
(2008) 03 KAR CK 0029
In the Karnataka High Court
Case No : Writ Petition No. 3584 of 2006

Smt. Muniyamma and Another	Vs	APPELLANT
S. Chandrakar and Others		RESPONDENT

Date of Decision : 13-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 8 Rule 1

Citation : (2008) ILR (Kar) 2863 : (2008) 3 KCCR 1576

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : G. Shankar, for the Appellant; Prakash T. Hebbar, for R1 and H.C. Dharmendra, for R2 and R3, for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda, J.—Petitioners, who are defendant Nos. 3 and 4 in O.S.3669/ 2002, pending on the file of Additional City Civil Judge, Bangalore, have questioned in this writ petition the order dated 19.1.2006, whereby I.A.4 filed by them for amendment of the written statement was rejected. 1st respondent herein, is the plaintiff who has instituted the said suit, against the petitioners and the 2nd and 3rd respondents herein.

2. Heard the learned Counsel appearing for the parties and perused the writ petition.

3. Learned Counsel for the petitioners filed a memo producing a copy of the order dated 22.7.2007 passed by the Disciplinary Committee No. III of the Karnataka State Bar Council in DCE No. 75/2006 i.e., on the complaint lodged by the 2nd petitioner herein, against his previous advocate "x" (real name not mentioned). Since the order produced along with the memo has a direct bearing for the decision making in this writ petition, after hearing the learned Counsel appearing for the 1st respondent, the same is taken on record.

4. Sri G. Shankar, learned Counsel appearing for the petitioners contended that,

on account of fraud and misrepresentation played on the petitioners by their previous advocate, amendment of the written statement became necessary. Learned Counsel contended that, fraud and justice do not dwell together and in view of the findings by the competent forum against advocate "x" with regard to his fraudulent acts on the petitioners and his collusion with the plaintiff, the proceedings in the suit, the so called written statement filed in the trial Court, are vitiated. Learned Counsel contended that in view of the record of the case, to advance cause of justice and not to perpetuate the injustice caused to the petitioners on account of the collusive acts by the advocate "x", the writ petition may be allowed by granting the prayer in I.A.4, filed in the trial Court.

5. Per contra, Sri Prakash T. Hebbar, learned Counsel appearing for the 1st respondent/plaintiff contended that, before the trial Court, no material was produced to show that the petitioners' earlier advocate had committed any act of collusion with the plaintiff and hence, the trial Court was justified in passing the impugned order. Learned Counsel further contended that the admissions made in the written statement filed in the trial Court, cannot be taken away by the amendment. Learned Counsel further contended that, the prayer in I.A.4, is for substitution of the written statement, and such a prayer is not permissible in view of the decision of this Court in the case of Revansiddappa and Ors. v. Siddaramappa 2005 (2) KCCR 761. Learned Counsel contended that the trial Court has correctly exercised the jurisdiction vested in it and the impugned order does not call for interference in the writ jurisdiction of this Court.

6. Considering the rival contentions and the record, the points that arise for my consideration are:

(a) Whether the petitioners have established that there was fraud and collusion by their previous advocate in the matter of filing the written statement before the trial Court?

(b) Whether the trial Court has failed to exercise the jurisdiction vested in it?

REGARDING POINT (a):

7. It is not in dispute that, the petitioners had engaged advocate "x" in the trial Court to appear on their behalf and that he had prepared the written statement and has filed it on 24.9.2002. It was stated by the petitioners, in I.A.4 that, after filing the written statement, their advocate "x" did not co-operate with them in conducting the suit and they became suspicious, obtained back the papers from the said advocate, engaged the present advocate and gave instructions to the present advocate to go on with the matter. It was their case that the present advocate after going through the file, informed them about the defense taken in the previous written statement and on hearing, they were shocked to note that their previous advocate had conceded the plaint allegations by colluding with the plaintiff. It was stated that their previous advocate, obtained their signatures on the written statement, without explaining the contents thereof and that their previous advocate had misrepresented to them by stating that he is defending

their interest. It was stated that Smt. Muniyamma, the 3rd defendant does not know any other language than Telugu and Sri Venkataswamy, the 4th defendant, was a school drop out and he had studied in Telugu language. With the said background, I.A.4 was filed, which was contested by the plaintiffs.

8. Petitioners had filed a complaint before the Karnataka State Bar Council, against their previous advocate "x", alleging that he has drafted the written statement to the suit, without disclosing to them, the defense taken, he did not explain the contents of the written statement and that he has committed the professional misconduct. The Bar Council had referred the complaint to its Disciplinary Committee - III. Notice of the said complaint was issued to advocate "x", who after appearing, has filed his statement of objections denying the allegations made against him in the complaint and also contending that he had not committed any professional misconduct. On the basis of the complaint and the objection statement, the said authority has framed the following charges on 22.12.2006. against advocate "x":

1. Whether the complainant proves that the respondent colluded with counsel Shri. Chandrakar appearing for plaintiffs in the suit in OS 3669/2002 for extraneous consideration?

2. Whether the complainant proves that the respondent has committed professional misconduct?

3. Whether the respondent proves that he has drafted written statement, as per the instructions given to him by the complainant?

4. What Order?

9. The said authority has conducted the enquiry, in which, the complaint i.e., the 2nd petitioner herein has deposed as CW1 and the documents produced by him, were marked as Exs.C1 to C12 and he has also examined one witness as CW.2. Advocate "x" who was the respondent therein, has got himself examined as RW.1 and the documents produced by him, were marked as Exs.R4 to R8. After hearing the arguments, the said authority has held that the charges 1 and 3, as proved. It was further held as follows:

As per the Bar Council of India Rules under Chapter II it is duty of the advocate to explain and to inform the client regarding drafting and pleadings of the case. But according to the respondent he has drafted the written statement as per the instructions given by the complainant and his mother. However the respondent ought to have taken much care before drafting and pleading the case of the complainant. By drafting in such way it will harm the case of the complainant and likely that he may lose the property. The respondent would have explained to the complainant regarding conceding the case of the complainant. Hence we hold that the complainant has proved that the respondent has committed professional misconduct. However looking into the facts of the case as well as the defense taken by the respondent, the respondent has committed professional misconduct

and we pass the following.

After arriving at the said conclusions, an order has been passed by the Disciplinary Committee-III of the Karnataka State Bar Council, REPRIMANDING advocate "x" as per Section 35(3)(b) of the Advocates Act, 1961.

10. From the said proceedings, it is clear that the petitioners have clearly established that there was fraud and collusion by their previous advocate in the matter of filing the written statement in the trial Court. The allegations made by the petitioners in I.A.4 have thus been duly established. Once fraud is established, it will have to be held that the proceedings are vitiated and the consequential effect is that, the result of the fraudulent action should be declared as null and void, otherwise there will be serious miscarriage of justice. Hon"ble Supreme Court, in catena of decisions has held that fraud and justice never dwell together and that the fraud vitiates the most solemn proceedings. In the case of Ram Chandra Singh Vs. Savitri Devi and Others, , it has been held as follows:

Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.

Point (a) is answered accordingly.

REGARDING POINT (b):

11. Trial Court has relied upon the decision in the case of REVANSIDDAPPA, to disallow the amendment. In the case of REVANSIDDAPPA, petitioners who were the defendants in the suit, had filed written statement and thereafter filed an application under Order 6 Rule 17 CPC, seeking permission of the Court to amend the plaint, which was allowed. Thereafter, they also filed additional written statement, after which, they had filed, an application seeking permission of the Court to withdraw the earlier written statement filed by them and to substitute the new written statement, which application was rejected by the trial Court, which was challenged in the writ petition in this Court, wherein the

question considered was, whether under Order 8 Rule 1 of CPC, can the defendants replace the written statement filed by them. Noticing that, there is no provision to replace the written statement once filed by the parties and observing that, if the defendants are so willing to incorporate or add new paragraphs or new events, they can do so by filing an application under Order 6 Rule 17 CPC, the writ petition was rejected. In the instant case, prayer in I.A.4 was to amend the written statement, i.e., to file annexed written statement to the application, by substituting the defects/pleadings taken in the previous written statement filed on 24.9.2002. The petitioners have subsequently, i.e., on 8.9.2005 filed a memo, restricting the amendment. Considering the said memo and also the vitiating factor on account of the fraud committed in the matter, discussed supra while answering point (a), in my view, the case is not one of replacing the written statement already filed, but is only an amendment of the written statement filed and hence the decision in the case of REVANSIDDAPPA, has no application. Even in the said case, it has been held that, amendment by incorporating new paragraphs or new events, can be permitted in an application filed under Order 6 Rule 17 CPC.

12. Another reason which has weighed with the trial Court in rejecting I.A.4 is that, by the proposed amendment, the defendants want to withdraw valuable admissions made by them in their previous written statement and if such an application is allowed, the plaintiff will be burdened to offer the proof regarding acquisition of suit property. In my view, considering the background of the case, while answering point (a), it has been noticed that the alleged admissions, were only on account of fraud and misrepresentation committed on the petitioners by their previous advocate "x". In the instant case, in view of the circumstances which have lead the commission of fraud and misrepresentation on the petitioners, it cannot be held that there was any conscious admission made by them in the written statement, from which, they are attempting to wriggle out, by way of seeking amendment. What had happened at the time of filing the written statement on 24.9.2002, was only on account of the fraud and misrepresentation committed on the petitioners by their previous advocate "x", in collusion with the plaintiff, which acts have been duly proved and established before the competent forum, i.e., Karnataka State Bar Council. It is the cardinal principle of law that plaintiff has to prove his case in accordance with law. The plaintiff who has approached the Court for relief, has to offer the proof in support of his case and hence the reasoning of the trial Court that, "the plaintiffs will be burdened to offer proof regarding the acquisition of the suit schedule property etc.," to say the least, is one passed against settled principles of law. Since the suit is one for grant of declaratory decree with consequential reliefs, not withstanding the alleged admissions, the Court can still require the plaintiff to prove the fact, which has been admitted by the defendant, which will be in consonance with Section 58 of the Evidence Act.

13. It is also well settled principle of law that the defendant in a suit has the latitude and is entitled to take inconsistent pleas. If an authority is required, the

same can be found in the case of Basavan Jaggu Dhobi v. Sukhnandan Ramdas Choudhary wherein it has been as held as follows:

3. As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his written statement under Order 6 Rule 17 CPC by taking a contrary stand than what was stated originally in the written statement. This is opposed to the settled law. It is open to a defendant to take even contrary stands or contradictory stands, thereby the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new of cause of action. Be that so.

14. Object of Rule 17 of Order 6 CPC has been declared by the Hon"ble Supreme Court in the case of Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, follows:

15. This rule declares that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The provision enacts that no application for amendment should be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the part could not have raised the matter for which amendment is sought before the commencement of the trial.

16. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

17. Order VI, Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

15. In the instant case, trial of the suit, has not yet commenced. Petitioners had sought amendment of their written statement on account of the circumstances stated above. I have perused the proposed amendment. After considering the same, in my view, it would be in the interest of justice, to allow the petitioners to amend the written statement filed by them on 24.9.2002. In my view, the proposed amendment, is necessary, to determine the real questions in controversy between the parties.

16. The trial Court has failed to exercise the jurisdiction vested in it and the illegality is apparent. Hence the impugned order is unsustainable. I.A.4 filed in the trial court, being meritorious, for the reasons stated above, is liable to be allowed by setting aside the impugned order. Point (b) is answered accordingly.

17. For the foregoing discussion and reasons, the writ petition is allowed and the impugned order is set aside. I.A.4 filed in the trial Court shall stand allowed. The petitioners shall incorporate the amendment to their written statement filed on 24.9.2002 in terms of the clarification furnished in their memo dated 8.9.2005. In the facts and circumstances, parties are directed to bear their respective costs.