

(2011) 06 GUJ CK 0053
In the Gujarat High Court

Case No : Letters Patent Appeal No. 2193 of 2010 In Special Civil Application
No. 11627 of 2008

Liliben Through Power of Attorney and Others

APPELLANT

Vs

Ramilaben Patel

RESPONDENT

Date of Decision : 15-06-2011

Acts Referred:

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

Citation : (2012) 2 GLH 308

Hon'ble Judges : S.J. Mukhopadhaya, C.J.;J.B. Pardiwala, J

Bench : Division Bench

Advocate : Devang T. Shah For appearance, Mr. P.R. Nanavati, Mr. P.R. Marshall,
With Mr. A.J. Shastri, for the Appellant;

Final Decision : Dismissed

Judgement

Mr. J.B. Pardiwala, J.—The appellants have preferred this Appeal under clause 15 of the Letters Patent challenging the judgment and order dated 23rd August 2010 passed by the learned Single Judge in Special Civil Application No. 11627/2008, whereby the learned Single Judge rejected the petition. Brief facts relevant for the purpose of deciding this Appeal can be summarised as under :-

(1) Appellants are the original petitioners (original plaintiffs) of Regular Civil Suit No. 184/2003 filed in the Court of 10th Civil Judge (S.D.), Surat. The suit has been preferred for declaration and permanent injunction.

(2) In the said Suit, the appellants preferred application Exh.41 for amendment of the plaint, by which a declaration was sought from the Civil Court to quash and set-aside the sale deed dated 21st July 1993 and further declaration to treat the said sale deed as null and void being illegal.

(3) It appears that the said application Exh.41 was partly allowed by the learned Civil Judge. While partly allowing the amendment, the relief as prayed for in clause 1(A) was rejected. The part of the amendment which the trial Court

refused was on the ground that the suit was filed for declaration and permanent injunction, while the amendment at a later stage was with regard to a challenge to the legality and validity of the sale deed dated 21st July 1993. In the opinion of the learned Civil Judge, if such amendment is permitted and if the plaintiffs at a later stage are allowed to challenge the sale deed dated 21st July 1993, then it would change the entire nature of the suit. The Civil Judge was also prima facie of the view that the challenge to the sale deed was time-barred inasmuch as the application for amendment was preferred in the year 2006. Accordingly, the learned Civil Judge thought fit to reject the application Exh.41 in part.

(4) Aggrieved by the said order passed by the learned Civil Judge, the appellants (original plaintiffs) preferred Special Civil Application No. 11627/2008. The learned Single Judge, while rejecting the petition, came to the conclusion that the order passed by the Civil Judge was just and proper and no error much less an error of law was committed by the learned Civil Judge in passing the order below application Exh.41. In taking this view, the learned Single Judge noticed the following aspects :-

(a) In the opinion of the learned Single Judge, the amendment application preferred by the appellants (original plaintiffs) to replace paragraph 2 of the plaint would not only affect the entire nature of the suit but also the cause of action and certain admitted pleadings.

(b) The learned Single Judge also noticed that prima facie on the face of the record the challenge to the sale deed was time-barred. The sale deed was executed on 21st July 1993. On 17th May 2003 when the suit was preferred, there was no challenge to this particular sale deed and the same came to be challenged only by way of amendment application preferred on 11th June 2006.

(c) In the opinion of the learned Single Judge the sale deed ought to have been challenged within a period of three years, which has expired admittedly on the date of filing of application for amendment,

(d) Learned Single Judge also took notice of the fact that the appellants (original plaintiffs) have not acted with due diligence. At the time of filing the suit the appellants had produced one document Exh.3/1, which is a 7/12 extract of revenue record which reveals mutation entry No. 774 regarding the transaction of the sale deed dated 21st July 1993. This is atleast evident of the fact that when the suit was preferred the appellants (original plaintiffs) were within the knowledge of the sale deed, which they proposed to challenge after a period of three years from the date of filing of the suit.

(e) Learned Single Judge also took notice of the fact that the appellants (original plaintiffs) were also aware about the notice u/s 135(D) of the Bombay Land Revenue Code produced at Exh.3/8. This notice was also within the knowledge of the appellants (original plaintiffs) when the suit was filed.

(5) It would be expedient to quote two paragraphs of the impugned judgment to

show as to why the learned Single Judge thought fit to dismiss the petition. Paragraphs 10 and 10.1 read as under :-

10. Having heard learned Advocates appearing of the parties and considering the facts and circumstances of the case and law laid down by the Apex Court in the decision relied on by the learned Advocates, I do not find any merit in the submissions made by learned Counsels for the petitioners on the ground that the amendment application preferred by the plaintiffs to replace para 2 of the plaint would certainly not only change nature of the suit but also cause of action and certain admitted pleadings could not have been permitted and rightly so by the trial Court which would have bearing on the title, ownership and possessory rights of the parties. The trial Court has also considered certain documentary evidence prima facie to show that all reference to revenue entries No. 774 and a notice u/s 135 D of Bombay Land Revenue Code issued by Talaticum-Mantri of the village Bhimrad, the plaintiffs were in know of the fact about the sale deed dated 21.7.2003 and in spite of the fact, no pleadings were made to assail the said sale deed but after three years of filing the suit by changing the pleadings about sole ownership and proprietorship, right of the deceased Gabubhai Narsinhbhai, a sale deed was sought to be quashed and set aside. If the above amendment is accepted it would change cause of action and acceptance of amendment to relief clause will come in way of defence of the defendant.

10.1. That purpose of an amendment under Order VI Rule 17 permitting the parties to amend the plaint is no doubt to avoid multiplicity of proceedings but powers cannot be exercised by the trial Court so as to add and assist, indolent and negligent litigant, so as to defeat the very purpose of the order. As early as on 2005, this Court had directed the trial Court to dispose of the suit as expeditiously as possible but due to pendency of amendment application, the trial Court could not dispose of the suit. That application for amendment on the face of it, appears to be an attempt on the part of the plaintiffs to create and introduce new pleadings, new cause of action and relief clause, cannot be permitted and rejection of such an amendment by the trial Court cannot be said to be illegal exercise of powers by the trial Court.

2. We have heard learned senior Counsel Mr. R.R. Marshall appearing with Mr. A.J. Shashtri for the appellants.

3. Learned Counsel for the appellants would submit that the learned Single Judge has committed serious error of law in dismissing the petition and not permitting the appellants (original plaintiffs) to amend the plaint and permit them to challenge the sale deed.

4. It was further submitted that the original prayers in the Civil Suit are for declaration of the ownership of the appellants (original plaintiffs) so far as the disputed land is concerned and the other relevant ancillary reliefs are for restraining the respondents (original defendants) from disturbing the possession of the appellants of the land in question. By virtue of amendment, the appellants

want to add prayer, seeking challenge to the so-called illegal and bogus sale deed dated 21st July 1993, the land being ancestral property and the amendment application is related to the very piece of land, for which the dispute is pending between the parties.

5. It is also submitted that while rejecting the amendment application, the Court below has recorded certain findings, which are final in nature, as a result of which even a fresh suit, if initiated, would be barred by the principle of res judicata.

6. Strong reliance has been placed on the judgment of the Apex Court in the case of Pankaja and Another Vs. Yellappa (D) by Lrs. and Others, . This judgment has been relied upon to canvass the proposition of law that there is no absolute rule that in every case where a relief is barred because of limitation, an amendment should not be allowed. Relying upon the aforesaid judgment, it is submitted that jurisdiction to allow or not to allow the amendment being discretionary, the same will have to be exercised on a judicious evaluation on the facts and circumstances of the case in which the 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.

7. Paragraphs 17 and 19 of the said case have been heavily relied upon, which read as under :-

17. Factually in this case, in regard to the stand of the defendants that the declaration sought by the appellants is barred by limitation, there is dispute and it is not an admitted fact. While the learned Counsel for the defendant-respondents pleaded that under Entry 58 of the Schedule to the Limitation Act, the declaration sought for by the appellants in this case ought to have been done within 3 years when the right to sue first accrued, the appellant-plaintiff contends that the same does not fall under the said entry but falls under Entry 64 or 65 of the said Schedule of the Limitation Act which provides for a limitation of 12 years therefore, according to them the prayer for declaration of title is not barred by limitation, therefore, both the Courts below have seriously erred in not considering this question before rejecting the prayer for amendment. In such a situation where there is a dispute as to the bar of limitation this Court in the case of Ragu Thilak D. John v. S. Rayappan,(2001)2 SCC 472, has held "The amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise 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 for.

19. We have already noted, hereinabove, that there is an arguable question whether the limitation applicable for seeking the relief of declaration on facts of this case falls under Entry 58 of the Limitation Act or under Entry 64 or Entry 65 of the Limitation Act which question has to be decided in the trial, therefore, in

our view, following the judgment of this Court in the case of Ragu Thilak D. John we set aside the impugned orders of the Courts below, allow the amendment prayed for, direct the trial Court to frame necessary issue in this regard and decide the said issue in accordance with law bearing in mind the law laid down by this Court in the case of L.J. Leach and Co. Ltd.

8. We have given our anxious considerations and thoughts to the submissions of the learned Counsel for the appellants.

9. We are of the view that the learned Single Judge has not committed any error in rejecting the petition, declining to permit the appellants (original plaintiffs) to amend the plaint and introduce a new relief praying for cancellation of the sale deed.

10. In order to consider whether the appellants/plaintiffs have made out a case for amendment of their plaint, seeking permission to challenge the sale deed of the year 1993, it is useful to refer Order 6, Rule 17 of the Code of Civil Procedure, which reads as under :-

17. Amendment of pleadings :-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :--

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

11. The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy. However, this rule is subject to proviso appended therein.

12. The said rule with proviso again substituted by Act 22 of 2002 with effect from 01.07.2002 makes it clear that after the commencement of the trial, no application for amendment shall be allowed. However, if the parties to the proceedings are able to satisfy the Court that in spite of due diligence they could not raise the issue before the commencement of trial and the Court is satisfied with their explanation, amendment can be allowed even after commencement of the trial. To put it clear, Order 6 Rule 17 of the CPC confers jurisdiction of the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made.

13. With this background, we may consider the application filed by the appellants (original plaintiffs) and the orders passed by the Civil Court as well as the

learned Single Judge of this High Court.

14. It is an admitted fact, as evident from the record, that it was well within the knowledge of the appellants (original plaintiffs) that a sale deed has been executed dated 21st July 1993. When the suit came to be preferred in the year 2003, there was no challenge to this sale deed. The suit was for declaration and permanent injunction. Assuming for the moment that the appellants learnt about the sale deed in the year 2003, they could have very well challenge the same in the suit, which was preferred on 17th May 2003. However, this was not done but it is only by way of an amendment application preferred on 11th June 2006 that the plaint was sought to be amended by including the challenge to the so-called illegal and bogus sale deed dated 21st July 1993. There is no doubt in our mind that the challenge is belated and time-barred as per the law of limitation. Not only this, but it will also change the entire nature of the suit causing grave prejudice to the defendants.

15. So far as the decision of the Apex Court in the case of Pankaja and another (supra) is concerned, which has been very heavily relied upon by the appellants, the same would not help the appellants in any manner. There is no quarrel about the proposition of law that was submitted by the learned Counsel for the appellants.

16. In any view of the matter, in that decision, namely, Pankaja and another (supra), the question of limitation was found to be arguable issue and on that ground the Supreme Court allowed the amendment and the trial Court was directed to frame necessary issue on the question of limitation and decide the same keeping in view the law laid down in another Supreme Court's decision rendered in the case of L.J. Leach & Co. Ltd. v. Jardine Skinner, reported in AIR 1957 SC 357. But, in the present case, we are in full agreement with the Courts below that there was no dispute on the question of limitation. Therefore, it cannot be said that the point of limitation was arguable one and the same should be decided by raising the issue at the time of disposal of the suit.

17. It is settled law that grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment, (ii) when the amendment would result introducing new cause of action and intends to prejudice the other party, (iii) when allowing amendment application defeats the law of limitation.

18. In the present case, the appellants (original plaintiffs) not only failed to satisfy the conditions prescribed in proviso to Order 6, Rule 17 of the Code of Civil Procedure, but even on merits the claim is liable to be rejected. All these relevant aspects have been duly considered by the learned Single Judge and rightly confirmed the order passed by the Civil Judge rejecting the amendment application in part.

19. It would also be expedient to refer to a Supreme Court's decision in the matter of Chandra Kanta Bansal v. Rajinder Singh Anand, reported in 2008(2)

GLH 477, wherein the Supreme Court dealt with the provisions of Order 6, Rule 17, more particularly, the proviso and the words "due diligence". In paragraph 11 of the judgment, the Supreme Court observed as under :-

As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the Court is free to order such application. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial.

20. In the case of Union of India (UOI) Vs. Pramod Gupta (D) by L.Rs. and Others, , the Supreme Court cautioned that delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing the application for amendment of the pleadings.

21. In L.J. Leach & Co. Ltd. (supra), the Supreme Court in paragraph 16 of the said judgment observed as follows :--

It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interest of justice.

22. Again in T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board and Others, , the Supreme Court observes as follows :--

The law as regards permitting amendment to the plaint, is well settled in L.J. Leach and Co. Ltd. v. Jardine Skinner and Co., it was held that the Court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But this is a factor to be taken into account in exercise of the discretion as to whether amendment

should be ordered, and does not affect the power of the Court to order it. It is not disputed that the appellate Court has a coextensive power to the trial Court. We find that the discretion exercised by the High Court in rejecting the plaint was in conformity with law.

23. In the case of Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another, , the Supreme Court held that if as a result of allowing the amendment the basis of the suit is changed, such amendment, even though allowed, cannot relate back to the date of filing of the suit to cure the defect of limitation.

24. In view of our findings made hereinabove that on the date of filing of the amendment application, seeking to challenge the legality and validity of the sale deed of the year 1993 in the year 2006, the claim as made by the appellants (original plaintiffs) in their amendment application was already barred, no purpose would be achieved by allowing the amendment which has already stood barred by the law of limitation. For the reasons aforesaid, we are of the view that the learned Single Judge exercised his discretion in a proper manner while refusing to permit the appellants to amend the plaint and include the challenge to the legality and validity of the sale deed of the year 1993. We, therefore, do not find any merits in this Appeal. Accordingly, the Appeal is dismissed.