
(2010) 09 KAR CK 0013

In the Karnataka High Court

Case No : Writ Petition No's. 25667-25668 of 2010

Sri D. Thilakan Naidu

APPELLANT

Vs

Skylark Mansions Pvt. Ltd.

RESPONDENT

Date of Decision : 01-09-2010

Acts Referred:

Advocates Act, 1961 — Section 35

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

Citation : (2010) 09 KAR CK 0013

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

Bench : Single Bench

Advocate : Goutam, Rajeswar and Narayan Rao, for the Appellant; M.G. Javeed Ahmed Khan, for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda, J.—2nd plaintiff is the petitioner. Respondent is the sole defendant. Suit filed on 05.06.2004 is for the relief of permanent injunction to restrain the defendant from interfering or causing encumbrances to the suit schedule property. Written statement was filed by the defendant on 30.07.2004. The petitioner contends that, their advocate has played fraud in filing injunction suit, instead of filing the suit for specific performance and alleges that, there is collusion. A complaint has been lodged in the Bar Council of Karnataka on 09.02.2005. The trial court has framed the issues on 03.01.2006 and the suit was posted for trial. The complaint lodged against P.S. Rajendran, advocate, by the petitioner, having found to be meritorious by the Karnataka Bar Council, by its order dated 07.01.2007, he was suspended for a period of three years and was directed to pay Rs. 5000/- towards cost to the complainant/petitioner.

2. Plaintiff/petitioner filed I.A No. 2 on 30.03.2007 seeking permission of the court to amend the plaint and to incorporate the relief of specific performance. Defendant/respondent filed objection to I.A No. 2 on 02.06.2007. Said application was rejected by the trial court on 18.12.2009.

3. Plaintiff/petitioner filed I.A. No. 3 on 12.04.2010 seeking permission of the court to incorporate additional plea in the plaint and an alternate prayer for refund of Rs. 8,50,000/- with interest. Defendant/respondent filed objections to I.A. No. 3 on 24.07.2010. The trial court has dismissed the said application on 29.07.2010. The challenge in these writ petitions are to the orders dated 18.12.2009 and 29.07.2010, dismissing I.A. Nos. 2 and 3.

4. Learned Counsel appearing for the petitioners contended that, the trial court has failed to exercise the jurisdiction vested in it under Order 6 Rule 17 of C.P.C., since it has passed the orders mechanically without taking into consideration the fact that fraud had been played on the plaintiffs by their advocate, against whom complaint was lodged with the Bar Council of Karnataka, which having been found to be meritorious, was allowed and the advocate has been suspended and I.A. No. 3 was filed immediately thereafter. Learned Counsel submitted that, the fraud unravels everything and the period of limitation does not run, since most solemn proceedings are vitiated if they are tainted with fraud. Learned Counsel submitted that, the trial court has misdirected itself and has passed the impugned orders, which if allowed to stand, would cause irreparable loss and prejudice to the petitioner. It was submitted that, the trial court has gone into the merit of the amendment prayed, which is not permissible at this stage of the proceedings and since the impugned orders are irrational and illegal, interference is called for.

5. On the other hand, learned advocate appearing for the respondent submitted that, the trial court has correctly noticed the facts and the record and since the property has already been sold on 16.03.2000, the suit has become infructuous and there was no due diligence on the part of the plaintiffs and in view of applicability of proviso to Rule 17 of Order 6 C.P.C., since the trial has commenced, the trial court is justified in disallowing the prayers made in I.A. Nos. 2 and 3. Learned Counsel made submissions in support of the findings and conclusion of the trial court in the impugned orders.

6. I have perused the writ petition papers.

7. When LA No. 2 was filed, trial of the suit had not commenced. Issues had only been framed. In the case of Vidyabai and Others Vs. Padmalatha and Another, , the Apex Court has held that, once the issues are struck, the trial is deemed to have commenced. On the date I.A. No. 3 was filed, affidavit evidence of plaintiff had been filed, but cross-examination by the defendant had not taken place. Even in a case where the proviso to Rule 17 of Order 6 C.P.C. is attracted, the party despite due diligence, could not have raised the matter before commencement of trial, such party can be allowed to alter or amend his pleading as may be necessary for the purpose of determining the real questions in controversy between the parties.

8. Petitioner has produced the copy of the order passed in DCE 18/2006 dated 07.01.2007 passed by the Karnataka Bar Council against Sri P.S. Rajendar,

advocate, who had undisputedly been engaged by the plaintiffs and who has failed to protect the interest of the plaintiff since it has been held that there is misappropriation of the plaintiffs money, which is a grave professional misconduct and there is breach of trust and the said advocate has been held to have committed professional misconduct in violation of Section 35 of the Advocates Act and as a result, he was suspended for a period of three years and was directed to pay Rs. 5,000/- towards cost. The said circumstance itself was sufficient to the court to have liberally construed the prayers in I.A. Nos. 2 and 3 to amend the plaint and incorporate additional pleading and prayers. Even otherwise, the claim made by the petitioner that they were not aware of the written statement filed to the suit on 30.07.2004 cannot be lightly brushed aside, in view of the conduct of their advocate, which having been enquired by the Karnataka Bar Council, the said order suspending his practice on account of professional misconduct committed has been passed. If the plaintiff/petitioner was aware of the stand taken by the defendant, he would have certainly approached the court for incorporating the amendment much earlier. The fraud played on the plaintiffs by their then advocate has been established before Karnataka Bar Council, which has passed the order dated 07.01.2007 (Annexure-K).

9. 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*.

10. The power under Rule 17 is entirely discretionary to be used judicially on consideration of the circumstances of each case. On satisfying two conditions, namely (1) of not working injustice to the other side and (sic) of being necessary for the purpose of determining the real question in controversy between the parties, the prayer for amendment can be allowed subject to the limitation

placed under the proviso thereunder.

11. The trial court without taking into consideration the circumstances and by misdirecting itself has recorded erroneous findings and as a result, has passed the impugned order. Considering the factual background and the object of Rule 17 under Order 6 C.P.C. in order to minimise the litigation and to decide the real questions in controversy between the parties, the prayers made in I.A. Nos. 2 and 3 being meritorious, ought to have been allowed. In not doing so, the trial court has committed irrationality and also illegality, by adopting a pedantic approach to the matter.

In the result, the writ petition stands allowed. The impugned order stands quashed. The plaintiffs shall carry out the amendment to the plaint within two weeks from today. The defendant is at liberty to file additional written statement within two weeks from the date a copy of the amended plaint is served on the defendant or the learned advocate who appears: for the defendant, in the trial court. The trial court is directed to raise additional issues if any and try the suit as expeditiously as possible and dispose of the same on or before 31.01.2011.

Ordered accordingly.