

(2016) 01 KAR CK 0320

In the Karnataka High Court

Case No : Writ Petition No. 35091/2015 (GM-CPC)

K.V. Shiva Kumar

APPELLANT

Vs

Ayesha Moosa and Others

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 10(2)

Citation : (2016) 01 KAR CK 0320

Hon'ble Judges : Budihal R.B., J.

Bench : Single Bench

Advocate : V.B. Shiva Kumar, Advocate, for the Appellant; Kum Mubarak Begum, Advocate for R. Kotwal, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Budihal R.B., J.—1. Heard the arguments of learned counsel for the petitioner-proposed applicant so also heard the arguments of learned advocates appearing for respondent Nos. 1 and 2, 4 and 5.

2. This writ petition is filed by the proposed applicant challenging order dated 12.8.2015 passed on I.A No. 29 in O.S. No. 9254/2007 by the City Civil Judge-65, Bengaluru produced as per Annexure-A. In the said suit, the proposed applicant-petitioner herein filed an application under Order XXII Rule 10(2) read with Order I Rule 10 of CPC requesting the Court that he is to be impleaded in the said suit. The same was objected by the other side. The trial Court has, considering the merits of the application, rejected the said application by imposing the cost of Rs. 1,00,000/-. Being aggrieved by the said order of the trial Court, the petitioner-proposed applicant is before this Court in this petition.

3. Learned counsel for the petitioner-proposed applicant during the course of the arguments made submission that earlier, the original owner, who filed the suit for injunction, had executed a power of attorney in favour of the petitioner and on that basis, he represented the original plaintiff in the suit. After the death of the

original plaintiff, his legal representatives were brought on record. So when the legal representatives of the original plaintiff were brought on record, the applicant-the petitioner herein continued to represent the said suit and he was claiming that even the legal representatives of the original plaintiff also had executed the power of attorney in his favour. The learned counsel submitted that subsequently the petitioner filed an application to reopen the case and to permit him to adduce further evidence in the matter. As the said application was allowed by the trial Court, the other side preferred writ petition being aggrieved by the said order of the trial Court. This Court while allowing the writ petition set aside the order passed by the trial Court allowing the three applications i.e., I.A. Nos. 24 to 26 filed therein. The learned counsel submitted that this Court, in the earlier writ petition, when called for the original records, noticed that no copy of the power of attorney was found in the said file. Therefore, accepting the contentions of respondent No. 5, ultimately allowed the said writ petition and the order of allowing the applications passed by the trial Court was set aside. The learned counsel submitted that the present application filed seeking impleadment in the said suit is rejected mainly because of the order passed by this Court in the earlier writ proceeding. The order of this Court passed earlier in the writ proceeding is totally unconnected with the present application. In the present application, the applicant wanted to come on record not basing on any power of attorney but basing his claim under the agreement of exchange. In this connection, the learned Counsel drew the attention of this Court to the agreement of exchange wherein the original plaintiff and his legal representatives are the parties so also the petitioner-applicant was the party to the said agreement. Therefore, it is the contention of the learned counsel for the petitioner herein that on the basis of the said agreement, the petitioner wanted to come on record in the said suit only for the limited purpose as the suit was also in respect of the same property. But the said application has been wrongly rejected by the trial Court. It is also the submission of the learned counsel that so far as the agreement of exchange is concerned, it is not denied by the other side. The learned counsel draws the attention of this Court to legal notice issued on behalf of the petitioner to the legal representatives of the original plaintiff and the reply sent by them to the said notice wherein there is an admission with regard to the exchange agreement. Hence, he submitted that in view of these materials placed on record, the trial Court ought to have allowed the application, but instead of that, it has rejected the application that too by imposing cost of Rs. 1,00,000/- and the said order is illegal and it is not sustainable in law.

4. Per contra, learned counsel for respondent Nos. 1 and 2-plaintiffs, who are the legal representatives of the original plaintiff, during the course of arguments made submission that the suit was for bare injunction. The respondents plaintiffs never executed power of attorney in favour of the proposed applicant and even subsequently, they moved an application before the trial Court for termination of the vakalath given to the advocate who represented the plaintiffs in the said suit. Hence, the learned counsel submitted that the legal representatives of the

original plaintiff never admitted that they had executed any power of attorney in favour of the petitioner-proposed applicant. Even if there is an agreement of exchange, no right, title or interest is going to create in favour of the applicant by mere agreement of exchange and looking to the terms and conditions of the said agreement of exchange, there is a clause that subsequently, the registered deed of exchange is to be executed between the parties and at that time, the possession of the properties are also to be handed over. The learned Counsel submitted that though no exchange registered deed has been entered into between the parties, the applicant has made false averments in the affidavit supporting application that there is an exchange deed in his favour. It is also the contention of the learned counsel that even if it is assumed that there is an agreement of exchange for the specific purpose, the petitioner has to bring a separate suit for specific performance. Though agreement is of the year 2008, till now he has not filed such suit seeking specific performance. Therefore, looking to the facts and circumstances involved in the case and the order passed by the trial Court on the impleading application rejecting the same by assigning cogent reasons, the said order is legal and valid and does not call for interference by this Court.

5. Learned counsel appearing for respondent No. 5 made submission that in the suit for permanent injunction filed by the plaintiffs, the proposed applicant cannot come on record because his grievance is that under the exchange deed, he becomes the owner of the property. If that is his contention, the petitioner has to bring a separate suit for specific performance and his relief cannot be granted in the bare suit for permanent injunction. The learned counsel submitted that when the petitioner was representing the plaintiffs as a power of attorney holder, all along, he contended that it is the original plaintiff who was the owner of the suit schedule property and after the demise of the original plaintiff, his legal representatives are in possession of the suit schedule property. But when he filed an application under Order I Rule 10 seeking impleadment in the said suit, he took up a strange contention for the first time that under the exchange agreement, he is in possession and enjoyment of the suit schedule property. Hence, this averment which was not at all contended during the pendency of the suit and contended only when the application was filed by the applicant, cannot be accepted. The learned counsel submitted that when evidence of both side was closed, arguments on the plaintiffs side was closed, the defendants' arguments was also completed, belatedly, at that stage, the applicant came up with the present application for impleading. The trial Court considering all these aspects of the matter has rightly rejected the application filed by the applicant. Therefore, the writ petition may be rejected.

6. Learned counsel appearing on behalf of respondent No. 4 made submission that the averments made in the affidavit supporting the application for impleading are all false. Though it is contended by the applicant that there is an exchange deed, in fact, no such deed has been produced before this Court and it is only an agreement of exchange. Hence, he submitted that there is no merit in

the writ petition and same is to be rejected.

7. I have perused the grounds urged in the writ petition, the application filed by the applicant under Order XXII Rule 10(2) read with Order I Rule 10 of CPC, objection statement filed to the said application, the document agreement of exchange produced as per Annexure-F and relied upon by the applicant-petitioner herein so also I have perused the impugned order passed by the trial Court rejecting the application.

8. Perusing the materials placed on record, looking to the agreement of exchange at Annexure-F, it is no doubt true that there is such an agreement and the original plaintiff K. Mohammed Moosa and his legal representatives have been shown at Sl. Nos. 1 to 4 in the said agreement as the first party and the petitioner herein, who is the proposed applicant, is shown as the second party. With regard to the nature of this document, at point IV (1), it is mentioned as time for completion of exchange. At Sl. No. 1.1 of point IV (1), it is stated that the exchange shall be completed within three years from this date by a registered exchange deed and within the said period, the first parties herein shall obtain and furnish the following original/certified copies of the documents in respect of schedule "A" property. At Sl. No. 2.4 of point IV (2), it is also stated in the said agreement of exchange that each of the parties hereto shall hand over the vacant possession of their respective schedule properties to the other on the date of registration of Deed of Exchange. This averment in the said agreement of exchange clearly goes to show that the said document entered into was only an agreement and not the exchange deed.

9. I have perused the affidavit supporting the application filed by the petitioner-proposed applicant. As it is rightly contended by the learned counsel for the petitioner that in the affidavit, there is an exchange deed in favour of the petitioner under which the petitioner is having a right in respect of the said property, which contention is patently false and no such exchange deed was produced before the Court. It is no doubt true that when the legal notice was issued on behalf of the petitioner to respondents-plaintiffs, in the reply, the plaintiffs have contended that the agreement of exchange is a nominal one. When that is the case and when there is a clear clause in the said agreement that within three years, deed of exchange is to be executed between the parties and possession of the property is also to be handed over, on the basis of the present agreement and exchange, the applicant wanted to come on record. As it is rightly submitted by learned counsel for the respondents, the suit is for bare injunction. But for the documents relied upon by the proposed applicant for specific enforcement of the said agreement, he has to bring a separate suit for specific performance and this aspect has been rightly observed by the trial Court in its order that the petitioner can bring independent suit for specific enforcement of the agreement of exchange.

10. So far as the affidavit supporting application is concerned, looking to the earlier order passed by this Court in the writ proceedings, prima facie, makes it

clear that the present plaintiffs have not executed power of attorney in favour of the applicant requesting him to represent them in the suit.

11. Considering all these aspects of the matter, I am of the opinion that the trial Court has extensively considered this aspect of the matter and has rightly come to the conclusion that the applicant cannot be permitted to be come on record. The trial Court has held that even in the absence of the petitioner, the suit can be disposed of and he is not necessary party to the said suit. I do not find any illegality in the order passed by the trial Court. There are no valid and justifiable grounds to interfere with the said order of the trial Court. The matter does not call for interference by this Court. The writ petition is accordingly dismissed.

12. Since the suit is of the year 2007, the trial Court is directed to take up the matter on priority basis and dispose of the same, as early as possible, in accordance with law and without being influenced by the observations made by this Court in this order.

13. In view of dismissal of the writ petition, I.A. Nos. 1/2015 and 2/2015 do not survive for consideration. They are disposed off accordingly.