

(2008) 07 DEL CK 0248

In the Delhi High Court

Case No : IA 4683 of 2008 in CS (OS) 12 of 2007

Vipul Khosla

APPELLANT

Vs

Anil Khosla and Others

RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 115

Citation : (2008) 07 DEL CK 0248

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Masood Mirza and Himal Akhtar, for the Appellant; S.K. Verma, Atul Kumar, for D-1, D2 and D-4 and Niloy Dasgupta, for D-3, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—This order will dispose of is No. 4683/2007 which seeks rejection of the plaint on several grounds.

2. The plaintiffs, as minors, had sued the defendants and claimed declaration with other consequential reliefs through their mother and next friend; the suit was filed on 11.11.2002 in this Court. The change in pecuniary jurisdiction of Courts in Delhi, led to the suit, CS(OS) 1846/2002 Vipul Khosla v. Anil Khosla and Ors. being transferred to the Court of the District Judge by order of this Court dated 18.3.2004 During the course of proceedings, after the written statements were filed, the defendants raised a series of objections including valuation of the suit for the purposes of Court fee. They also moved an application for rejection of the plaint under Order 7 Rule 11 CPC. It would be necessary to notice at this stage that the grounds for rejection of plaint are the same as are being articulated in is No. 4683/2007. That application was rejected on 6.12.2005 by the trial Court. That order was challenged in revisional proceedings u/s 115, CPC being CRP No. 23-25/2006. Notice was issued in the revision petition which remained pending on the trial of the Court.

3. In the meanwhile, on 2.6.2006 the Addl. District Judge (trial Court) noticed that the suit was improperly valued and directed the plaintiffs to value it at Rs. 1.5 crores for the purposes of court fee and jurisdiction. That order was challenged by one of the plaintiffs Vipul Khosla who had attained majority in the course of the proceedings and was permitted to contest the case. He accordingly moved CM(M) No. 1223/2006, assailing the order directing fresh valuation, dated 2.6.2006. This Court disposed of CM(M) 1223/2006 by the order dated 11.8.2006. Even while affirming the trial court's order directing the plaintiffs to increase valuation to Rs. 1.5 crores the Court granted 30 days time to make up the deficiency in Court fees. The Court, in CM(M) 1223/2006 clarified to some extent its previous order, on 30.9.2006 when instead of the 30 day time limit, the trial Court was granted the liberty to consider the issue of time limit for payment of court fee. The Petitioner was permitted to satisfy the trial Court about the contention of delay in filing the Court fee.

4. After this development, on 5.10.2006 an amendment application was moved before the trial Court, to comply with the orders dated 2.6.2006. These amendments valued the suit at Rs. 1.5 crores and proposed payment of the requisite court fee. Other amendments included the claim for separation and partition of the plaintiff's share in the suit property. The amendments proposed were allowed by the order date 30.11.2006. The petitioner thereafter took back the papers and filed the suit, in accordance with the fresh valuation, before this Court on 2.12.2006.

5. On 23.1.2007 a development took place which has a direct material bearing on the present controversy. The previous order of the trial Court dated 6.12.2005, rejecting the application for amendment under Order 7 Rule 11 was set aside in the pending CRP No. 23-25/2005. In the course of the order, in those revisional proceedings, the Court noticed that the trial Court after making the impugned order (dismissing the application for rejection of plaint on 6.12.2005) had on 2.6.2006 held that the valuation of the suit was improper. The Court, Therefore, reasoned that all subsequent orders, after 2.6.2006 made by the trial Court, including the amendment of 30.11.2006 were unauthorized and the proceedings, void. The Court, however, in the course of the order noticed that the revision had become technically infructuous.

6. The applicant-defendant argued that the suit has to be rejected for the self same reasons objected by them before the trial Court and also for the reason that unauthorized amendments, held to be void and a nullity (by the order of this Court dated 23.1.2007) have nevertheless been incorporated in the plaint. It is argued that the plaintiff has not valued the suit properly or paid the requisite Court fee and that the suit does not disclose any cause of action. The applicants dispute that the cause of action as alleged in the suit to have occurred on 28.2.2001 ever arose in the manner alleged. It is also contended and argued in support of the application that the challenge to the relinquishment deed is not on the ground of lack of necessity or other legal impediment and in the absence of

such allegation, the suit is not maintainable. The applicant- defendant alleged that the suit has been deliberately undervalued at Rs. 1.5 crores to evade proper Court fee.

7. The non-applicant plaintiff argues that the objections to maintainability of the suit are frivolous. It is contended that although there are observations about unauthorized amendments being made after 2.6.2006, that order directing proper valuation and amendment was questioned in CM(M) 1223/2006 and upheld. The plaintiff acted upon it although after some time by approaching the Court on 5.10.2006 and depositing the requisite Court fees along with the amendment of the suit. The order of the trial Court dated 2.6.2006 directing upward valuation and the consequential action in the return of the plaint for re-filing before this Court was a logical step. It was contended that the subsequent order dated 23.1.2007, could not have commented on the later developments in the suit particularly when the order of 2.6.2006 had been upheld in another proceeding by this Court, and had merged with the order of this Court.

8. So far as the merits of the application are concerned, it is contended that the amendments incorporated in the suit are not unauthorized as they are also consequential in nature. It was further argued that the defendant's contention about the suit being time barred is untenable since the declaration sought was within the prescribed three years period. It was submitted further as to what ought to be legally tenable grounds or otherwise for impeaching a relinquishment deed, are matters of trial best left for later stages in the proceedings.

9. The picture which emerges from the previous narrative is a somewhat confused tangle, perhaps the result of change of jurisdiction and re-valuation of the suit on the one hand and assisted in part by two seemingly conflicting orders of this Court while exercising supervisory jurisdiction. What, however, is clear that the order of the trial Court dated 2.6.2006 was affirmed by this Court which even extended the time to deposit the proper court fee on the basis of the enhanced valuation. The order of this Court dated 23.1.2007 (in CRP No. 23-25/2006) was only concerned with the legality of the order of the trial Court dismissing the order 7 Rule 11 application. Yet in the course of those proceedings the Court commented on the post 2.6.2006 developments in the suit. Curiously enough that order "2.3.2007" is completely silent about the previous orders of the Court in CM(M) 1223/2006. In my opinion those previous orders affirmed the trial Court's determination dated 2.6.2006 and also implicitly approved the consequential step of valuation, by extending the time to pay the requisite Court fee. Had this important event been noticed by the Court, on 23- 1-2007, in CRP 23-25/2006, it may well not have commented about the legal effect of the subsequent order of the trial Court, permitting the amendment. In any event having regard to the limited nature of the challenge before this Court in CRP No. 23-25/2006, the observations made about subsequent orders, can also be regarded as tentative views expressed without the orders being under challenge before the court, and not necessarily conclusive or determinative of the issue.

10. Now coming to the issue of the unauthorized amendments. No doubt the trial Court permitted the amendments on 30.11.2006; the suit was, Therefore, returned and filed before the Court as amended, incorporating the amendments so made. Now if the logic of the order in CRP No. 23-25/2006 were to be pursued, what would follow is that the suit would be on the file of the Court as originally presented, but without the amendments. Yet all other proceedings including the orders and the applications pending on the file would be on the record and would have to be considered by this Court. Strictly speaking the plaint as presented, should have conformed to what was pending on the file of the Court as on 2.6.2006 without the amendments other than those relating to valuation. The incorporation of these amendments is one serious objection that the Court proposes to deal with, but in a later part of the order.

11. As far as the merits of the application for rejection of the plaint are concerned, this Court finds no substance in the objection that the suit is time barred. It is well-settled that the merits of a claim cannot be gone into and in dealing with such applications the Court is concerned with only averments, in the suit as well as the list of documents filed along with the suit. These averments clearly reflect that the cause of action arose in 2001. The suit was filed in 2002. Therefore, the relief of declaration has been claimed well within the time. So far as the question of not impeaching the relinquishment deed for legally sound reasons are concerned that objection, in the opinion of the Court is unmerited and insubstantial. Whether the grounds urged for saying that the relinquishment made by the plaintiff's father, is not binding upon them are permissible in law, are subject to scrutiny during the trial and final arguments. This Court cannot pre-judge that issue at this stage; doing so would be conjectural and denying the plaintiffs the right to prove their allegations.

12. Now as far as the unauthorized amendments are concerned in one sense the defendants are right when they point out that the subsequent additions to para 15 and the amendment to the relief clause, have been added after 2.6.2006 and that such amendments, cannot be permitted. Yet this Court is not unmindful of the fact that such amendments were granted by order dated 30.11.2006. There is nothing on the record to suggest that such order was challenged. The defendants relied solely on the order of this Court dated 23.1.2007 which was concerned only with the previous order dated 6.12.2005. If the defendants arguments are to be accepted, this Court would have to reject the suit placed on the record and proceed with the suit as it existed on the file of the trial Court. That course of action does not commend to this Court at this juncture. This is the third time this Court is called upon to decide the question of rejection of plaint, or valuation. Also, the suit is being presented a third time- the first time, it was filed in this Court, in 2002, returned and filed in the District court in 2004, and returned from that court, to be filed yet again before this Court, in 2-12-2006. These procedural squabbling cannot surely go on endlessly. Also, if the defendant's argument reflects the true position, there was no need for re-valuation and presentation of the suit before this Court. So far as the other

amendments are concerned, acceptance of the defendants arguments would also mean that the application for amendment moved before the trial Court (and allowed on 30.11.2006 which order has never been impeached is illegal) would have to be decided by this Court since it is a part of the proceedings filed after return of the plaint. As so aptly remarked by the Supreme Court in *Sushil Kumar Sen Vs. State of Bihar*, The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable.?

13. This Court has considered the amendments proposed. They are contained in Paras 15(a) to 15(d) of the suit. The relief clause has also been consequently amended. Now a reading of the order of 2.6.2006 of the trial Court would disclose that the Court had directed revaluation of the suit and also consequential amendment of the plaint to reflect the relief of possession. The plaintiffs had originally sought for a decree for declaration that the family settlement of the HUF dated 28.2.2001 was illegal and that they continued to be co-parceners in the HUF. A permanent injunction restraining the first defendant from dealing with HUF property was sought. As a result of the order dated 2.6.2006 (which was upheld by this Court on 11.8.2006 and later by the clarificatory order); the plaintiff acted on that and sought the amendment. Even though *strictu sensu* the trial Court could not have allowed such amendment yet the fact remains that in sum and substance the necessity of revaluing the suit and making, consequential necessary changes in the plaint was felt and upheld by this Court in CM(M) 1223/2006 on 11.8.2006. Viewed from this perspective, this Court has the power ? in view of the fact that the trial Court proceeded to allow the application for amendment after hearing the arguments of the parties, on 30.11.2006, to take the amended plaint on the record. This conclusion is fortified by the order of the trial Court dated 30.11.2006 which shows that counsel for defendant were heard. They never objected to jurisdiction of the trial Court and in fact the defendants do not even seem to have seriously opposed the amendments. At any rate during the hearing of this application the defendants did not rely upon any reply filed on the record, opposing the applications before the trial Court. In these circumstances this Court concludes that on the merits the defendants did not have any objection to the amendment; rather they were necessary and consequential to the order dated 2.6.2006. Therefore, this Court is within its rights to permit such amendment as consequential to the order of the trial Court dated 2.6.2006, and does so, as a curative measure, *ex debito justitiae*, to take on record the existing plaint.

14. As far as the objection with regard to valuation and payment of court fees is concerned, the Court is of the considered opinion that these too are unfounded. The plaintiffs have valued the suit at Rs. 1.5 crores and have claimed 1/9th share in the co-parcenary property. The court fees has been paid on the said 1/9th share of which possession is sought. The plaintiffs are not in possession of their

share of the property. In these circumstances, the plaint cannot be rejected.

15. For the above reasons the Court is of the opinion that the application is unmerited and has to fail and it is accordingly dismissed.