

(2009) 07 MAD CK 0497

In the Madras High Court

Case No : C.R.P. (P.D.) No. 961 of 2009 and M.P. No. 1 of 2009

R. Krishnamoorthy

APPELLANT

Vs

B. Ramkumar and 7 others

RESPONDENT

Date of Decision : 01-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Court Fees Act, 1870 — Section 25(3)

Citation : (2009) 07 MAD CK 0497

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : Arul Murugan, for the Appellant; K.V. Sundarajan, for the Respondent

Judgement

S. Palanivelu, J.—The allegations contained in the affidavit filed by the petitioner/7th defendant are as follows:

1.(i) The suit property originally belonged to one Appasamy Naidu who purported to create a deed of partition under which he pretended to divide his properties to his daughters, which violated the Agricultural Land Ceiling Act. The Court declared the document as hit by law. Appasamy Naidu died after executing a Will dated 11.12.1983 by means of which he bequeathed the property to the plaintiff. Long time after his death the defendants in collusion with his father and grand mother filed a fraudulent suit in O.S. No. 57 of 1990. The plaintiff was not made a party to the suit. Suppressing the Will, the suit was filed. Since the petitioner was not a party in O.S. No. 57 of 1990, the decree passed in the suit is nullity, void and vitiated by collusion and fraud and not binding on him. Hence an amendment is sought for to the plaint with regard to necessary pleadings as to O.S. No. 57 of 1990 and a declaration as follows:

4) In Prayer Column add the following as (d) "declare that the alleged decree in O.S. No. 57/1990 as confirmed by A.S. No. 440/1991 is bad, void, nullity, vitiated by collusion and fraud and not binding on the Plaintiff in any manner whatsoever.

The allegations found in the counter filed by the 7th defendant/7th respondent are as follows:

2. (i) The petition is not maintainable. The application for amendment is sought for after eight years. Appasamy Naidu had 5 daughters and even during his life time he divided the properties under the registered partition dated 30.9.1970 and allotted specific properties to his daughters. Thereafter, he did not have any right over the properties to execute the Will dated 11.12.1983, which is a fabricated document. The deed of partition has not been declared void ab initio nor had it violated the provisions of Land Reforms Act. It was held by the Court that it was not binding nor enforceable as far as the provisions of the Land Reforms Act are concerned. In A.S. No. 440 of 1991, the High Court, Madras, has clearly stated that the authorities have not declared the deed of partition to be ab initio void, but held that the document is valid as far as the transaction between parties to the documents including Appasamy Naidu. The judgment in A.S. No. 440 of 1991 has become final.

2. (ii) The petitioner in the counter statement filed in I.A. No. 49 of 2005 in O.S. No. 3 of 2005 has categorically admitted the legitimacy and fair contest in the suit O.S. No. 57 of 1990. The relevant portion is as follows:

One of the daughters of Appasamy Naidu filed a suit for partition in OS No. 422 of 1986 later transferred to Tirupur in O.S. No. 57 of 1990 before the Sub-Court, Tirupur. The trial court again held in the presence of all daughters and after the death of Appasamy Naidu. The suit was decreed on 11.3.1991, after contest, holding that partition deed itself was void and particularly in respect of the suit property as totally void and upheld the title of Appasamy Naidu.

2. The petitioner's father and grand mother were parties in O.S. No. 57 of 1990. Rajammal, the grand mother filed O.S. No. 57 of 1990 disputing the partition deed. The decree in O.S. No. 57 of 1990 was challenged before the High Court in A.S. No. 440 of 1991. No reason has been set out as to how his grand mother and father conspire against his interest. The petitioner even now does not contend that he came to know all the proceedings in O.S. No. 57 of 1990 only now. The relief to declare the proceedings in O.S. No. 57 of 1990 as null and void, after lapse of more than a decade is hopelessly barred by time. He is not entitled to seek to set aside the Judgement and decree of a higher court viz., High Court in the present suit. The court fee paid as mentioned in the proposed amendment is erroneous. To such a relief Section 40 of the Court Fee Act will apply and the petitioner has to value the suit property at the present market value and pay ad valorem court fee thereon. He is not entitled to value the suit u/s 25 (3) and pay court fee thereon. There is no merits or bona fides in the application in the application and the same is liable to be dismissed.

3. After hearing both parties, the learned I Additional District Judge, Coimbatore, allowed the application by observing that in the interest of justice it has to be allowed. Aggrieved against the said disposal, the revision petitioner is before this

Court.

4. The first respondent filed a suit against this petitioner and other respondents in O.S. No. 319 of 1999 on the file of the Sub Court, Tiruppur, which is now in O.S. No. 182 of 2007 on the file of the I Additional District Court, Coimbatore, for the relief of his title as sole legatee under the Will dt. 11.12.1983 of Late Appasamy Naidu in respect of plaint-schedule properties, for possession of the schedule lands and for permanent injunction to restrain the defendants 1 to 7 from altering the physical features of the properties into layout site or division in any manner whatsoever. The defendants filed written statement and the suit is pending. The trial has not commenced so far. In the mean time, the plaintiff has filed an amendment petition under Order 6, Rule 17 of C.P.C. The said Appasamy Naidu had five daughters, Rajammal and defendants 1 to 4. He brought out partition between himself and his daughters under the registered partition deed dated 30.09.1970 allotting specific portions in favour of his daughters. The said partition was objected by Rajammal, who filed O.S. No. 57 of 1990 from the judgment passed in the said suit, A.S. No. 440 of 1991 preferred before the High Court, Madras. The Judgments of both the Courts are not made available in the this proceedings. The plaintiff is grand-son of Rajammal i.e., son's son. Appasamy Naidu died on 21.01.1984. First respondent herein claims that, his grand-father, Appasamy Naidu executed a Will on 11.12.1983, bequeathing A-Schedule properties to him. Hence he filed the present suit claiming right over the properties. He pleads that the petitioners fraudulently obtained a decree behind his back and hence he may be permitted to file this petition for amendment.

5. When the nature of the amendment is seen, it is for a declaration that the alleged decree in O.S. No. 57 of 1990, as confirmed in A.S. No. 440 of 1991 is bad, void, nullity and vitiated by collusion. It is to be borne in mind that A.S. No. 440 of 1991 was heard and disposed of by this Court and whether the petitioner is competent to challenge the propriety of the judgment and decree passed by this Court, which could be varied or set aside by a District Court is the moot question. The answer could be emphatic No. To set aside a judgment and decree passed by this Court, the first respondent should have initiated proceedings before the appropriate forum and certainly it is not the trial court.

6. As far as the allowing of amendment applications are concerned, it is general rule that pre-trial amendments have to be considered liberally, of course, subject to certain principles. Learned counsel for the petitioner would place reliance upon a decision of this Court in 2009 (1) CTC 516 [V. Sridhar v. V. Srinivasan] in which after referring to various judgments of this Court it is concluded as under:

21. Even in the decisions relied on by the learned counsel for the revision petitioner, it has been clearly stated that the amendment should not be allowed:

1. If such amendment introduces a new case other than what was originally pleaded; and

2. If the prayer for amendment of pleadings causes serious injustice to the other side.

7. The learned counsel for the respondents would place reliance upon a decision of the Supreme Court in 2008-4-L.W.80 [North Eastern Railway Administration Gorakhpur v. Bahgwan Das (D) by L.Rs.] wherein Their Lordships have held as follows:

15. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (Also see: Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar,

8. The operative portions of the other judgments which are relied upon by the learned counsel for the respondents are as follows:

2008 (1) CTC 19 = 2008-2-L.W. 46[R. Dhanalakshmi and others v. Senthilkumari and others]

By allowing this amendment no prejudice is caused or stated to have been caused to the appellants/defendants. Only technical plea was raised. Fairplay in action must inhere in judicial approach and Court's approach should be oriented with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. A Code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties.

Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others,

We think that the correct principles were enunciated by Bachelor ,J., in his judgment in the same case viz., 33 Bom.644 at p.655 (c), when he said at pp. 649-650:

All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.... but I refrain from citing further authorities as, in my opinion they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of

this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not?

2008-3-L.W. 53 [Puran Ram v. Bhaguram & another]

In this regard, we may observe that the court may, in its discretion, allow an application for amendment of the plaint even where the relief sought to be added by amendment is allegedly barred by limitation.

9. It is pleaded on behalf of the respondent that even though the amendment appears to be time barred, still there is no bar for the Court to entertain at first and it would decide the point of limitation at the time of final disposal of the case, as decided in Puran Ram's case supra. Hence the point of limitation will not be a bar for the court to allow the amendment application.

10. As far as the present proceedings are concerned, the prayer has been couched in such a way that it could not be discussed or decided by a trial court. The relief could not be granted by the trial court since the High Court had already seized of the matter in A.S. No. 440 of 1991. It is also observed that the proposed amendment would certainly prejudice the rights of the defendants to a greater extent and it introduces a new cause of action and it would cause serious injustice to them. In the circumstances, this Court is of the considered view that the amendment could not be allowed and the order impugned before this court in this revision petition is liable to be set aside and accordingly set aside. The Civil Revision Petition deserves to be allowed. In fine, the Civil Revision Petition is allowed. No costs. Connected M.P. is closed.