition of above said shares of the above said company, it refers only to sale of schedule mentioned properties. The plaintiffs further stated that an advance of Rs. 1,00,00,000/- was paid by way of four cheques and another sum of Rs. 1,00,00,000/- was paid in cash and altogether the plaintiffs paid an advance amount of Rs. 2,00,00,000/- to the defendants. It was orally agreed between the parties that the transaction was to be completed on or before 9.11.2005, termed as "appointed day" as per Clause 1 of the MOU. However, the said time schedule could not be adhered to as the second defendant did not clear the cloud on title of 7.22 acres out of the total extent of land. It is further averred that even though the plaintiffs were ready and willing to perform their part of obligations, the defendants had evaded. It is further averred in paragraph No. 13 of the plaint that "the defendants failure to perform their part entitles the plaintiffs to seek for specific performance against it and the plaintiffs also consciously reserved its right to file a separate suit for specific performance against the defendants". It is also averred in the said paragraph that the defendants having received a sum of Rs. 2 Crores from the plaintiffs, making attempts to sell the schedule mentioned property in favour of some third party illegally. Therefore, the plaintiffs came forward to file the suit for the said relief.

4. Originally interim order was granted in favour of the plaintiffs and subsequently it was vacated on the ground that the shares of the company had already been transferred in favour of the Directors of the company incorporated under the name and style of "Surya Developers and Promoters Private Limited."

5. The plaintiffs took out an application in I.A. No. 6627 of 2007 under Order VI Rule XVII of C.P.C., praying for amendment of the plaint. In the affidavit filed in support of the said application, it is averred that the plaintiffs having parted with a huge sum towards the above said transaction in terms of the above said MOU, cannot be made to suffer at the hands of the Respondents/defendants for no fault on their part. Since the Respondents/defendants attempted to alienate or encumber the suit property, originally the suit was filed for permanent injunction. Since the plaintiffs had failed in their attempt to execute the sale deed in their favour, they sought to amend the plaint for the relief of specific performance instead of filing a separate suit. It is further averred that no prejudice would be caused to the Respondents inasmuch as the proposed amendment would neither alter the character of the suit nor the cause of action and that the trial is yet to commence and the pre-trial amendments are to be normally allowed. In view of the above said reasons, the plaintiffs sought for the amendment of the plaint and the proposed amendments are as follows:

(1) At the end of paragraph 15 of the plaint, add the following:

Relief (b) is valued at Rs. 7,51,50,890/- and Court Fee Stamps to the value of Rs. are affixed u/s 42 of the Tamil Nadu Court Fees and Suits Valuation Act, 1956 read with Appendix-1-A of the High Court Fees Rules.

(2) In paragraph 16 of the plaint, delete Sub-clause (b) and substitute the following:

(b) directing the defendants to jointly execute the deed of sale in respect of the scheduled properties in favour of the plaintiff after receiving the balance of sale consideration of Rs. 5,51,50,890/- within a date to be fixed by this Hon"ble Court and in default to have the same executed by the Court.

6. The first Respondent, second Respondent and the 4th Respondent had filed their counter affidavit strongly opposing the application for amendment of the plaint. It is contended by them that the plaintiffs had voluntarily given up the relief of specific performance at the time of filing of the suit and therefore, they are permanently debarred from doing so at any later stage under the provisions of Order II Rule 2 of C.P.C. It is further contended that the shares in question had already been transferred in favour of M/s. Surya Developers and Promoters Private Limited, no relief can be claimed against the Respondents/defendants. It is also contended that the plaintiffs had deliberately suppressed the material facts and a sum of Rs. 1,00,00,000/- was paid by way of advance was also received by him and the Memorandum of Understanding was also returned and cancelled. It is further contended that the Memorandum of Understanding cannot be termed as an agreement for sale of land and that the properties in schedule "A" fall outside the territorial jurisdiction of this Court and consequently the suit itself is not maintainable.

7. The learned Judge, after taking into consideration the pleadings, averments made in the affidavit, counter affidavit, held that on the facts of the case, Order II Rule 2 C.P.C. is not applicable. However, the learned Judge found that the application for amendment though filed in the pretrial stage, is belated and not bona fide and if the proposed amendment is to be allowed, it would cause serious prejudice to the Respondents, particularly when Surya Developers and Promoters Private Limited have taken over the rights of the Respondents company in favour of whom the shares have already been transferred as early as on 27.1.2006. The learned Judge citing the said reasons, has dismissed the application for amendment of plaint and aggrieved by the same, the plaintiffs had preferred this appeal.

8. Heard the submissions of Mr. V. Raghavachari, for Mr. T. Valliappan and Mr. G. Rajagopalaln, learned senior Counsel for M/s. Sunitha Vibhu for second Respondent. In respect of other Respondents, there is no appearance.

9. The learned Counsel appearing for the appellants would content that with regard to the relief of specific performance necessary pleadings are available in

paragraph Nos. 12 and 13 of the plaint and since the amendment of plaint is sought in the pretrial stage, it should have been allowed. It is further contended by the learned Counsel appearing for the appellant that the learned Judge has went into the merits of the case and erroneously dismissed the application for amendment of the plaint.

10. The learned Counsel appearing for the appellants in support of his submissions, placed reliance upon the following decisions:

- (i) Sampath Kumar Vs. Ayyakannu and Another,
- (ii) AIR 2005 SC 1592 - Raj Kumar v. Dipender Kaur Sethi.
- (iii) Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others,
- (iv) Dr. S.H. Sithik Basha Vs. Fazal Ahmed,

11. In Sampath Kumar Vs. Ayyakannu and Another, , original suit was filed for permanent injunction and subsequently the defendant was forcibly dispossessed and hence he filed an application for amendment seeking for the relief of declaration of title and the consequential relief of plea of possession. The said relief sought was negatived and the Hon"ble Supreme Court in the above said decision held that the basic structure of the suit would not be altered by the proposed amendment and what is sought to be changed is the nature of the relief sought for by the plaintiff and by allowing the amendment, multiplicity of legal proceedings would be curtailed. It is further held that the defendant therein is not prejudiced more so when the amendment was sought before the commencement of the trial.

12. In AIR 2005 SC 1592 - Raj Kumar v. Dipender Kaur Sethi, necessary averments in terms of Section 165(c) of the Specific Relief Act, 1963 was omitted and hence an application for amendment was filed which was rejected and the Hon"ble Supreme Court in that decision held that in view of such amendment no fresh cause of action was introduced as it was an inadvertent omission and consequently allowed the application for amendment.

13. In Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, , the appellants originally filed a suit for declaration, permanent injunction and mandatory injunction and later on, took out an application under Order VI Rule 17 of C.P.C., seeking leave of the Court to amend the plaint by incorporating the amendment claiming to the relief of mandatory injunction. Originally, the amendment was allowed and on appeal it was reversed. The matter went to further appeal to the Hon"ble Supreme Court of India and it has been held as follows:

The object of Order 6 Rule 17 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. 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. The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. 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 sub serve the ends of justice.

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. 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.

It is further held in the said decision that the reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to show that there was no question of any inconsistency if the case is originally made out in the plaint.

14. In Dr. S.H. Sithik Basha Vs. Fazal Ahmed, , the following issues were referred for reference before the Full Bench of this Court:

I. Whether an amendment of plaint seeking to claim enhancement of the amendment of compensation/damages could be entertained notwithstanding the fact that the amendment is sought for beyond the period of limitation?

II. Whether Section 40(2) of the Specific Relief Act would apply to the facts and circumstances of the present case and if so, whether it is mandatory to allow the amendment notwithstanding the bar of limitation?

III. Whether the constraints prescribed under the proviso to Order 6, Rule 17 C.P.C. in the matter of entertaining application for amendment after the commencement of trial could apply even to a plea for amendment as contemplated u/s 40(2) of Specific Relief Act?

The Full Bench of this Court after taking into consideration catena of decisions, and the facts of the said case, held that no new case has been introduced. The Full Bench answered the reference as follows:

(1) That the delay in filing the application for amendment of the pleadings is not fatal when no serious prejudice is shown to have caused to the opposite party so as to take away any accrued right and the Court should take notice of the subsequent events in order to shorten the litigation to preserve and safeguard the rights of both the parties and to sub serve the ends of justice and while doing

so, the Court was not justified in allowing or disallowing the amendments so as to defeat the valuable rights of the parties and amendments of pleadings should be allowed which are necessary for determination of the real controversy in the suit and while doing so, the Court should not go into the correctness or falsity of the main case and it should not record the finding on the merits of the amendment as it should be done only during the trial of the suit.

(2) According to the proviso to Sub-section (2) of Section 40 of the Specific Relief Act, the Court has no option except to allow the amendment for adding a prayer for damages. This being the provision of law, the same should be allowed.

(3) The proviso to Order 6 Rule 17 of Act 22 of 2002 is applicable to the pleadings instituted with effect from 1.7.2002 and not to the pleadings instituted prior to 1.7.2002 and while considering the proviso to Order 6 Rule 17, the Court has to examine in detail, and commencement of trial must be understood as final hearing of the suit i.e., examination of witnesses, filing of documents, addressing of arguments etc., and the Court should not forget its unfettered discretion to allow the amendment after applying itself the judicial discretion, if there is no negligence on the part of the party.

15. Per contra Mr. G. Rajagopalan, learned senior Counsel appearing for the second Respondent would submit that assuming that the plaintiff is entitled to amend the pleadings by including the prayer for specific performance, this Court lacks territorial jurisdiction to entertain the suit as the schedule mentioned properties are admittedly situate outside the territorial jurisdiction of this Court. It is further contended that the Memorandum of Understanding pertains to the sale of equity shares only and consequently the suit itself is not maintainable. It is further submitted by the learned senior Counsel appearing for the second Respondent that no cause of action survives in the suit as the shares in question had already been sold in favour of the third parties and the appellants/plaintiffs are barred from amending the plaint in terms of Order II Rule 2 of CPC. It is further submitted by the learned senior Counsel appearing for the second Respondent the present application for amendment has been filed after 2-1/2 years after the vacating of the order of ad-interim injunction and as such it was rightly rejected by the learned Judge.

16. The learned senior Counsel appearing for the second Respondent in support of his submissions placed the reliance upon the following judgments:

(i) K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, .

(ii) 2006(1) CTC 270 - Thamiraparani Investments Pvt. Ltd. v. Meta Films Pvt. Ltd.

17. In K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, , the appellants therein filed a suit for permanent injunction and thereafter filed an application seeking amendment of plaint for inclusion of the prayed for specific performance. The said application was dismissed by the trial Court, which was

confirmed by the High Court. The Hon''ble Supreme Court of India, on the facts of the said case, found that the plaintiffs having allowed the period of seven years to lapse from the date of filing of the suit, any amendment would defeat the valuable right of limitation accrued in favour of the Respondent.

18. In 2006(1) CTC 270 (DB)- Thamiraparani Investments Pvt. Ltd. v. Meta Films Pvt. Ltd., the issue as to whether the suit for permanent injunction restraining the defendant from entering into the suit property and disturb his possession and for mandatory injunction directing the defendant to restrict their activities to properties adjoining to the suit property would be treated as suit for land, a Division Bench of this Court in the said decision held that the suit is filed for control of land and consequently it would also fall within the ambit of expression suit for land and regarded the said reason, has revoked the leave granted.

19. In response to the said submissions made by the learned senior Counsel appearing for the second Respondent, the learned Counsel appearing for the appellants has placed reliance upon the following decision:

2001(4) CTC 39 (SC) - Adcon Electronics Pvt. Ltd. v. Daulate and Anr.

20. In 2001(4) CTC 39 (SC) - Adcon Electronics Pvt. Ltd. v. Daulate and Anr. The question arose for consideration was whether a suit simpliciter for specific performance of contract for sale of immovable property is a "suit for land" within Clause 15 of Letters Patent of the High Court at Bombay, the Hon''ble Supreme Court after taking into consideration various decisions including the Full Bench judgment of this Court reported in P.M.A. Velliappa Chettiar and Another Vs. Saha Govinda Doss and Others, , has held as follows:

From the above discussion it follows that a "suit for land" is a suit in which the relief claimed relates to title to or delivery of possession of land or immovable property. Whether a suit is a "suit for land or not has to be determined on the averments in the plaint with reference to the reliefs claimed therein; where the relief relates to adjudication of title to land or immovable property or delivery of possession of the land or immovable property, it will be a "suit for land". We are in respectful agreement with the view expressed by Mahajan. J. in Moolji Jaitha's case (AIR 1950 F.C. 83)

Ultimately it was held by the Supreme Court that the suit for specific performance of agreement of sale of property wherein the relief of delivery of suit property was not specifically claimed cannot be treated as a "suit for land".

21. Therefore, the learned Counsel appearing for the appellants prayed for allowing of the appeal.

22. This Court has carefully considered the submissions made by the respective counsel appearing on either side and also perused the impugned order, the decisions cited by the respective counsel and other materials available on record.

23. A perusal of the Memorandum of Understanding dated 12.8.2005 would

disclose that the purchasers namely the plaintiffs had agreed to purchase 5,18,282 equity shares of Rs. 10/- each and the lands admeasuring 2.75 acres specified in Annexure "B", for sale consideration of 7,51,50,890/- and the agreement would further state that an advance of Rs. 1,00,00,000/- was paid by way of four cheques and the balance amount would be paid on or before the appointed day. In Clause Nos. 18 and 19 of the said MOU, it has been stated as follows:

18. The Company and or the Vendor shall at all times and at the request of the Purchaser and at the cost of the Purchaser execute and register or cause to be executed and registered and do all such acts, deeds as may be reasonably required by the Purchaser for better assuring the title to the Schedule land or any part thereof, or, for realignment of the roads etc.

19. The company and or the Vendor hereby agree to do all necessary acts for the transfer of the ownership of the Company to the Purchaser.

24. A perusal of paragraph 12 and 13 of the plaint would disclose that averments have been made to that effect that the plaintiffs are ready and willing to perform their part of obligations, but the defendants are evading it. It is further averred that the plaintiffs had paid a sum of Rs. 2,00,00,000/- towards part performance of their obligation and therefore they are entitled to seek for specific performance and that they have also consciously reserved their right to file a separate suit for specific performance against the defendants. Therefore, necessary averments for filing a suit for specific performance are available in the plaint. The plaint was verified on 7.2.2006.

25. The 4th defendant has filed his written statement during March 2006 and the plaintiffs had filed application for amendment of plaint on 12.9.2007 stating among other things that they having parted with huge sum of money towards the transaction by way of part performance, they cannot be made to suffer and that they have also expressed their readiness and willingness to perform their part of obligations and only the Respondents are evaded to perform their part of obligations. It is further averred in the said application that the trial is yet to be commenced and consequently prayed for amendment of the plaint by directing the defendants to jointly execute sale deed in respect of the suit schedule properties after receiving the balance consideration. They also sought for amendment of valuation of suit claim.

26. A perusal of the averments made in the affidavit filed in support of the application for amendment of the plaint would disclose that the averments made in the plaint are repeated and reiterated and no new averments have been made and necessary averments are available for the relief of specific performance.

27. The relief sought for by the plaintiffs by way of amendment is for appropriate direction directing the defendants to jointly execute the sale deed pertaining to the schedule mentioned properties and they did not seek for recovery of possession of the same. Therefore, the suit in any event cannot be construed as

a suit for land.

28. Even though arguments have been advanced on behalf of the Respondents with regard to the maintainability of the suit, in view of the bar, under Order II Rule 2, the said contention was rejected even by the learned Judge.

29. This Court taking into consideration the ratio laid down in the above cited decisions and the facts of this case as available through pleadings and the averments made in the application and the counter affidavit, is of the considered opinion that the amendment of plaint sought for by the appellants herein in no way altered the nature and character of the suit. The issue with regard to the belatedness on the part of the appellants/plaintiffs to take out the above said application and lack of bona fide on their part are disputed questions of fact which can be thrashed out only during the course of trial. This Court is also of the view that no prejudice will be caused to the Respondent/defendants in the event of amendment being allowed.

30. In the result, this appeal is allowed and the order dated 4.12.2007 made in Application No. 6627 of 2007 in C.S. No. 110 of 2006 is set aside. However, there will be no order as to costs.

31. The appellants/plaintiffs are directed to carryout necessary amendments in the plaint within a period of two weeks from the date on which the copy of the order is made ready and serve a copy of the amended plaint on the defendants within a period of one week thereafter. The defendants on receipt of the amended copy of the plaint, are at liberty to file additional written statement and put forth their further defence.

32. The findings given/observations made are only for the purpose of disposal of this appeal and this Court has not entered upon the merits of the contentions put forth by the appellants and the Respondents in the suit.