

(2012) 11 MAD CK 0009

In the Madras High Court

Case No : O.S.A. No. 402 of 2012 and M.P. No. 1 of 2012

K.R. Rajeesh Kumar

APPELLANT

Vs

K. Nalini Raghavan, K.R. Reshma Sawini and K.R. Ranjiv
Ragav

RESPONDENT

Date of Decision : 26-11-2012

Acts Referred:

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

Citation : (2013) 1 CTC 297 : (2012) 8 MLJ 824

Hon'ble Judges : R. Banumathi, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : V.M.G. Ramakkannan, for the Appellant; S.R. Raghunathan for RR1 and 2 and Mr. M. Kamalanathan for R3, for the Respondent

Judgement

K.K. Sasidharan, J.—This Original Side Appeal is directed against the order dated 13 September, 2012 in Application No. 3953 of 2012

in C.S. No. 469 of 2008, whereby and whereunder the learned Judge was pleased to dismiss the application filed for including one item of

property to the suit schedule for the purpose of partition.

Facts in nutshell:

The appellant is the son of the first respondent. Respondents 2 and 3 are his sister and brother respectively. The appellant filed a Civil Suit in C.S.

No. 469 of 2008 before the Original Side of this Court praying for passing a preliminary decree, to partition the plaint schedule property into four

shares and to allot one such share to him. The Schedule to the plaint contains only one item of property, which is stated to be a residential house,

where the parties are now residing.

2. The appellant in his plaint in C.S. No. 469 of 2008 contended that the

schedule property was purchased by his father in the name of the first respondent out of his income and as such, the property is deemed to be a joint acquisition. It was the concrete case of the appellant that the first respondent had no independent source of income and as such, she was only a name lender for purchasing the schedule property. The father of the appellant constructed a residential house in the property. The appellant, respondents and their father lived in the said house. Subsequently, his father died and thereafter, differences of opinion arose between the appellant and the third respondent on the one side and respondents 1 and 2 on the other side. This resulted in filing the Civil Suit for partition.

3. The first respondent resisted the suit by filing a detailed written statement. The first respondent contended that the property was purchased out of her own funds and as such it cannot be treated as a joint family property. It was her further contention that the property was settled in the name of the second respondent vide document dated 28 June 2007. The first respondent has also filed a Civil Suit in C.S. No. 1079 of 2009 for the purpose of partitioning the other items of property left by her husband, who is none other than the father of the appellant.

4. The second respondent filed a separate written statement contending that the property was settled in her favour by her mother. It was her further contention that the appellant, third respondent and their spouses created problems in the residential house which resulted in filing a Civil Suit in C.S. No. 847 of 2009 praying for a decree of recovery of possession and injunction.

5. The suits in C.S. Nos. 469 of 2008 and 847 of 2009 were taken up together by way of joint trial. The appellant made an attempt to mark the Will executed by his father as a document on his side. The same was objected to by respondents 1 and 2 presumably on the ground that the Will was not probated. During the course of evidence, the appellant was made to believe that respondents 1 and 2 disputed the stipulations contained in the Will and as such, the property covered by the Will is also to be included as an item for partition.

6. The appellant originally filed an application to amend the plaint. The Registry appears to have returned the amendment application on the ground that the property which was sought to be included in the schedule is situated outside the jurisdiction of the High Court and as such leave should be

taken. Thereafter, the appellant filed interlocutory application in A. No. 3953 of 2012 for the purpose of including the Ambattur Estate property as an additional item in suit schedule in C.S. No. 469 of 2008.

7. The first respondent in her counter affidavit contended that she has already filed a Civil Suit in C.S. No. 1079 of 2009 for partitioning the available properties, which includes the Ambattur Estate property and the very same property is now sought to be included as an additional item for partition. The first respondent opposed the prayer for inclusion primarily on the ground that the suit in C.S. No. 469 of 2008 involves certain triable issues relating to benami transaction and the proposed second schedule property which stood in the name of her husband does not involve any such question.

8. The learned Single Judge found that the written statement was filed long ago and the suit was tried along with the connected suit in C.S. No. 847 of 2009. The parties have gone to the box and it was only thereafter, to delay the matter, the appellant has approached the Court to include one more item to the suit schedule. The learned Judge without going into the merits of the contention as to whether the said property is also available for partition, dismissed the application solely on the ground of delay. Feeling aggrieved, the appellant is before us.

Submissions:

9. The learned counsel for the appellant contended that originally, Ambattur Estate property was not included as an item of property available for partition on account of the Will executed by the father of the appellant. It was only during the course of recording evidence, respondents 1 and 2 contested the Will and claimed certain right in respect of Ambattur Estate property. This made the appellant to file an application for inclusion of Ambattur Estate property as an item available for partition. According to the learned counsel, inclusion of one additional item of property in the plaint schedule, would not change the character of the suit. Similarly, would not consume any additional time for disposal and as such, the learned Single Judge erred in rejecting the application.

10. The learned counsel for respondents 1 and 2 supported the order passed by the learned Single Judge. According to the learned counsel, the suit in C.S. No. 469 of 2008 proceeds as if the father of the appellant purchased

the property in the name of the first respondent and constructed a residential house. The issue raised by the appellant has to be decided taking into account the provisions of the The Benami Transactions (Prohibition) Act, 1988. However, the parties have no dispute with respect to the Ambattur Estate Property. In fact the first respondent has already filed a suit in C.S. No. 1079 of 2009 for partitioning the available properties, which includes, the Ambattur Estate property. The learned counsel vehemently contended that the intention of the appellant is very clear that he want to protract the matter taking into account the advanced age of the first respondent. It was his further contention that respondents 1 and 2 have no objection for partitioning Ambattrur Estate property and as such, there was no requirement to add the said item in the schedule to the suit in C.S. No. 469 of 2008.

11. The learned counsel for the third respondent supported the case of the appellant. According to the learned counsel, no prejudice would be caused to respondents 1 and 2 by including Ambattur Estate Property as an item in the pending suit.

Factual Analysis:

12. The appellant filed a suit in C.S. No. 469 of 2008 praying for a preliminary decree of partition of the residential property situated at South Beach Avenue, M.R.C. Nagar, Chennai-600 028. According to the appellant, the property was purchased by his father out of his funds in the name of the first respondent and as such, all the legal heirs are having equal right. The father of the appellant was doing business in printing ink. He had his manufacturing unit at Ambattur Industrial Estate. The father executed a Will bequeathing the movable and immovable properties to his wife and three children. The Will covers Ambattur Estate property also.

13. The appellant claimed one fourth right in the residential property at M.R.C. Nagar. Since the first respondent has already settled the said property in favour of the second respondent, they were not in favour of partition. This resulted in filing a Civil Suit by the appellant for partition in C.S. No. 469 of 2008. Though a Will was executed by his father with respect to Ambattur Estate property, the said property was not included in the schedule to the suit in C.S. No. 469 of 2008. It is also a matter of record that the first respondent has subsequently filed a suit in C.S. No.

1079 of 2009 seeking partition of Ambattur Estate property besides other reliefs, which includes payment of money and a prayer for injunction.

14. The second respondent after the receipt of summons in C.S. No. 469 of 2008 filed a suit in C.S. No. 847 of 2009 against the appellant, third

respondent and their spouses praying for a decree of recovery of possession and injunction. Both the suits in O.S. No. 469 of 2008 and 847 of

2009 were ordered to be taken up for joint trial. It is also a matter of record that the trial commenced and evidence were recorded. It was only at

that point of time, the appellant has filed the interlocutory application for inclusion of Ambattur Estate property as an item available for partition

among the parties. The delay in preferring the said application was explained by the appellant. According to the appellant though the first

respondent is the executor of the Will dated 13 February 1986 and in possession of the original registered Will, she failed to take steps to probate

the same. Hence, the appellant filed application in O.A. No. 1608 of 2011 seeking permission to mark the said Will as a document on his side in

C.S. No. 469 of 2008 and by order dated 16 March 2011, the said application was dismissed. Therefore, the appellant was constrained to file

application to amend the plaint seeking partition of his one-fourth share in the property left by his father and situated at G-3 Industrial Estate,

Ambattur. It was the further case of the appellant that initially, he filed an application before the Registry with a request to amend the plaint and to

include the subject property in the schedule. The Registry returned the said application under the pretext that the property is situated beyond the

original jurisdiction and as such it could not be added as an item in the suit schedule. It was only thereafter, Application No. 3953 of 2012 was

filed.

15. The learned Judge dismissed the application primarily on the ground that it was a belated one. The learned Judge, while dismissing the

application observed that Ambattur Estate property is the subject matter of another suit in C.S. No. 1079 of 2009 and as such, the appellant

would not be put to prejudice.

16. The core issue is whether the learned Single Judge was correct in dismissing the application solely on the ground of delay, not withstanding the

fact that the contesting respondents have no objection for partitioning the said

property.

17. There is no dispute that Ambattur Estate property, which is sought to be included as an item, was acquired by the father of the appellant,

respondents 2 and 3 and husband of the first respondent. The father of the appellant appears to have executed a Will bequeathing the said

property to the appellant and the respondents. Since there was no dispute with respect to partition of the said property, it was not included in the

suit in C.S. No. 469 of 2008. It is also a matter of record that the very same property was included as an item in C.S. No. 1079 of 2009.

Therefore, the parties are unanimous in their contention that Ambattur Estate property is available for partition and the appellant and the

respondents are having one fourth share each.

18. It is a settled legal position that all the properties available for partition should be included in the Civil Suit, as otherwise, the suit is liable to be

rejected for partial partition. Even though Ambattur Estate property was available for partition, the appellant has not included the said item in the

suit in C.S. No. 469 of 2008. The Will executed by the father of the appellant contains certain stipulations with respect to partition. The appellant

wanted the said Will to be marked as an exhibit on his side. The same was opposed by respondents 1 and 2 on the ground that it was not

probated. It was only at that point of time, the appellant filed an application to amend the schedule and to include Ambattur Estate property as

Schedule II to the plaint. The first respondent in her counter affidavit in A. No. 3953 of 2012 conceded that the Ambattur Estate property is a joint

family property and as such the parties are entitled to equal share.

The precedent:

19. The Supreme Court in *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*, underlined the factors to be taken into

consideration while dealing with applications for amendments.

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while

allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) 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.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

20. The Supreme Court in *Rameshkumar Agarwal Vs. Rajmala Exports Pvt. Ltd. and Others*, considered the scope of amendment of pleadings

before and after the commencement of trial and by following *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*,

reiterated the legal position that Court should not adopt hyper-technical approach in the matter of amendment of pleadings. The Supreme Court said:

21. It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary

amendments. The purpose and object of Order 6 Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and

on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such

prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule, particularly in cases where the other side can

be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

21. The issue, therefore, is whether the application for inclusion of the property, should be rejected, when there is no objection for partitioning the

said property.

22. It is true that the first respondent has included the said property in C.S. No. 1079 of 2009. Merely because the subsequent suit filed by the

first respondent contains Ambattur Estate property as an item available for partition, it cannot be said that there is no need to include the said item

in the Civil Suit filed by the appellant in C.S. No. 469 of 2008. In fact, it was only the appellant, who has filed the suit earlier for partition. The

learned counsel for respondents 1 and 2 during the course of his arguments submitted that the mother and sister of the appellant have no objection

for partitioning the Ambattur Estate property. In case, they have no objection for partitioning the property, they should have conceded for including

the property in the schedule, so as to decide the issue at the earliest point of time. The first respondent has no case that there was a joint trial

ordered by the Court to try her suit in C.S. No. 1079 of 2009 along with the other two suits filed by the appellant and the second respondent.

Admittedly, the property available for partition without any dispute was not included in the suit filed by the appellant. The appellant, therefore, was

perfectly correct in filing the application for inclusion of the said item. The suit was filed on 11 April 2008. The recording of evidence commenced

on 9 February 2011. The appellant has filed the application during the time of recording evidence. As pointed out earlier, the appellant was

pursuing the application in O.A. No. 1608 of 2011 seeking to mark the Will and the said application was dismissed on 16 March 2011 and it was

only thereafter, the amendment application was filed. Therefore, it cannot be said that the application was highly belated. Since the parties had a

common case that Ambattur Estate Property is available for partition, the reason that the inclusion would delay the trial of the suits would be of no

ground to reject the prayer for amendment of plaint schedule.

23. The learned counsel for respondents 1 and 2 contended that the issues to be tried in C.S. No. 469 of 2008 are entirely different and as such,

there is no necessity to include the Ambattur Estate property as an item in the said suit. We are not inclined to accept the said submission for more

than one reason.

24. The first respondent has already filed a suit in C.S. No. 1079 of 2009 for partitioning Ambattur Estate property. By filing the application No.

3953 of 2012 the appellant has also conceded that the said item is available for partition. In view of the above a decree on admission could be

passed with respect to Ambattur Estate property in the suit filed by the appellant

in C.S. No. 469 of 2008. No contentious issue required to be decided for partitioning the property, which is sought to be included by way of this application in the schedule to C.S. No. 469 of 2008.

Therefore, it is in the interest of all the parties, to include the Additional item and to pass a decree in respect of Ambattur Estate property at the earliest. We are, therefore, of the view that the appellant has made out a case for amending the schedule.

Conclusion:

25. In the result, the order and decretal order dated 13 September 2012 in Application No. 3953 of 2012 are set aside. Consequently, Application No. 3953 of 2012 is allowed. In the upshot, we allow the Original Side Appeal. Consequently, the connected MP is closed. No costs.