

M.Kumar Vs. M.Mohankumar

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Court : Chennai

Decided On : Nov-18-2013

Judge : R.Subbiah

Appellant : M.Kumar

Respondent : M.Mohankumar

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED: 18/11/2013
CORAM THE HON'BLE MR.JUSTICE R.SUBBIAH Application No.1458 of 2013 in
Civil Suit No.873 of 2010 MR.M.KUMAR4355, MC.NICHOLAS ROAD, CHETPUT,
CHENNAI-31.

versus M.MOHANKUMAR NO.5, NEW NO.9, SEETHAMMAL COLONY, 3RD
CROSS STREET, ALWARPET, CHENNAI-18.

2.

M.RAJKUMAR NO.5, NEW NO.9, SEETHAMMAL COLONY, 3RD CROSS
STREET, ALWARPET, CHENNAI-18.

3.

HEMA RAJAMOHAN NO.528, TTK ROAD, ALWARPET, CHENNAI-18.

ORDER

Application No.1458 of 2013 in Civil Suit No.873 of 2010 R.SUBBIAH, J., This application has been filed under Order XIV Rule 8 of O.S.Rules read with order VI Rule 17 of C.P.C.to amend the plaint.

2.The applicant herein has originally filed the suit for the following reliefs:- a)for grant of permanent injunction restraining the defendants, their men, agents, servants etc., in any manner from interfering with the plaintiff's peaceful possession and enjoyment of the suit property bearing No.43/55, Mc.Nicholes Road, Chetput, Chennai-600 031 more fully described under the schedule to the plaint, except due process of law.

b)to direct the defendants to pay the cost of the suit.

3.It is the case of the applicant/plaintiff that the respondents 1 & 2/defendants 1 & 2 are the owners of the suit property bearing No.43/55, Mc.Nicholes Road, Chetput, Chennai-600 031.

The 3rd respondent/D3 is the power of attorney of the respondents 1 & 2/defendants 1 & 2.

Through one Vijayakumar who is a common friend of 1st respondent and the applicant, the suit property was taken on lease by the applicant during January-2007.

The 3rd respondent, power of attorney, negotiated the terms and conditions to let out the suit property to the applicant/plaintiff.

The rent was fixed as Rs.20,000/- per month and the period of lease commenced from 1st February, 2007.

The applicant/plaintiff has also paid a sum of Rs.3,50,000/- towards advance amount and with all other usual terms and conditions, the applicant/plaintiff was put in possession of the suit property from 01.02.2007.

4.It is further case of the applicant/plaintiff that initially the applicant/plaintiff was paying the rent by way of cheque till August-2007 and thereafter, he was paying the rent by way of cash through the above said Vijayakumar, who is a common

friend of the applicant and the respondents 1 & 2/defendants 1 & 2.

The respondents 1 & 2/defendants 1 & 2 are permanently residing in Canada and the 1st respondent/D1 used to contact the applicant/plaintiff over phone and instruct to give the rent to the said Vijayakumar and upon such instructions, the plaintiff has been paying the rent by way of Cheque as well as cash as requested by the respondents 1 & 2.

Since the suit building/property was in a bad condition, when the respondents 1 & 2 came to India in the month of August 2007, the applicant suggested that in the event of the respondents 1 & 2 giving a long lease for a minimum period of 10 years the applicant was prepared to spend money for the improvement of the suit building and the same was agreed by the respondents 1 & 2 orally.

Pursuant to the said oral agreement, the applicant paid a sum of Rs.5 lakhs in the month of August-2007.

Thereafter, in the month of February-2008, the respondents 1 & 2 contacted the applicant over phone and informed that they were willing to sell the suit property to the applicant for a sale consideration of Rs.3,80,00,000/- and they would execute the sale deed when they come to India.

Pursuant to the willingness expressed by the respondents 1 & 2 to sell the suit property, the applicant paid a sum of Rs.25,50,000/-.

That apart, the applicant has also spent a sum of Rs.30 lakhs for improvement of the suit property only on the assurance given by the respondents 1 & 2 to the effect that they would sell the property to him.

But, after a long delay, when the respondents 1 & 2 came to India during February-2010, they demanded exaggerated value for the suit property than that of the amount originally agreed between the applicant and the respondents 1 & 2.

However, the applicant agreed to increase the price to Rs.4.8 crores, but the respondents 1 & 2 refused to accept the said proposal and further refused to execute the sale deed.

The respondents 1 & 2 prepared a Letter of Agreement dated 06.03.2010, wherein the respondents purposely failed to mention the sale consideration agreed by the applicant.

Since the respondents have not mentioned the sale consideration, the applicant did not sign the said letter of agreement dated 06.03.2010.

While so, the respondents 1 & 2 are now continuously threatening the applicant to dispossess him from the suit property without executing the sale deed.

On 17.10.2010 the respondents 1 & 2 came to the suit property along with muscle men and threatened the applicant with dire consequences in the event of he fails to vacate the suit premises.

Hence, the applicant filed the suit for injunction restraining the respondents from interfering with his peaceful possession and enjoyment of the suit property.

5.Now, the present application has been filed by the applicant stating that he is entitled for the relief of specific performance, since the respondents have orally agreed to sell the suit property over phone during February-2008 from Canada and pursuant to the said oral agreement, the applicant has paid a sum of Rs.25,50,000/- and spent a sum of Rs.30 lakhs for the improvement of the suit building/property.

6.The nature of the amendments sought for the applicant are as follows:- i)In the body of the plaint, after paragraph 11, the applicant sought to add paragraph 11(a).which is as follows:- 11(a)The Plaintiff submits that the Plaintiff has paid a sum of Rs.25,50,000/- on various dates to the Defendants 1 & 2 directly and through Mr.Vijayakumar and upon the specific instruction from the Defendants 1 & 2 the Plaintiff spent a sum of Rs.30,00,000/- towards the alterations and improvement of the property in all totalling a sum of Rs.55,00,000/- was paid to the Defendants 1 & 2 towards the advance sale consideration in pursuance of the oral agreement entered into between the Plaintiff and the Defendants 1 & 2 on 06.03.2010 agreeing the sale consideration of the suit property as Rs.3,80,00,000/-.

The Plaintiff is entitled for specific performance and it is just and necessary to direct the Defendants to execute the Sale Deed on receipt of the balance sale consideration of Rs.3,25,00,000/-.

ii) Similarly, in the prayer portion, after paragraph 15(a).the applicant sought to add the following prayer for specific performance as paragraph 15(aa):- 15(aa).Direct the Defendants to specifically enforce the oral sale agreement dated 06.03.2010 and direct the Defendants to execute the Sale Deed in respect of the suit property to and in favour of the Plaintiff after receiving the balance sale consideration of Rs.3,25,00,000/- from the plaintiff failing which directing the Sale Deed to be executed in favour of the plaintiff through the Registrar of this Hon'ble Court on deposit of the balance sale consideration of Rs.3,25,00,000/-.

7.Opposing the amendment sought for by the applicant, the respondents 1 & 2 have filed counter affidavit stating that the applicant has come to Court with unclean hands.

The applicant's wife is the tenant in the suit property and she has not paid the rent from December-2007 and nearly a sum of Rs.12,80,000/- is due towards rent.

Hence, the respondents 1 & 2 filed an eviction petition before the Rent Control Court, which is in part heard stage.

An application for fixing fair rent was also filed and the said petition is also in part heard stage.

Realizing the order of eviction is imminent, the applicant has filed the present application for amendment.

Absolutely there is no agreement for sale and the applicant has been creating documents to suit his claim.

Any transaction between the applicant and the said Vijayakumar has nothing to do with the present case.

The respondents have also denied that the applicant has paid a sum of Rs.25,50,000/- and spent a sum of Rs.30 lakhs for improvement of the suit

property.

The nature of amendment sought for by the applicant to add the prayer for specific performance is hit by Order II Rule 2 of C.P.C. At the time of filing the suit, the said relief should have been asked for.

The relief of specific performance is discretionary and the conduct of the applicant clearly disentitles him from the said relief.

Thus, they pray for the dismissal of the present application.

8. The learned counsel for the applicant/plaintiff submitted that in the plaint necessary averments were made to the effect that there was an oral agreement between the applicant and the respondents and the respondents agreed to sell the suit property to the applicant for a valuable consideration of Rs.3,80,00,000/- and pursuant to the said oral agreement, the applicant has paid a sum of Rs.25,50,000/- and he has spent a sum of Rs.30 lakhs for the improvement of the suit building/property.

Subsequently, the applicant has also agreed to increase the sale consideration to Rs.4.8 crores.

But, the respondents refused to accept the said proposal.

Though the respondents 1 & 2 prepared a letter of agreement on 06.03.2010 (hand written by the 1st respondent) since the respondents purposely failed to mention the sale consideration agreed by the parties, the applicant did not sign the said letter of agreement.

Therefore, the cause of action for filing the suit for specific performance arose on 06.03.2010.

The present application has been filed on 01.03.2013, i.e., within the period of three years from the date of cause of action.

The prayer for including the relief of specific performance has been made within the period of limitation.

Therefore, the nature of amendment sought for by the applicant is not hit by limitation.

Moreover, necessary averments were available in the plaint to add the relief of specific performance.

In support of his contentions that the Court should be extremely liberal in granting prayer of amendment of pleading unless serious injustice or irreparable loss is caused to the other side and that the amendment could be allowed irrespective of the law of limitation, if the cause of action is not going to be changed, the learned counsel for the applicant has relied upon the following judgments:_ a)CDJ 1981 SC279[Haridas Aildas Thadani and others versus Godrej Rustom Kermani].b)CDJ 2007 MHC2900[Church of South India Trust Association, Thiruchirapalli-Thanjavur Diocesan Council and others versus Kovil Pillai & others].c)CDJ 2004 MHC928[T.Gunaseelan versus M.Thamilselvi].d)CDJ 1999 SC742[B.K.N.Pillai versus P.Pillai].e)CDJ 2004 MHC534[Sengodan & another versus Sengodan & Others].Further, the learned counsel for the applicant by relying upon the above said judgment, submitted that it is well settled legal position that in the interest of justice, irrespective of the law of limitation, the amendment can be allowed.

Thus, he prays for allowing the application as prayed for.

9.Per contra, the learned counsel for the respondents submitted that the applicant is not a tenant under the respondents.

The lease agreement was only between the applicant's wife and the respondents.

The respondents 1 & 2 are the non-resident Indians and they are residing in Canada.

Taking advantage of their absence, from December-2007 the tenant has not paid the rent.

The respondents 1 & 2 never orally agreed to sell the suit property.

The applicant is squatting over the suit property without paying any rent.

When the respondents 1 & 2 requested the applicant to vacate the premises, he has filed the present suit for injunction against them not to interfere with his peaceful possession of the property.

The present suit has been filed by the applicant only for not to evict him from the suit property except due process of law.

After filing the present suit, the respondents 1 & 2 have initiated rent control proceedings to evict the applicant on the ground of willful default and also for fixing fair rent.

In view of the rent control proceedings initiated by the respondents 1 & 2, the prayers sought for by the applicant herein in the plaint have become infructuous.

Moreover, the present application has been filed only for the purpose of dragging on the proceedings.

10. Further, the learned counsel for the respondents submitted that the case of the applicant that he has paid a sum of Rs.25,50,000/- pursuant to the oral agreement and spent a sum of Rs.30 lakhs for improvement of the property, is utter falsehood and the said allegations were introduced by the applicant in the plaint with an ulterior motive.

11. It is yet another submission of the learned counsel for the respondents that period of limitation prescribed under Article 54 of the Limitation Act for filing the suit for specific performance is only three years from the date fixed for the performance of the contract or if no such date is fixed, when the plaintiff has notice that the performance is refused.

The learned counsel for the respondents submitted that it was never agreed by the respondents 1 & 2 to sell the suit property and the present suit has been filed alleging that there was an oral agreement between the parties.

Even as per the averment in the plaint, the respondents/defendants refused the oral contract during February-2010, whereas the present application for amendment was filed only in the month of March-2013.

Therefore, prayer sought for by way of amendment is time barred.

Moreover, cause of action for filing the suit for specific performance was available even on the date of filing the suit itself, but the applicant has omitted to include the said prayer.

Therefore, the prayer sought for by the applicant is hit by the provisions under Order II Rule 2 of C.P.C. Hence, on that ground also the application is liable to be dismissed.

In support of his submissions, the learned counsel for the respondents has relied upon the following Judgments_ i)(2010) 14 SCC596[Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit versus Ramesh Chander].ii)(2004) 3 SCC392[T.N.Alloy Foundry Co.Ltd., versus T.N.Electricity Board and others].12.Heard the learned counsel on either side and perused the materials available on record.

13.It is the contention of the applicant/plaintiff that he is a tenant under the respondents 1 & 2 in respect of the suit property and the respondents 1 & 2 are the non-resident Indians and residing in Canada and they very often used to contact him over phone and give instructions to him.

As per their instructions, the applicant was paying the rent by way of cheque and cash to one Vijayakumar as requested by the respondents 1 to 2.

When the respondents 1 & 2 came to India, the applicant made a suggestion that in the event of leasing out the suit property to him for a long period of ten years he would be prepared to spend money for the improvement of the suit property.

Since his suggestion was agreed by the respondents 1 & 2, he had spent about Rs.30 lakhs to improve the suit property.

That apart, according to the applicant, the respondents 1 & 2 orally agreed to sell the suit property for a sale consideration of Rs.3,80,00,000/- and the applicant had paid a sum of Rs.25,50,000/-.

Further, according to the applicant, subsequently the respondents 1 & 2 demanded exaggerated value for the suit property.

The applicant had also agreed to increase the price to Rs.4.8 crores.

But, the respondents 1 & 2 refused to accept the said proposal and refused to execute the sale deed.

The respondents 1 & 2 prepared a letter of agreement on 06.03.2010, wherein the respondents purposely failed to mention the sale consideration.

Hence, the applicant refused to sign in the said letter of agreement.

Since the respondents made an attempt to evict the applicant forcibly from the suit property, the applicant has filed the present suit.

14.A reading of the averments made in the plaint would show that the suit was filed only for preventing the respondents from evicting the applicant from the suit property except under due process of law.

Even a reading of the cause of action para in the plaint would show that the present suit has been filed, since the respondents 1 & 2 came to the suit property along with muscle men on 17.10.2010 and threatened the applicant to vacate the suit property.

Now, the present application has been filed to add the prayer for specific performance stating that the respondents 1 & 2 orally agreed to sell the property to the applicant and pursuant to the said oral agreement, he has paid a sum of Rs.25,50,000/- and spent a sum of Rs.30 lakhs for improvement of the suit property.

But, absolutely no evidence was produced to show that the applicant has paid a sum of Rs.25,50,000/- and spent a sum of Rs.30 lakhs.

According to the respondents, they never agreed to sell the property to the applicant.

It is further case of the respondents that after December-2007, the applicant has not paid the rent, by taking advantage of the absence of the respondents in India.

Hence, the respondents 1 & 2 initiated RCo.proceedings for evicting the applicant from the suit property.

Thereafter, the present application has been filed by the applicant only to drag on the RCo.proceedings.

Further, according to the respondents, the present prayer sought for by the applicant is barred by limitation.

15.The learned counsel for the applicant has produced number of judgment in support of his contention that the Court has to be extremely liberal in granting prayer of amendment of pleading unless serious injustice or irreparable loss is caused to the other side, irrespective of the law of limitation.

Absolutely, there cannot be any quarrel in accepting the said principle that irrespective of law of limitation, in the interest of justice, the prayer for amendment could be allowed.

But, the said principle has to be applied based on the facts and circumstances of each case.

The present application has been filed by the applicant to add the prayer for specific performance.

Under Article 54 of the Limitation Act, there is a specific bar and the period for filing the suit for specific performance is only three years from the date fixed for the performance of the contract or if no such date is fixed, when the plaintiff has notice that the performance is refused.

In the instant case, absolutely no written agreement was entered into between the parties.

The present suit has been filed based on the so-called oral agreement.

The respondents are denying that there is such an oral agreement.

Even according to the applicant, only in February-2010 the respondents 1 & 2 refused the oral agreement, whereas the present application for amendment of the prayer has been filed only in the month of March-2013 i.e., after three years. The cause of action for the applicant to pray for specific performance is very much available even on the date of filing the suit.

The applicant has not chosen to add the prayer for specific performance at the time of filing the suit.

Only after the respondents filed eviction proceedings before the Rent Control Court on the ground of willful default in paying the rent, the applicant has come forward with the present application to add the prayer of specific performance.

Even on the date of filing the suit, the applicant had the cause of action for filing the suit for specific performance.

But, he had omitted to add the relief of specific performance in the prayer in the plaint and hence, now he cannot be allowed to include the relief of specific performance in the plaint, at this stage.

16. In this regard, a reference could be placed in the Judgment reported in (2010) 14 SCC 596 [Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit versus Ramesh Chander], wherein it has been held that if a prayer for specific performance is not originally made in the suit, it could not be included after a period of 11 years. The relevant passages in the said judgment read as follows:-
24. In the present case, the factual situation is totally different and the appellants have not filed any suit for Specific Performance against the respondents within the period of limitation.

In this context, the provision of Article 54 of the Limitation Act is very relevant.

The period of limitation prescribed in Article 54 for filing a suit for specific performance is three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

25. Here admittedly, no date has been fixed for performance in the agreement for sale entered between the parties in 1976.

But definitely by its notice dated 3.2.1991, the respondent has clearly made its intentions clear about refusing the performance of the agreement and cancelled the agreement.

26. The appellant, on noticing the same, filed a suit on 11.2.1991 but he did not include the plea of Specific Performance.

The appellant wanted to defend this action by referring to two facts- (i) there was an acquisition proceeding over the said land under the Land Acquisition Act and (ii) in view of the provisions of the Ceiling Act, the appellant could not have made the prayer for Specific Performance.

27. The aforesaid purported justification of the appellant is not tenable in law.

If the alleged statutory bar referred to by the appellant stood in its way to file a suit for Specific Performance, the same would also be a bar to the suit which it had filed claiming declaration of title and injunction.

In fact, a suit for Specific Performance could have been easily filed subject to the provision of Section 20 of the Ceiling Act.

28. Similar questions came up for consideration before a Full Bench of Gujarat High Court in the case of *Shah Jitendra Nanalal v.*

Patel Lallubhai Ishverbhai [AIR 1984 Guj 145]. The Full Bench held that a suit for Specific Performance could be filed despite the provisions of the Ceiling Act.

A suit for Specific Performance in respect of vacant land in excess of ceiling limit can be filed and a conditional decree can be passed for Specific Performance, subject to exemption being obtained under Section 20 of the Act.

(AIR Paras 11- 13). 29. We are in respectful agreement with the views of the Full Bench in the above mentioned decision and the principles decided therein are attracted here.

30. 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 Civil Procedure Code.

31. 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.

32. Even though the prayer for amendment to include the relief of specific performance was made about 11 years after the filing of 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.

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.

This Court held in Vishwambhar versus Laxminarayan & Anr.

reported in (2001) 6 SCC 163 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 of the suit to cure the defect of limitation.

(Para 9 at pg.

168-9). Those principles are applicable to the present case.

33.In K.

Raheja Constructions Ltd v.

Alliance Ministries reported in 1995 Suppl.(3) SCC17 this 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 rights of limitation accruing to the 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.

(Para 4 at pg.18-19). The dictum laid down in the above said judgment squarely applies to the present facts of the case.

If the prayer for specific performance is not asked for at the time of filing the plaint and latter if the prayer for specific performance is allowed to be added in the plaint by way of amendment after the expiry of period of limitation, in view of the specific bar under Article 54 of the Limitation Act, the same cannot relate back to the date of filing of the suit to cure the defect of limitation.

Hence, considering the facts of the present case, I am not inclined to accept the submission made by the learned for the applicant that the Court should be liberal in allowing the application for amendment of plaint irrespective of law of limitation.

For the foregoing reason, I am of the opinion that this application is liable to be dismissed and accordingly, the same is dismissed.

ssv

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