
(2011) 02 CHH CK 0035
In the Chhattisgarh High Court
Case No : Writ Petition (227) No. 2490 of 2010

Shyam Kathpal and Another	Vs	APPELLANT
Smt. Swarnakanta Sharma and Another		RESPONDENT

Date of Decision : 10-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17
Limitation Act, 1963 — Article 54

Citation : (2011) 3 MPHT 60 : (2011) 2 MPJR 100

Hon'ble Judges : N.K. Agarwal, J

Bench : Division Bench

Judgement

N.K. Agarwal, J.—Legality and propriety of the order dated 23-4-2010 passed by the first Civil Judge Class II, Raipur in Civil Suit No. 34-A/2010 whereby an application preferred by the Respondent No. 1/Plaintiff under Order 6 Rule 17 of CPC has been allowed is under assail in the instant petition preferred by the Defendants.

Facts of the case in brief are as under:

2. On 20-12-2007 Plaintiff instituted a suit for declaration of title based on adverse possession, injunction to restrain Defendants from interfering his possession over the suit property inter alia on the following pleading:

3. The Plaintiff's mother Late Shantidevi Sharma entered into agreement of sale of the suit property with the Defendant No. 1 on 8-8-1987 for a consideration of Rs. 10,000/-. The entire sale consideration was paid by her till 4-5-2005. She also obtained its possession. Plaintiff is paying its municipal tax. Earlier Defendant No. 1 instituted a suit for eviction of Plaintiff's mother from the suit property bearing Civil Suit No. 441-A/2002. Later, on 4-5-2005 as per compromise the above suit was withdrawn and Defendant agreed to execute the sale deed regarding suit property in her favour. Smt. Shantidevi Sharma died on 11-10-2007. After her demise, the Defendant No. 1 assured Plaintiff for execution of sale deed but did not execute the same. On 4-12-2007, the

Defendant No. 2 entered in the suit property for unauthorized construction. The matter was reported to Police Station, Pandri, Raipur. It appears, in connivance with Bhumafia, the Defendants want to dispossess Plaintiff in order to sell the same to Defendant No. 2. The Plaintiff is in possession of the suit property in pursuance of sale agreement dated 8-8-87 and also Defendant is bound to execute the sale deed based on compromise dated 4-5-2005. The Plaintiff is in continuous possession of the suit land for the last 20 year's and the Defendants have no right to dispossess her.

4. Vide application dated 8-4-2010, amendment was sought in the plaint to incorporate the relief of specific performance contract. Prayer was opposed. Learned Trial Court vide order impugned allowed the amendment.

5. As per Learned Counsel for the parties, the amendment had already been incorporated and Petitioner's application for consequential amendment is pending.

6. Shri Manoj Paranjpe; Learned Counsel appearing for the Petitioner would submit, the agreement was executed on 8-8-1987 and after a period of 20 years from the date of execution of the agreement, the Plaintiff wants to incorporate the relief of specific performance of contract which is clearly barred by time. It is trite law that such time barred amendment cannot be allowed. He would further submit, the above amendment would change the nature and character of the suit. The relief of title based on adverse possession and relief of specific performance of contract are destructive to each other and therefore, the order impugned is patently illegal and deserves to be set aside. Reliance has been placed on the judgment of Supreme Court in the case of Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Mary adit (Regd.) v. Ramesh Chander and Ors. reported in AIR 2010 SCW 6761.

7. On the other hand, Shri H.B. Agrawal, learned Sr. Counsel appearing for the Respondent No. 1 would submit, in essence the suit was based on agreement of sale dated 8-8-87. Looking to the fact that on 4-5-2005, the Defendant No. 1 agreed to execute the sale deed and cause of action arose only on 4-12-2007 when Defendant tried to dispossess the Plaintiff, therefore, the relief of specific performance of contract sought by way of amendment is neither time barred nor would change the nature and character of the suit. Learned Trial Court in its discretion has rightly allowed the same. It will not cause any prejudice to the Petitioner. The Petitioner's are well within their right to deny Plaintiff's claim. It was further contended, the plea of limitation in the facts and circumstances of the case is a mixed question of law and fact which would be decided during trial.

8. I have heard Learned Counsel for the parties and perused the pleading and order impugned.

9. The Supreme Court in case of Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, , has issued guidelines to be taken into consideration while dealing with application for amendment in Para 63 of its

judgment which is reproduced here in below:

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) Whether the application for amendment is bonafide or malafide;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

The Supreme Court in the above judgment has further observed in Para 64 as under:

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the Courts must not refuse bonafide, legitimate, honest and necessary amendments and should never permit malafide, worthless and/or dishonest amendments.

10. The Supreme Court in case of Van Vibhag (supra), in Paras 33 to 38 of its judgment has observed as under:

33. This Court is therefore, of the opinion that the Appellant had the cause of action to sue for Specific Performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. This Court may consider its omission to include the relief of Specific Performance in the suit which it filed when it had cause of action to sue for Specific Performance as relinquishment of that part of its claim. The suit filed by Appellant, therefore, is hit by the provisions of Order 2 Rule 2 of the Code of Civil Procedure.

34. Though the Appellant has not subsequently filed a second suit, as to bring his case squarely within the bar of Order 2 Rule 2, but the broad principles of Order

2 Rule 2, which are also based on public policy, are attracted in the facts of this case.

35. Even though the prayer for amendment to include the relief of specific performance was made about 11 years after the filing the suit, and the same was allowed after 12 years of the filing of the suit, such an amendment in the facts of the case cannot relate back to the date of filing of the original plaint, in view of the clear bar under Article 54 of the Limitation Act.

36. Here in this case, the inclusion of the plea of Specific Performance by way of amendment virtually alters the character of the suit, and its pecuniary jurisdiction had gone up and the plaint had to be transferred to a different Court.

37. This Court held in Vishambhar and Ors. v. Laxminarayan and Anr. (supra), 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 the suit to cure the defect of limitation. Those principles are applicable to the present case.

38. In K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, , thus Court held that an application for amendment filed 7 years after the filing of the suit to include the plea of Specific Performance would not defeat the valuable right of limitation accruing to other side. In that case, the factual position was somewhat similar to the present case and this Court held that when a plea for Specific Performance was not included in the original suit, it could not be included after a period of 7 years having regard to Article 54 of the Limitation Act.

11. In view of the law laid down by the Supreme Court in the above referred cases, time barred relief normally should not be allowed to be incorporated by way of amendment. Such amendment even though allowed cannot relate back to the date of filing of the suit to cure the defect of limitation.

12. Now coming to the facts of the case, since complete facts and documents were not brought on record, it is not possible for this Court to hold whether or not amended relief of specific performance of contract is barred by limitation; the amendment has already been incorporated, Petitioner's application for consequential amendment is pending; interest of justice would be subserved if it is held that the amendment in question shall not relate back to the date of filing of the suit and plaint shall be deemed to be filed so far as relief of specific performance of contract is concerned, on 8-4-2010, i.e., the date of filing of amendment application.

13. In view of above, the petition is allowed in part and the order impugned is modified to the extent as referred hereinabove.

14. No order as to costs.