
(2010) 03 KAR CK 0099

In the Karnataka High Court

Case No : Regular Second Appeal No. 467 of 2007 and Regular Second Appeal
Cross Objection No. 5 of 2007

New India Assurance Company Limited

APPELLANT

Vs

Ramakrishna Vasu Shetty and Others

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 7 Rule 7, 151, 80

Citation : (2010) 3 KarLJ 133 : (2010) 2 KCCR 1611

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : S.S. Ramdas and R.B. Deshpande, for the Appellant; P.S. Rajagopal and K. Chandranath Ariga, P.S. Rajagopal R. Omkumar, A.G.A. and K. Chandranath Ariga, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—Heard the Counsel for the parties.

2. The parties are referred to by their rank before the Trial Court for the sake of convenience.

3. The appellant was the plaintiff before the Trial Court. The suit was for the relief of declaration that the plaintiff was born on 5-2-1951 and the date of birth given as 5-2-1947 in his School Cumulative Record is a mistake and for consequential rectification of his service register maintained by the fourth defendant representing his employer, New India Assurance Company Limited.

It was the plaintiffs case that he was born on 5-2-1951 in Thokur Village of Mangalore Taluk. His date of birth is said to be borne out by the Birth Certificate issued by the Tahsildar, Mangalore Taluk, as also by his original horoscope. It is his case that his father died a year after the plaintiffs birth. The plaintiff was admitted to school by his grand-father and it is claimed that he had passed SSLC examination in the year 1966, from the Board High School in the year 1969, he

had joined the New India Assurance Company Limited on temporary basis. In the year 1973, he was taken on probation and subsequently confirmed in the services of the company. In the service register, the date of birth entered was 5-2-1947, which is said to be based on the cumulative record of the plaintiff. The error had gone unnoticed. It is in the year 2002, that while casually conversing with his uncle one Vittala Shetty, that the plaintiff was informed that he was born on 5-2-1951. It was then that the plaintiff realised the serious error as to his date of birth in the school records and on account of that error, the consequences that followed were manifold, especially with regard to his career and service prospects. Hence, the plaintiff had approached his employer seeking correction of his date of birth and when all efforts failed, he had got issued a legal notice in this regard to his employer as well as other defendants, namely, the Director of Public Instructions and the Deputy Commissioner, Udupi District, to comply with Section 80 of the Code of Civil Procedure, 1908 and as there was no positive response from any quarter, the suit was filed.

The suit was contested by the fourth defendant--his employer. The plaintiff's allegations were denied as to the plaintiff's date of birth being 5-2-1951. It is contended that the date of birth of the plaintiff was recorded in his service register in accordance with the guidelines of the company in respect of verification and admission of age of its employees, as also on the basis of acceptable proof of age, supplied by the plaintiff at the time of his appointment and entry of the date of birth made in the basic staff records on the basis of the guidelines prescribed, is conclusive evidence of an employee's date of birth for the purpose of his service and the plaintiff seeking to claim correction of his date of birth after three decades of service and having reaped the benefits with reference to his higher age is estopped from contending his age as being otherwise towards the fag-end of his service. The other consequence of any such correction being made at the instance of the plaintiff, would affect the seniority, promotion prospects and other benefits of other employees with a cascading effect, which would militate against any equitable relief being granted in favour of the plaintiff.

On these contentions, the Trial Court placed the burden of establishing his case entirely on the plaintiff and held all the issues framed against the plaintiff.

This having been carried in appeal, the First Appellate Court framed the following points as arising for its consideration:

1. Whether it is just and necessary to allow I.A. Nos. 2 and 3 filed in the instant appeal?
2. Whether it is just and proper to allow I.A. No. 4 filed under Order 41, Rule 27 and Section 151 of the Code of Civil Procedure, 1908 filed in the instant appeal?
3. Whether the lower Court has committed any error in appreciating the evidence let in by the parties in the light of the pleading of the parties?

4. Whether the appellant has made out the grounds to show that the decree of the lower Court is unjust, unjudicious, illegal and contrary to law and facts of the case?

5. Whether the relief of permanent injunction restraining the fourth defendant/fourth respondent from retiring the appellant/plaintiff on or before 28-2-2009 from service is liable to be issued?

6. What order?

The application mentioned above by the First Appellate Court namely, Interlocutory Application Nos. II and III were applications filed by the plaintiff before the Appellate Court for injunction restraining the defendants from retiring the plaintiff from service during the pendency of the appeal, and for amendment under Order 6, Rule 17 of the Code of Civil Procedure, 1908, to include the plea that since the plaintiffs actual date of birth was 5-2-1951, the fourth defendant could not terminate the services earlier. The First Appellate Court has dismissed these applications, having regard to a memo dated 12-12-2006 filed by the plaintiff to the following effect:

Memo filed on behalf of the appellant

It is submitted as follows.--

It is submitted on behalf of the 4th respondent that the date of birth of the plaintiff/appellant as per service register which are marked as Exs. D. 1 and D. 2 is 5-2-1949. Therefore, the plaintiff is entitled to be in service 5-2-2009. Whereas, after the disposal of the suit, the 4th respondent by letter dated 31-1-2006 informed that the plaintiff-appellant would retire on 28-2-2007 thereby indicating premature retirement. In view of the subsequent event the plaintiff/appellant do not press the plea that his correct date of birth is 5-2-1951 instead admits that the plaintiff was actually born on 5-2-1949 and does not press the other reliefs of declaration but claims only the relief of permanent injunction restraining the 4th defendant/4th respondent from retiring the appellant/plaintiff before 28-2-2009 from service.

etc.

Insofar as Interlocutory Application No. IV was concerned, the plaintiff sought to produce additional evidence, namely, a notice of retirement issued by the fourth respondent to the plaintiff dated 31-1-2006, an office copy of the legal notice dated 3-3-2006 issued by the plaintiff to the fourth defendant and the postal acknowledgement of having sent the notice. The First Appellate Court has accepted the contention of the plaintiff that the above documents would require to be taken on record, in view of the subsequent events as spelt out in the memo dated 12-12-2006. The First Appellate Court on the basis of Exhibits D. 1 to D. 3 has held that the service register maintained by the fourth defendant records the date of birth of the plaintiff as 5-2-1949 and therefore concluded that the plaintiff was entitled to an alternative relief as his date of birth being declared as

5-2-1949 in terms of the memo dated 12-12-2006 if not for the suit relief which he had claimed and since he was not a Government servant, such a declaration would bind only the fourth defendant and not other defendants and therefore could be granted. It is this which is sought to be questioned in the present appeal.

This Court framed the following substantial question of law while admitting the appeal:

Whether the lower Appellate Court was justified in ignoring the date of birth mentioned in the Cumulative Record, SSLC Marks Card; in pursuance of which action has been taken to retire the respondent as at the end of 28-2-2007 and in granting the injunction restraining the appellants from retiring the respondent when no such request has been made in the suit?

At the time of final arguments, a further substantial question of law was framed namely.--

Whether the respondent-plaintiff was entitled to take inconsistent pleas which could not be sustained mutually?

4. Sri S. Ramadas, Senior Advocate appearing for the Counsel for the appellant submits that by the judgment and decree of the First Appellate Court, relief has been granted to the plaintiff which was never sought for. When the plaintiff had failed to establish his case, that he was born on 5-2-1951 as per Exhibits P. 1 and P. 2 which were discarded by the Trial Court, the First Appellate Court was not justified in proceeding to find a case for the plaintiff, on the basis of the memo dated 12-12-2006 found at page 123 of the paper book. The Senior Advocate contends that the Memo which was filed during the pendency of the appeal, claimed that Exhibits D. 1 and D. 2, which were documents with which the plaintiff was confronted in cross-examination, indicated his date of birth as 5-2-1949, If those documents are accepted, the plaintiff would be entitled to retire from service on 5-2-2009, but since the fourth defendant-employer had issued a letter informing him that he would retire on 28-2-2007, it was stated in the memo that the plaintiff would not press the plea that his date of birth is 5-2-1951 instead, he would concede that his date of birth, as mentioned in Exhibits D. 1 and D. 2 is 5-2-1949 and therefore, would not press the other relief for declaration and hence, claimed it was necessary to injunct the fourth defendant-employer from retiring the plaintiff before 28-2-2009 and it also sought for amendment of the plaint to incorporate the pleadings in support of the prayer for injunction and had sought injunction in terms of the memo. The Senior Advocate would point out that though the application for amendment was rejected, the First Appellate Court has thought it fit to grant relief to the plaintiff and to hold that the date of birth of the appellant was 5-2-1949, even though no such relief of declaration was sought for in the plant. This substantial question of law according to the Senior Advocate should be answered in favour of the appellant and on that ground alone, the appeal ought to be allowed.

In this regard, the Senior Advocate would take this Court through the record to demonstrate that it could not be said that the date of birth indicated in Exhibits D. 1 and D. 2 were final and conclusive. It was the cumulative record of the appellant, which was the basis for the service register maintained by the employer. The same was on record. Therefore, in reconciling the date of birth, which may have been indicated in Exhibits D. 1 and D. 2 and the cumulative record of the plaintiff, it would be the Cumulative Record that would prevail. Further documents were produced by the plaintiff to contend that his date of birth was 5-2-1951, therefore, added a third dimension which rendered the date of birth claimed as 5-2-1949 as unacceptable. It could not be said that there was an admission by the defendant as to the plaintiff's case that his date of birth was 5-2-1951. This has been completely overlooked by the First Appellate Court and merely proceeded on the basis of the memo filed by the plaintiff. The Senior Advocate has placed on record a large number of decisions to hold that in cases where employees seek correction of the date of birth as entered in their service records, towards the end of their services it ought to be treated with extreme circumspection and care, as it would result in undue benefit being conferred on such claimants while affecting the service prospects of others. The Senior Advocate would particularly place reliance on a decision in *Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others*, to contend that it is a settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action, or the nature of the claim, applies to amendment of the plaint. It is not the counter part in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substitute or alter defence or taking inconsistent pleas in the written statement, would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. He would point out that in the present case on hand, the plaintiff has sought a declaration as to the date of birth being 5-2-1951. There is no change in his prayer. Hence, the grant of a relief by the First Appellate Court to declare that the date of birth of the plaintiff was 5-2-1949 is without there being any basis and totally inconsistent with the prayer in the plaint and hence, it could not have been granted. Therefore, the Senior Counsel would submit that the appeal be allowed.

5. Per contra, Sri P.S. Rajagopal, Senior Advocate appearing for the Counsel for the respondent seek to contend that there is no inconsistency in the relief sought in the plaint and the lesser relief, that has been granted by the First Appellate Court in the light of the fact that the service register maintained by the appellant itself records the date of birth of the appellant as 5-2-1949. Therefore, the plaintiff having chosen to restrict the relief, to that extent has been granted by the First Appellate Court, There is no illegality and the same would not give rise to any substantial question of law as it is well-within the power of the Court to mould the relief in the manner that it has.

In this regard, the Senior Advocate would take this Court extensively through the pleadings, and the evidence on record to demonstrate that though the endeavour of the plaintiff was to establish that his date of birth was 5-2-1951 and this having been rendered futile, in the Trial Court having rejected the horoscope as well as the certificate of date of birth produced the plaintiff, has fallen back on the records maintained by the fourth defendant employer in ultimately seeking a lesser relief. Hence, there is no infirmity and insofar as the second substantial question of law is concerned, he would submit that the relief claimed in the alternative cannot be characterised as an inconsistent plea as there is material to establish that the date of birth of the plaintiff even according to the fourth defendant employer was 5-2-1949 and the judgment cited by the appellant itself would indicate that there is no impediment in such an amendment being allowed and there is no prohibition in the plaintiff seeking an alternative relief nor is there a fetter on the power of the Court to mould the relief accordingly. He would place reliance on a judgment in *Srinivas Ram Kumar Vs. Mahabir Prasad and Others*, , to support his contention that a plaintiff may rely upon different rights alternatively and there is nothing in the Code of Civil Procedure, 1908 to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there is no foundation in the pleadings and which the other side was not called upon or had an opportunity to be heard. But when the alternative case which the plaintiff could have made was not only admitted by the plaintiff in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. The admission of the plaintiff based on defendant's own plea cannot possibly be recorded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances when no injustice could possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit. He next relies on *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, , to support the stand of the plaintiff in seeking the date of birth as 5-2-1949 based on the subsequent development during the proceedings whereby it was discovered that the employer's record itself indicated his date of birth as 5-2-1949. He places reliance on *Neelawwa Vs. Shivawwa*, , to contend that under Order 7, Rule 7 of the Code of Civil Procedure, 1908, relief can be granted even in the absence of a specific prayer for such relief and that it would apply to the facts and circumstances of the present case. He places reliance on *Rajendra Tiwary Vs. Basudeo Prasad and Another*, to support the contention that under Order 7, Rule 7 of the Code of Civil Procedure, 1908, permission is granted to a lesser relief if the plaintiff has not made out a case for the grant of a larger relief. Therefore, he would submit that notwithstanding there was no formal amendment to the prayer, the First Appellate Court was well-within its power to grant the relief in favour of the plaintiff and there was no inconsistency in the claim made or the relief granted

and therefore, he would submit that the suit be dismissed.

6. In addressing the substantial questions of law framed, it is seen that the prayer of the plaintiff was to declare his date of birth as 5-2-1951 in accordance with a certificate of birth and his horoscope. This having been rejected by the Trial Court, the plaintiff had not sought for any amendment of the prayer seeking that his date of birth be construed as 5-2-1949 as evident from Exhibits D. 1 to D. 3 which were produced from the custody of the fourth defendant. As against the Cumulative Record and the SSLC Marks Card which indicated the date of birth of the plaintiff as 5-2-1947, the First Appellate Court proceeded to find a case for the plaintiff to grant an alternative relief to declare the plaintiffs date of birth 5-2-1949 is entirely on the basis of the arguments put forth at the hearing of the appeal and the First Appellate Court has proceeded to accept the date of birth reflected in Exhibits D. 1 to D. 3 has thought it fit to grant the relief which was not prayed for by the plaintiff in the plaint.

Order 7, Rule 7 of the Code of Civil Procedure, 1908 requires that every plaint shall state specifically the relief which the plaintiff claims either singly or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. This does not mean that the Court could grant a relief, which was not sought in the alternative. And even if sought in the alternative, would be wholly inconsistent as a person's date of birth could only be on a particular date and not in the alternative--if the same calendar is to be followed. In the instant case, the Court was also not justified in granting such relief as it is not in the nature of a general or other relief which has been granted but an alternative relief which could not have been contemplated in the absence of specific pleadings in support of such alternative relief.

And given the circumstances of the case, it cannot be said that alternative pleadings were permissible in claiming an alternative date of birth. Even assuming that the plaintiff had by drawing the attention to the material on record was in a position to raise a plea in the alternative to be entitled to the relief, it also has to be borne in mind that if alternate cases are alleged, the facts ought not to be mixed up leaving the opponent to pick out the facts applicable to each case. The facts ought to be distinctly stated so as to show on what facts each alternative relief is found. In the instant case, it is not possible for the plaintiff to meet these requirements if he seeks to claim his date of birth as 5-2-1951 and also in the alternative as 5-2-1949.

Inconsistent pleadings are not prohibited, but the litigant who avails himself of the right to press an inconsistent case and endeavours to establish both the alternatives by contradictory oral testimony places himself in peril and may find himself entangled in inextricable difficulty, for evidence adduced in support of two absolutely inconsistent cases which are mutually destructive can hardly be expected to secure confidence (*Bhuban Mohini v. Kumud* 28 CWN 131).

Insofar as the cases cited by the Senior Advocate on behalf of the plaintiff, it is to be seen that the same may not apply to the plaintiffs case since as noticed, there is no amendment of the pleadings to accommodate an alternative relief that was granted by the First Appellate Court even in the absence of any such alternative prayer and the reference to the power of the Court to grant relief would also not be permissible as Order 7, Rule 7 of the Code of Civil Procedure, 1908 cannot be availed for granting such a relief which would be beyond the scope of the appeal and which would result in substantial variation of the decree of the Court below to the disadvantage of the appellant (See Jayakunvar Manilal Shah and Ors. v. Syndicate Bank, Banavasi, Uttara Kannada District and Ors. 1992 (2) Kar. L.J. 583 (DB)).

Therefore, in the light of the above, the substantial questions of law would have to be answered against the plaintiff. Hence, the appeal is allowed and the suit is dismissed. In view of the appeal having been allowed, in terms as above, the cross-objection would not survive for consideration and is accordingly, dismissed.