

(2009) 11 CHH CK 0060
In the Chhattisgarh High Court
Case No : F.A. No. 159 of 2009

Mahesh Kumar Agrawal and Others

APPELLANT

Vs

Dinesh Kumar Chouksey and Others

RESPONDENT

Date of Decision : 17-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17, Order 7 Rule 11, 105(1), 151

Citation : (2009) 4 CGLJ 489 : (2009) 4 CGLJ 475

Hon'ble Judges : Rangnath Chandrakar, J;Dhirendra Mishra, J

Bench : Full Bench

Advocate : Ali Asgar, for the Appellant; Prashant Mishra and Varuendra Mishra, for Respondent No. 1, Sanjay K. Agarwal and Saurabh Sharma for Respondent No. 2, Manoj Paranjpe, for Respondents Nos. 3 to 5 and Ashish Shukla, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dhirendra Mishra, J.—This first appeal u/s 96 of the Code of Civil Procedure, 1908 (for short "CPC") is directed against the order dated 25.9.2009 passed in Civil Suit No. 5A/2009 whereby the learned 8th Additional District Judge, Bilaspur allowing two separate applications, one preferred by Respondent No. 2 and another preferred by Respondents No. 3 to 5, under Order 7 Rule 11 of CPC has dismissed the suit of the Appellants.

2. The parties to this appeal shall be referred hereinafter as per their status before the trial court.

3. Briefly stated, facts of the case are that on 17.3.2008 the Plaintiffs filed a civil suit and prayed for issuance of perpetual injunction against the Defendants No. 2 to 5 that they should not create any hindrance either personally or with the help of others in obtaining possession by the Plaintiffs from the Defendant No. 1 and further, they be restrained from transferring the suit land in favour of any other person. Defendant No. 1 filed written statement on 23.4.2008, whereas

Defendants No. 3 to 5 filed their written statement on 18.6.2008. During the pendency of the suit, on 22.12.2008 the Plaintiffs filed an application (I.A. No. 9) under Order 6 Rule 17 read with Section 151 CPC and proposed amendments in the relief clause that the decree dated 24.5.2008 passed in Civil Suit No. 1-A/07, its subsequent amendment on 18.6.2008 and other consequential orders are void as the same has been procured by illegal means and the same is not binding on the Plaintiffs. The Defendants have already submitted their reply to the amendment application. Thereafter, Defendant No. 2 and Defendants No. 3 to 5 have filed two separate applications under Order 7 Rule 11 CPC for dismissal of the suit on 26.8.2009 and 4.9.2009 respectively. These applications have been allowed by the trial court vide impugned order dated 25.9.2009 and the suit has been dismissed

4. Mr. Ali Asgar, learned Counsel appearing for the Plaintiffs submits that the impugned order has been passed without deciding the application for amendment in the plaint (IA No. 9) which was filed on 22.12.2008. By the aforesaid application the Plaintiffs have impugned the collusive decree obtained by the Defendant No. 2 against Defendants No. 3 to 5 on 8.5.2008 and the Plaintiffs have also prayed for decree of declaration and possession. Since the suit was filed on 17.3.2008 and the collusive decree was obtained later on, the Plaintiffs' application for amendment (IA No. 9) was based on the subsequent events. The Plaintiffs' earlier applications for amendment of similar nature were dismissed as withdrawn vide order dated 17.11.2008 with liberty to file detailed application for amendment. The Defendants have already filed reply to IA. No. 9, however, the matter was adjourned for five times, between 18.3.2009 to 16.6.2009, as the Court was without Presiding Officer.

Suit was transferred to the Court of learned 8th Additional District Judge, Bilaspur on 27.6.2009. The Plaintiffs by way of application dated 10.7.2009 filed u/s 151 of the CPC brought to the notice of the trial Court that the Plaintiffs have already moved an application u/s 24 of the CPC for transfer of the case pending adjudication and till that application is decided, proceedings in the case be stayed. The trial Court vide order dated 17.7.2009 observed that if the Plaintiffs file any document or affidavit in support of this application, then only the prayer may be considered. The Plaintiffs filed copy of the application filed u/s 24 of the CPC along with an affidavit, however, the prayer was rejected vide order dated 4.8.2009 with an observation that from the copy of application it is not clear whether the same has been filed in the Court of learned District Judge or not. It has been further observed that since the matter is not being finally decided and only at the interim stage, staying the proceedings would not be appropriate. The Plaintiffs' subsequent application for adjournment on the ground of pendency of the transfer petition was also rejected.

The Defendants, after almost 1 1/2 years of filing of the suit, filed the applications under Order 7 Rule 11 of CPC for dismissal of the suit on 26.8.2009 and 4.9.2009 respectively and the same were allowed by the trial Court vide

impugned order dated 25.9.2009. The Plaintiffs had mentioned in their reply to the applications under Order 7 Rule 11 CPC that their application under Order 6 Rule 17 for amendment of suit is pending. Pendency of the amendment application finds reference in the impugned order. The impugned order was passed during the pendency of transfer application u/s 24 of the CPC before the learned District Judge.

Relying upon the judgment of Division Bench of the Bombay High Court in the matter of Gaganmal Ramchand v. The Hongkong and Shanghai Banking Corporation AIR (37) 1950 Bom 345, it was argued that the suit may be dismissed under Order 7 Rule 11 of CPC which does not disclose cause of action or if the relief claimed by the Plaintiff for perpetual injunction cannot be decreed in absence of the Plaintiffs seeking relief of possession of the suit property. However, it cannot be said that the Court cannot allow an amendment of pleadings in the plaint which may save the plaint from being rejected by exercising its power under Order 6 Rule 17, and allowing the plaint to be amended.

Learned trial Court has dismissed the suit under Order 2 Rule 2 CPC though the Defendants have not raised any ground available under Order 2 Rule 2 of CPC in their applications under Order 7 Rule 11 CPC for dismissal of the suit.

5. Mr. Sanjay K. Agarwal, learned Counsel appearing for Defendant No. 2 referring to Sections 96 and 105 (1) of the CPC would argue that appeal lies u/s 96 from every decree passed by any Court exercising original jurisdiction, whereas, Section 105 (1) provides that where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of case, may be set forth as a ground of objection in the memorandum of appeal. Since in the instant case there is no order passed by the trial Court, which may affect the decision of the case by the trial Court, the Plaintiffs cannot be permitted to raise a ground that non-decision of amendment application (IA No. 9) has vitiated the impugned order, as non-deciding of amendment application under Order 6 Rule 17 is not an order within its meaning of Section 105 (1) of the Code of Civil Procedure. It was further argued that the Plaintiffs' earlier application for amendment dated 25.8.2008 seeking identical relief was dismissed as withdrawn vide order dated 17.11.2008 without granting any liberty to the Plaintiffs and therefore, the Plaintiffs could not be permitted to even file same application under Order 6 Rule 17 raising identical averments.

6. On the other hand, Shri Paranjpe, learned Counsel appearing on behalf of Respondents No. 3 to 5, vehemently argued that from bare perusal of Para-24 of the plaint, it would be evident that no cause of action arose to the Plaintiffs for filing civil suit. The trial Court passed an order of temporary injunction on 24-5-2008. The Plaintiffs filed an application under Order 6 Rule 17 of the CPC (IA No. 6), however, the Plaintiffs are not seeking any relief for setting aside the judgment and decree dated 8-5-2008 passed in Civil Suit No. 1 -A/07. Though the Plaintiffs have prayed for amendment and sought relief of possession,

however, the relief has deliberately not been valued for the purposes of payment of Court fee. Since the Plaintiffs themselves did not press their application for amendment and consented to argue on applications under Order 7 Rule 11 of the CPC finally, they cannot be permitted to raise a ground that the trial Court could not have dismissed the suit under Order 7 Rule 11 of the CPC without deciding IA No. 9.

7. We have heard learned Counsel for the parties. We have perused the record of the trial court as also the impugned order.

8. Indisputably, after filing of the suit on 17.3.2008, written statements have been filed by the Defendants. The learned District Judge vide its order dated 24.5.2008 passed an order of temporary injunction in favour of the Plaintiffs and directed the Defendants not to alienate or transfer the suit property to any other person. From perusal of the records it is also clear that the Plaintiffs' interim applications (IA. No. 6 and 7) for amending the plaint were sought to be withdrawn with liberty to file detailed amendment application and prayer was allowed vide order dated 17.11.2008 and thereafter the Plaintiffs moved IA. No. 9 on 28.12.2008. The Defendants have already filed reply to the said application. In Para-14 of the amendment application (IA No. 9), the Plaintiffs have proposed to incorporate a relief in the relief clause that "the decree passed in Civil Suit No. 1A/ 07 in favour of Defendant No. 2 and consequential order of mutation is void as the same have been obtained by illegal means". Corresponding amendments have also been proposed in the body of the plaint. The Plaintiffs have also prayed for decree of declaration and vacant possession of the suit property.

In the impugned order, the learned trial Court, while referring to the reply filed by the Plaintiffs to the applications under Order 7 Rule 11 CPC has mentioned that the Plaintiffs have moved an application for amendment in the plaint in the light of changed circumstances, the same has not been adjudicated and therefore, no order could be passed in the instant application. However, the application has been allowed with a finding that the suit is for perpetual injunction; the Plaintiffs have admitted that they are not in possession of the suit property and they have also not prayed for the relief of possession. Therefore, the suit is dismissed in view of Order 2 Rule 2 of the CPC for not including all the reliefs in the plaint.

9. Submission of the learned Counsel for Defendants that earlier applications of the Plaintiffs proposing some amendments were dismissed on 17.11.2008 and therefore, the subsequent application for amendment i.e. IA. No. 9, could not be entertained, cannot be accepted. From a bare reading of the order dated 17.11.2008 it is clear that the amendment applications were sought to be dismissed as not pressed with liberty to file fresh amendment application and this prayer of the Plaintiffs has been allowed and thereafter, application for amendment (IA No. 9) was filed on 17.12.2008. After going through the amendments proposed in IA. No. 9, it is clear that the Plaintiffs have proposed to incorporate other reliefs in the plaint including the relief for declaring the decree,

which has been passed subsequently in favour of Defendant No. 2, void and also prayed for possession of the suit property. From perusal of the order sheets of the trial court, we find that the Defendants have filed detailed reply to the application for amendment and in the meanwhile, the Plaintiffs filed an application u/s 24 of CPC before the learned District Judge for transfer of the suit and they also sought adjournment of the case on the ground that their transfer application is pending. However, prayer of adjournment was rejected by the trial court and only thereafter the applications under Order 7 Rule 11 CPC were filed and the same were allowed by the impugned order.

10. Therefore, we are of the view that the trial court ought to have verified about filing of any transfer petition on any ground from the respective parties and the result thereof before proceeding with the matter.

11. From perusal of the reply to the application under Order 7 Rule 11 CPC by the Plaintiffs, it is clear that the Plaintiffs had brought to the notice of the trial Court regarding pendency of the application for amendment in the plaint, however, the impugned order is silent as to why the above objection was not considered while considering the application of the Defendants under Order 7 Rule 11 Code of Civil Procedure. We are unable to accept the contention of Mr. Sanjay K Agarwal, learned Counsel appearing for Defendant No. 2 that non-decision of application for amendment cannot be set as a ground for regular appeal u/s 96 of CPC Section 105 (1) of the CPC reads thus:

105. Other orders.-(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

12. In the instant case, the Appellants have challenged the impugned order on the ground that the same has been passed without considering the objection of the Plaintiffs that the applications under Order 7 Rule 11 of CPC cannot be decided without deciding their pending application for amendment in the plaint. Non-consideration of the above objection of the Plaintiffs while passing the impugned order is an irregularity which has affected the decision of the case and therefore, there is no force in the arguments that the same cannot be taken as a ground of appeal u/s 105 (1) of the Code of Civil Procedure.

13. In Gaganmal Ramchand's case AIR (37) 1950 Born 345 (supra) the plaint was sought to be rejected by the Defendants under Order 7 Rule 11 CPC on the ground that it does not disclose cause of action. The argument of the Defendants based on the Order 7 Rule 11 CPC that when a plaint comes before the Court and that plaint does not disclose cause of action, it is mandatory upon the Court to reject that plaint and dismiss the suit and the Court has no power to permit the plaint to be amended was repealed by the Division Bench of Bombay High Court and it was held that that "I see no reason whatever why the power of the Court

to allow amendment of pleadings should be in any way restricted or controlled by the provisions contained in Order 7, Rule 11. It is perfectly true that it is incumbent upon the Court to reject a plaint that does not disclose a cause of action but it does not allow a plaint to be amended so that it should disclose a cause of action. It is only when a plaint does not disclose a cause of action that the Court is called upon to exercise its power under Order 7 Rule 11. But the Court may prevent the operation of Order 7, Rule 11, and may save the plaint being rejected by exercising its power under Order.6 Rule. 17, and allowing the plaint to be amended."

14. We are in respectful agreement with the principle of law laid down by the Bombay High Court in the aforesaid judgment and we hold that the trial Court was duty bound to decide the application for amendment (IA No. 9) filed by the Plaintiffs on 28.12.2008 before deciding the applications under Order 7 Rule 11 CPC subsequently preferred by the Defendants for dismissal of the plaint.

15. On the basis of aforesaid discussion, the appeal is allowed and the impugned order dated 25.9.2009 (Annexure P-3) whereby the suit of the Plaintiffs has been dismissed upon a preliminary point is hereby set aside. We remand the matter to the trial court with a direction to first decide the application dated 22.12.2008 (LA. No. 9) filed by the Plaintiffs after affording opportunity of hearing to the respective parties and after deciding the aforesaid application, the applications filed by the Defendants under Order 7 Rule 11 of the CPC shall be decided afresh.

16. The parties to the proceedings shall appear before the trial court on 30th November, 2009.

17. No order as to costs.