
(2008) 09 AP CK 0055
In the Andhra Pradesh High Court
Case No : C.R.P. No. 2816 of 2008

Maheshwari Builder and Others

APPELLANT

Vs

Dr. Mohd. Shafiuddin Junaidi and Others

RESPONDENT

Date of Decision : 01-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 11, 12
Limitation Act, 1908 — Article 120, 91, 95
Limitation Act, 1963 — Article 58, 59, 65

Citation : (2008) 5 ALD 806 : (2008) 6 ALT 575

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : K.K. Wagharey, for the Appellant; Pratap Narayan Sanghi, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Respondents in the present civil revision petition filed CMP No. 4482 of 2008 praying for vacation of interim stay granted in CRP No. 2816 of 2008 dated 11.7.2008. This Court on 11.7.2008 ordered notice before admission and granted interim suspension and on 1.8.2008 this Court admitted the civil revision petition and directed to list the matter after three weeks for filing proof of service. Though the matter is appearing under the caption of "interlocutory", at the request of the Counsel on record Sri K.K. Wagharey, representing the revision petitioners and Sri Pratap Narayan Sanghi, the Counsel representing respondents-vacate stay petitioners, the civil revision petition itself is finally heard.

2. Sri K.K. Wagharey, learned Counsel representing the revision petitioners had taken this Court through the contents of the plaint and would maintain that if the dates pleaded in the plaint to be taken into consideration, the suit is clearly barred by limitation. The learned Counsel also would maintain that when the cancellation of the exchange deed had been prayed for beyond a period of three

years, the same being clearly barred by limitation, no further evidence need be let in in this regard and, hence, inasmuch as no factual controversy as such is involved and it being a pure question of law, the plaint is liable to be rejected. While further elaborating his submissions the learned Counsel also pointed out that at any stage such application can be moved under Order VII Rule 11 of the Code of Civil Procedure. Further, the learned Counsel also pointed out to the relevant portions of the plaint and would maintain that this cannot be got over by just cleverly drafting the plaint. The Counsel pointed out that these averments relating to either fraud or misrepresentation, this stray sentence as can be seen from the plaint cannot save the plaintiffs from the rigor of operation of Law of Limitation and if the Court is satisfied that these pleas had been taken only with a view to get over the limitation, this Court can definitely go into the said question and reject the plaint at the threshold instead of permitting the parties to contest the suit. The learned Counsel placed strong reliance on several decisions to substantiate his submissions.

3. Per contra, Sri Pratap Narayan Sanghi, the learned Counsel representing respondents-vacate stay petitioners raised a preliminary objection on the ground that the selfsame parties represented by Rajkumar Malpani filed an application I.A. No. 1927 of 2007 in O.S. No. 1705 of 2004 before the Court below under Order VII Rule 11 of the CPC and the said application was dismissed on 14.2.2008 and the said matter was not carried by way of revision and the said order had attained finality. The learned Counsel would maintain that it is not as though this ground of limitation was not available when the said application was moved, but however, on the ground of cause of action the said application was filed and ultimately an order in detail had been made recording reasons by the learned V Senior Civil Judge, City Civil Court, Hyderabad. While further elaborating his submissions, the learned Counsel also would maintain that the suit is a part heard one and at the advanced stage this application had been thought of only with a view to delay the disposal of the suit. While further elaborating his submissions the learned Counsel pointed out to the relevant portions of the plaint and would maintain that while reckoning the period of limitation when a plea of fraud and plea of misrepresentation were pleaded, the date of knowledge may have to be taken into consideration and this question definitely can be decided only after the parties adduce evidence. In fact, in the evidence which had been recorded already, several facts had been elicited in relation thereto and, hence, it is not a case where the plea of limitation as a pure question of law can be decided at this stage, this being a mixed question of fact and law as well, in the facts and circumstances of the case. The Counsel also pointed out to several other litigations and also the proceedings and placed strong reliance on several decisions to substantiate his submissions.

4. Heard the Counsel, perused the impugned order.

5. The defendants in O.S. No. 1705 of 2004 on the file of V Senior Civil Judge, City Civil Court, Hyderabad, filed I.A. No. 367 of 2008 under Order VII Rule 11 (A

and D) of the CPC (hereinafter in short referred to as "the Code" for the purpose of convenience) praying for rejection of plaint as barred by law in the interest of justice. The learned V Senior Civil Judge, City Civil Court, Hyderabad, after referring to the respective stands taken by the parties in the affidavit filed in support of the application and also in the counter having formulated the point for consideration at para 4, recorded reasons commencing from paras 5 to 8 and ultimately dismissed the application as devoid of merit. Aggrieved by the same, the present civil revision petition had been preferred.

6. Though there is some controversy whether the same parties had moved the prior application I.A. No. 1927 of 2007, the fact remains that the said application was filed by the selfsame parties, no doubt representing those parties, Rajkumar Malpani, wherein it appears the ground of cause of action was made the predominant ground while praying for rejection of the plaint. It is also not in controversy between the parties that the said application was dismissed and in a way the said order had attained finality having been not challenged. It may be true that in the present application specifically the ground of limitation had been raised as a specific ground praying for the rejection of the plaint.

7. It was averred by the revision petitioners in the affidavit filed in support of the said application that the petitioner was the Managing Director of 4th petitioner company and 1st petitioner was originally a partnership firm which had taken the development rights of the property bearing No. 3-6-552 to 558, Himayathnagar, Hyderabad, from the shareholders/owners including the respondent/plaintiffs 1 to 5. There was no dispute about the property being given for development to the petitioner and the petitioner was put in possession of the property. Subsequently, the petitioners/ plaintiffs 1 to 3 had merged and amalgamated with 4th petitioner. Ipso facto the mother of respondents/plaintiffs 1 to 5 Smt. Sarwarunnisa Begum was having undivided share of 7/88th in the property and she had given up her share and in pursuance of that she executed an exchange deed during her lifetime which was duly presented before the registration authorities on 18.10.2000 and the said exchange deed was presented by respondent/plaintiff No. 4 who was the son of Sarwarunnisa Begum, who was given a registered specific power of attorney bearing No. 85/2000 empowering and authorizing him to complete the registration formalities on behalf of Sarwarunnisa Begum and accordingly the said document was registered vide document No. 3616/2000. Even the respondent/plaintiff No. 2 was the witness in the exchange deed registered document No. 85/2000 and ipso facto the respondents had filed the present suit for cancellation of the exchange deed dated 18.10.2000 bearing document No. 3616/ 2000. Respondents/plaintiffs 1 to 5 were the legal heirs of Sarwarunnisa Begum and during her lifetime she did not challenge the exchange deed and the respondents/ plaintiffs 1 to 5 had filed the present suit on the ground of fraud, as such the present suit itself was barred by limitation. Admittedly, the respondent/plaintiff No. 4 had knowledge about the execution of exchange deed, as he himself was the signatory and party to the transaction.

8. The first plaintiff resisted the same by filing counter. Specific stand had been taken that such application is not maintainable. Further it was stated that ipso facto defendant No. 1 filed voluminous written statement. Further, it is denied that the first petitioner obtained development rights in respect of the suit schedule property from respondents-plaintiffs 1 to 5. The allegation that petitioners/defendant Nos. 1 to 3 had merged with petitioner/defendant No. 4 was not within the knowledge of the answering respondents and the said act of merger was an act of perpetuating fraud played on the mother of the plaintiffs and subsequently on the plaintiffs. The merger as pleaded cannot take away the rights of the plaintiffs, as the companies formed out of such merger were only with a view to defraud the plaintiffs and entangle them in unending litigation in respect of their rights over the suit schedule property, inasmuch as the companies formed out of merger were closely held family concerns of the deponent of the affidavit and his family members. The allegation that the petitioner/defendant No. 4 owns, possess and taking up construction work, was of no consequence inasmuch as the 4th petitioner was equally liable for the suit claim of the plaintiffs being a company formed from out of the earlier partnership firm by operation of Indian Companies Act and this was a classic case where the corporate veil of the petitioners/defendants 2 to 4 was to be lifted to account them for fraud. It is denied that the present suit itself was barred by limitation. In fact, the exchanged property was never handed over and was sold away to 2nd defendant on 4.10.2001. As the exchange deed became invalid and unexecutable as the exchanged property was sold to defendant No. 2 on 4.10.2001, there was no need to interfere with this petition at this stage.

The learned Judge formulated the wider noted point for consideration.

Whether the petitioners/defendants can pray to reject the plaint in O.S. No. 1705 of 2004 at this juncture?

9. No doubt certain submissions were made by the Counsel, on record. Whether this application can be entertained at all for the reason that the same was moved at a belated stage? May be that it may be just and proper on the part of a party to move such application at the earliest point of time. This Court is not inclined to express any further opinion relating to this aspect. However, the learned Counsel representing the revision petitioners had placed strong reliance on the decision of this Court in *Koratomaddi Tippa Bhatlagari Subbanarsaiah Vs. Koratomaddi Thippabhatlagari Venkata Chalamaiiah and Another*, wherein this Court observed as hereunder:

In the present case, it is not in dispute that the plaintiff is a party to the partition deed dated 25.8.1957 and the suit praying for the relief of cancellation should be instituted within three years, as per Article 59 of the Limitation Act, 1963. It is needless to say that even by the date of institution of the suit in the year 1997 the relief is clearly barred by limitation. Further, even after institution of the suit in the year 1997 after a long lapse of time, the present proposed amendment had been prayed for. It is no doubt true that whenever the bar of limitation or

question of limitation is raised as a ground for negating the relief praying for amendment necessarily, the same need not be refused but the same depends upon the facts and circumstances of each case. It is also no doubt true that question of limitation necessarily always need not be a pure question of law, it may be a mixed question of fact and law as well. But, however, whenever it is clear on the admitted facts in the respective pleadings of the parties that no further evidence need be let in for the purpose of deciding the question of limitation, there is no point in allowing such amendment, which is clearly barred by limitation, as it will be a futile exercise. Hence, such amendments need not be allowed.

10. Further strong reliance was placed in the decision of this Court in Kundalayya and Ors. v. Siddalingamma 1958 (1) An. WR 166, wherein the learned Judge observed as hereunder.

The test as to when a cause of action has accrued is to ascertain when the plaintiff could have maintained an action to a successful result, provided that the starting point of time in the third column of the schedule synchronizes with the cause of action. Where, however, at the time when the cause of action arises, there is no person capable of suing, the statute does not run. In this case it is seen that the plaintiffs husband discovered that fraud had been played by the 1st defendant in obtaining a deed of gift from him. He discovered this fraud during his lifetime and filed a suit against the 1st defendant. Time had, therefore, begun to run as the right to sue had accrued and the plaintiff was not in anyway disabled from suing. Where time has begun to run, owing to the right to sue having accrued to a person not labouring under any legal disability the subsequent disability of himself or other representative is not a ground for exemption from the operation of the ordinary rule, and it cannot be suspended for any other reasons than those specified in the Act. Insofar as the general proposition is concerned, it does not admit of any doubt and needs no further elucidation. Insofar as the facts of this case are concerned, the Article of the Limitation Act which is applicable to this case is Article 91 which prescribes three years" period from the date when the facts entitled the plaintiff to have the instrument cancelled or set aside. In Someshwar Dutt v. Tirbhawan Dutt (1934) 67 M.L.J. 7 : L.R. 61 I.A. 224 (P.C), it was held that the limitation for a suit to set aside a deed of gift on the ground that it was obtained by undue influence is governed by Article 91 of the Indian Limitation Act, 1908, Schedule I, and the three years" period runs from the date when the plaintiff discovered the true nature of the deed, not from the date when he escaped from the influence by which he alleges that he was dominated. Learned advocate for the respondent contends that Article 120 applies to the suit of the plaintiff, because she was unaware of the fraud and only discovered it when the notice in execution proceedings were served on her and limitation should, therefore, start from that date. There is no substance in this contention, because, as I have already stated, if time began to run in the lifetime of the plaintiffs husband with respect to a document to which he was a party and cause of action had accrued to him to

have the same set aside, time would commence to run from that date and the suit would be barred after the expiry of the period, irrespective of the fact whether the heir of the executant of the document became aware of the fraud subsequently or not. If time has commenced to run against the predecessor, it will not stop, but still continue to run against the heir also. Article 120, therefore, has no application. The suit by the plaintiff should have been filed on or before the 7th December, 1950, but it has been filed on 10th September, 1951, and is, therefore, clearly barred.

11. Further strong reliance was placed on the decision in *N.V. Srinivasa Murthy and Ors. v. Mariyamma (dead) by proposed LR's.* 2005 (5) ALD 113 (SC) : 2005 (5) SCALE 342, wherein the Apex Court while considering Order VII Rule 11 and Order II Rule 2 of the Code and rejection of plaint as barred by limitation came to the conclusion that reckoning the cause of action from 25.3.1987, the suit filed on 26.8.1996, was hopelessly barred by time. The Apex Court also observed that after examining the pleadings the Apex Court was clearly of the opinion that by clever drafting of the plaint, the civil suit, which is hopelessly barred for seeking avoidance of registered sale deed of 5.5.1953 had been instituted by taking recourse to orders passed in mutation proceedings by the Revenue Courts.

12. Further, Sri Pratap Narayan Sanghi placed strong reliance on the decision of the Apex Court in *Kamala and Ors. v. K.T. Eshwara Sa and Ors.* 2008 (4) ALD 24 (SC) : 2008 (1) DT (SC) 363, wherein the Apex Court while dealing with rejection of plaint under Order VII Rule 11(d) of the Code observed as hereunder:

No evidence can be looked into and merit of the case would not be considered at that stage. All issues shall not be the subject-matter of an order under the said provision. The principles of *res judicata*, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage. The appeal is allowed and however it was made clear that the parties would be at liberty to raise all contentions before the learned Trial Judge at appropriate stage.

13. Reliance also was placed on the decision in *Rasumalla Yellaiah and Others Vs. Chief Commissioner, Land and Administration and Others*, , wherein it was held, relying upon *K.M. Somaiah Vs. The Secretary, Government of Karnataka, Revenue Department, Bangalore and Others*, and *Ragam Yellaiah and Ors. v. Chinta Shankaraiah* 2003 (3) ALD 105, as hereunder:

In a suit for declaration that plaintiffs are absolute owners and title holders of the suit property by virtue of adverse possession, rejection of plaint on the ground that it does not disclose any cause of action and the plaint averments themselves disclose that the relief claimed is barred by limitation. The question of limitation

always is not a pure question of law, but a mixed question of fact and law. When several factual details have to be gone into to decide the said question of law, rejection of plaint at the threshold is not proper. Rejection of plaint in the instant case cannot be sustained in view of the averments in plaint and documents relied on in the plaint.

14. Reliance also was placed on the decision in Ragam Yellaiah and Ors. v. Chinta Shankaraiah (supra), wherein this Court observed as hereunder:

At the outset I may state that the question of limitation necessarily always is not a pure question of law, but it is a mixed question of fact and law. May be that there may be certain circumstances where on the face of the allegations in the plaint a suit may be clearly barred by limitation. Here the dispute appears to be whether Article 58 of the Limitation Act or Article 65 of the Limitation Act, 1963 is applicable to the facts and circumstances of the case. Reliance also was placed on State of Maharashtra case (supra). No doubt on facts this decision is distinguishable because it was a case where the documents in question were treated to be a nullity. But in the present case no doubt a ground that the document is voidable had been raised. Be that as it may, all the factual disputes which may have to be gone into on both parties letting in evidence cannot be decided at the threshold unless on the allegations made in the plaint itself, the Court can arrive at a conclusion that the suit is clearly barred by any law, be that a question of limitation or any other question. When several other factual aspects are also to be gone into while deciding a question of law involved incidentally, the rejection of the plaint at the threshold cannot be sustained. In the light of the allegations made in the plaint, I am of the considered opinion that these are all aspects, which are to be gone into at the time of regular trial after both parties adducing evidence. I do not want to express any other opinion relating to the other merits and demerits of the matter which may have to be decided at the appropriate stage. Hence, in view of the same, I am of the opinion that the appellants are bound to succeed. The impugned order dated 3.4.2002 is hereby set aside and the learned Senior Civil Judge, Siddipet is hereby directed to number the suit and proceed with the matter in accordance with law. In view of the facts and circumstances of the case, this Court -makes no order as to costs.

15. In Ningawwa Vs. Byrappa and Others, , while dealing with applicability of Article 95 of the Limitation Act, 1908, the Apex Court dealt with fraudulent misrepresentation as to character of document and fraudulent misrepresentation as to contents of document and former transaction is void, but latter is merely voidable.

16. In S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , the Apex Court at Paras 7 and 8 observed as hereunder:

The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the Court. The High Court,

however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the Court process of convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

17. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the Court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the Court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B.15 in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamount to playing fraud on the Court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B.15 and non-suited the plaintiff. A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party.")

18. This Court is not inclined to express any opinion touching the merits and demerits of the matter relating to either the plea of fraud or plea of misrepresentation and the stray sentences, which had been pleaded in the plaint. It is stated that evidence had been adduced and the suit is a part heard one. Though the stand taken by Sri K.K. Waghray that inasmuch as the relief of cancellation had been prayed for when the limitation is reckoned from the date of document, the same is barred by limitation. Prima facie this contention appears to be attractive.

19. In the light of the specific pleas of fraud and misrepresentation which had been pleaded in the plaint, this Court is not inclined to accept that the said

contention that the said question to be taken as a pure question of law and on that ground the plaint to be rejected at the threshold. It is needless to say that on the strength of the evidence, which may be adduced by the parties, this aspect may have to be decided.

20. Be that as it may, there is yet other problem. It is not as though this is the first application, may be, on the ground that for want of cause of action the plaint is liable to be rejected, an application LA. No. 1927 of 2007 already had been moved and the said application was dismissed. The said order was left unchallenged. Now, to raise yet another ground of limitation on the ground that the said question had not been agitated by any party and different party is moving the said application, in the considered opinion of this Court also cannot be a justifiable ground.

21. Hence, viewed from any angle the civil revision petition is devoid of merit and the same is liable to be dismissed and accordingly the civil revision petition shall stand dismissed;. The parties to bear their own costs.

22. However, before parting with the matter, this Court is making it very clear that any observations made by this Court while deciding the present civil revision petition are limited for the purpose of deciding the present civil revision petition and the learned Judge to decide the suit and the questions, which are raised and canvassed by the parties before this Court, independently not being influenced by any of the observations made by this Court while deciding me present civil revision petition.).