
(2007) 01 MAD CK 0135

In the Madras High Court

Case No : CRP (PD) No. 39 of 2007 and M.P. No. 1 of 2006

KTA Raja Chettiar and K. Pandian

APPELLANT

Vs

Smt. Rajamani and Others

RESPONDENT

Date of Decision : 25-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Limitation Act, 1963 — Article 21
Specific Relief Act, 1963 — Section 22
Transfer of Property Act, 1882 — Section 22(2)

Citation : (2007) 01 MAD CK 0135

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant;

Final Decision : Dismissed

Judgement

S. Ashok Kumar, J.—This revision has been preferred by the plaintiffs, as against the dismissal of the I.A., filed by them to amend the Plaint to include the alternative relief of recovery of advance money paid by them to the defendants.

2. According to the revision petitioners/plaintiffs, they filed the suit for specific performance of the contract based on sale agreement dated 7.10.1989 between them and the defendants' father one Dhanapal. As per the sale agreement, the petitioner should convert the suit property into house sites after planning survey stones and boundary stones in and around sites after drawing the layout and plan of the suit property and in that event, the deceased Dhanapal had agreed to execute the sale deed either in their name or in the name of the prospective purchasers of the sites in the suit property. But the deceased Dhanapal avoided and evaded to receive the balance of sale consideration and they never permitted to measure the land for the purpose of obtaining the approval of the lay out and he never took steps to remove the encroachments adjacent to the suit property. Due to this the plaintiffs could not offer the sites to the third parties. After the

demise of the said Dhanapal, though the defendants requested the plaintiffs to wait for some time, they also did not honour the sale agreement and did not remove the illegal encroachments. Though the plaintiffs were always ready and willing to perform their part of the contract the defendants did not cooperate and hence they filed the suit for specific performance of the contract of sale. But due to inadvertence and oversight they have not claimed the alternative relief for refund of the advance amount with interest from the date of Plaint. If the defendants did not have any title to execute the sale deed in respect of the suit property, the plaintiffs are entitled to claim an alternative relief of refund of advance amount with accrued interest if any and unless the relief is included by way of amendment to the plaint, they will be put to loss and hardship.

3. But the defendants resisted the said application contending that the suit agreement itself is a fabricated one and the plaintiffs have remained quiet for nearly 14 years and only during 2003 they come forward with the present suit. No amount was received as advance and repudiation of notice claim by reply letter dated 6.1.2002 was made even during the life time of Dhanapal. From such refusal by Dhanapal several years have lapsed and the suit itself is barred by limitation and consequently, the proposed amendment after is period of limitation is not sustainable as the same is directly hit by Article 21 of the Limitation Act.

4. Before the learned Subordinate Judge, Vellore several decisions of various High Courts and Supreme Court were cited to the effect that amendment could be made at any stage of the proceedings irrespective of the bar of limitation, however, by distinguishing all the citations, the learned Trial Judge dismissed the said application. Aggrieved over the same, the present revision has been preferred by the plaintiffs.

5. In the present case the only point that has to be decided is whether the amendment sought for can be granted irrespective of the fact that the same is hit by limitation.

6. In this respect Mr.V.Raghavachari, Learned Counsel appearing for the revision petitioners/plaintiffs referred to Section 22 of the Specific Relief Act, which reads as follows:

22. POWER TO GRANT RELIEF FOR POSSESSION, PARTITION, REFUND OF EARNEST MONEY, ETC.-

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) Possession, or partition and separate possession of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any

earnest money or deposit paid or made by him in case his claim for specific performance is refused.

(2) No relief under Clause (a) or Clause (b) of subs Section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the Plaint, the court shall at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

7. According to the learned Counsel a bare perusal of this section itself would show that an application for amendment can be filed at any stage of the proceedings and the principles of CPC are not a bar on the power of the court. In support of his contention, the learned Counsel relied on decision of the Apex Court in Babu Lal Vs. Hazari Lal Kishori Lal and Others, wherein their Lordships have held as follows:

12. The Section enacts that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for possession, or for partition or for separate possession including the relief of specific performance. These reliefs he can claim, notwithstanding anything contained in the Code of Civil Procedure, 1908, to the contrary. Sub section (2) of this Section, however, specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claimed by the plaintiff in the suit. Sub Sec(2) of the Section recognised in clear terms the well established rule of procedure that the court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally entitled to. The proviso to this Sub section (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the court shall permit the plaintiff at any stage of the proceedings to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of his newly enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications....

17. The term "proceedings" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word proceedings in Section 22 includes execution proceedings also. It is a term giving the widest freedom to a court of law so that it may do justice to the parties in the case. Execution is a stage in the legal proceedings. It is a step in the judicial process. It marks a stage in litigation. It is a step in the ladder. In the journey of litigation there are various stages. One of them is execution. The Legislature has given ample power to the court to allow amendment of the plaint at any stage, including the execution proceedings.

8. According to the learned Counsel, the Apex Court in the above decision laid down that such amendment can be allowed even at the stage of execution and in the present case the trial is yet to start and the amendment can very well be allowed. According to the learned Counsel the above decision has been followed by several High Courts including this Court in (1) AIR 1983 ALL 343 (2) 1993 (1) LW 219 and (3) 1989 (2) LW (2)529.

9. According to the learned Counsel for the revision petitioners Section 22 of the T.P.Act starts with a non obstante clause, namely "Notwithstanding anything contained to the contrary in the Code of Civil Procedure", which impliedly means that the rules which normally govern an application under Order 6 Rule 17 do not apply to this Section.

10. Learned Counsel for the revision petitioners also relied upon the judgment in Pankaja and Another Vs. Yellappa (D) by Lrs. and Others, , wherein their Lordships of the Apex Court directly answered the issue of applicability of limitation and in that it has been held as follows:

13. But the question for our consideration is whether in cases where the delay has extinguished the right of the party by virtue of expiry of the period of limitation prescribed in law, can the court in the exercise of its discretion take away the right accrued to another party by allowing such belated amendments?

14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised in a judicious evaluation of the facts and circumstances in which amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings....

11. Learned Counsel for the revision petitioners also contended that even if Order 6 Rule 17 is applied still the application should have been allowed because it does not change the cause of action or does it affect the right of the other party and in fact the defendants can always be compensated by ordering costs.

12. However, a perusal of Sub section (2) of Section 22 of the Transfer of Property Act specifically debars grant of any reliefs as enumerated in Clauses (a) and (b) of Sub section (1) to be claimed unless the same has been specifically claimed in the plaint itself. The present claim of refund of advance amount would within the ambit of Clause (b). But, it is true that in the proviso it is provided that where the plaintiff has not claimed any such relief in the Plaint, the court shall at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief. Even accepting the contention of the learned Counsel for the revision petitioners that Section 22 of the T.P.Act starts with a non obstante clause, namely "Notwithstanding anything

contained to the contrary in the Code of Civil Procedure", which impliedly means that the rules which normally govern an application under Order 6 Rule 17 do not apply to this Section, Section 22 of the Transfer of Property does not exclude the applicability of the Limitation Act.

13. In the decision of the Apex Court in Babu Lal v. Hazari Lal Kishori Lal, cited supra, by the learned Counsel while dealing with Sub section (2) of Section 22 of the Transfer of Property Act, it has been laid down that "the proviso to this Sub section (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the court shall permit the plaintiff at any stage of the proceedings to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of his newly enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications". In the said decision the Apex Court allowed the amendment to be carried out in the stage of execution proceedings since according to their Lordships, there had been a protracted litigation and it was dragged on practically for about 13 years and it will be really a travesty of justice to ask the decree holders to file a separate suit for possession and the objection of the other side is on hyper technical. Thus in the above said case such amendment was permitted considering the difficulty of the decree holders in filing a fresh suit for the relief asked for by way of amendment after getting a decree after a lapse of 13 years legal battle. But, in the present case only written statement has been filed and the trial is yet to commence. Therefore, factually the above said decision is distinguishable and cannot be followed.

14. Though the above said decision does not directly dealt with the limitation aspect, in the later decision in Ragu Thilak D. John v. S. Rayappan and Ors. reported in 2001 (2) SCC 472 the Supreme Court held thus:

The amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimize 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.

15. The above decision has been followed in various decisions by various courts and amendments are being permitted with a condition to frame necessary issue in the suit to be tried by adducing evidence at the time of trial. But, in the present case even such a conditional relief is not necessary because the relief claimed is definitely barred by limitation. According to the defendants in the reply dated 6.1.2002 itself they have denied the execution of sale agreement and receipt of advance amount and only after a lapse of 4 years the application has been filed. According to the defendants the alleged sale agreement itself is a fabricated one and the plaintiffs were in deep slumber till 2002 and they did not come forward to file a suit till that date and only after the demise of Dhanapal, the defendants' father with whom they entered into such a sale agreement, filed

the suit after a lapse of 13 years. Thus a valuable right has accrued to the defendants which cannot be taken away by granting the amendment sought for. In *P. Ganeshammal, A.P. Velusamy, E. Rukmani, V. Gomathi and P. Manigandan Vs. M. Jeganathan, S. Duraisamy, A. Selvaraj, V. Thangavel and M. Yogabalakrishnan*, this Court held that amendments which is necessary and effective adjudication of contrary between the parties can be allowed even though it is time barred, but if it is taking away the right valuable right accrued to the other side, such amendment can be rejected.

16. Moreover, the plaintiffs have to blame for themselves since they have not established that such mistake or omission has taken place inspite of due diligence. The payment of advance amount is well known to them even at the time of filing of the suit. Yet, they failed to make any claim in that regard. In that circumstance, the plaintiffs cannot be permitted to file the amendment application as has been held in the decision of this Court reported in *Ramesh Ramanujam (for himself and representing: Subramanian and Others) Vs. Varadammal and Others*, Though the amendment sought for does not alter the nature and character of the suit which can be generally allowed since the same will not cause prejudice to the other side, in the present case the defendants will be greatly prejudiced since by virtue of limitation a valuable right or defence has accrued to them which cannot be taken away even by imposing heavy costs. The plea of subsequent events after filing of the suit for allowing the amendment cannot also be raised by the plaintiffs since the alleged payment of advance amount relates backs to 14 years.

17. Even in the later judgment of the Apex Court in *Pankaja and Another Vs. Yellappa (D) by Lrs. and Others*, , which has been relied upon by the learned Counsel for the revision petitioners, the Hon''ble Supreme Court only reiterated that discretion in such cases depends on the facts and circumstances of the case and the jurisdiction to allow or not to allow an amendment being discretionary the same will have be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought for and there can be no straight jacket formula for allowing or disallowing an amendment of pleadings.

18. Thus on an analysis of the case laws cited by the learned Counsel for the revision petitioners before the learned Trial Judge as well as before this Court, it is clear that consideration of the application filed for amending the prayer in the Plaint is a discretionary exercise of the court and the Court has to weigh the prejudice that would cause to the other side and in the present case when the amendment sought for is clearly barred by limitation, even allowing the amendment application on terms and with a liberty to the other side to raise the issue of limitation at the time of trial will not serve any purpose, since the alleged payment of advance is paid in the year 1989. Therefore for these reasons, the CRP is dismissed.

19. Consequently, connected Miscellaneous Petition is also dismissed.