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Court : Karnataka

Decided On : Sep-29-2015

Judge : Aravind Kumar

Appeal No. : Regular Second Appeal No. 796 of 2014

Appellant : Puttamaramma

Respondent : Giriyappa and Others

Judgement :

1. This a plaintiffs second appeal questioning the correctness and legality of judgment and decree passed by Principal District Judge. Ramanagara, in R.A.No.51/2009 dated 18.03.2014 whereunder appeal filed by unsuccessful plaintiff challenging the judgment and decree passed by principal civil Judge (Sr. Dn.) Ramanagara, in O.S.No.167/2006 dated 21.03.2009 dismissing the suit of plaintiff for declaration and consequential relief of possession came to be affirmed.

2. This court by order dated 08.09.2015 has admitted the appeal to consider following Substantial Question of law:

(i) Whether First Appellate Court was justified in dismissing I.A.No.4 filed by appellant/plaintiff under Order VI Rule 17 CPC on the ground that same is not maintainable before First Appellate Court?

3. Facts in brief which has led to filing of this appeal can be crystalised as under: Plaintiff filed suit O.S.No.167/2006 for a judgment and decree to declare plaintiff is the owner having title to suit schedule property; to cancel the registered sale deed dated 19.05.2005 with a direction to Registering Authority to enter cancellation in their register pertaining to said sale deed; consequential relief of possession by directing 6th defendant to hand over possession to plaintiff; for an enquiry into mesne profits from the date of suit till possession is delivered to plaintiff and; costs.

4. On service of suit summons defendants did not appear and contest the matter, hence they were placed ex-parte and trial Court after having formulated points for consideration dismissed the suit on the ground that plaintiff claims to have purchased the property from one Sri Channagiriyaiah of Sangabasavanadoddi and in the plaint she had contended that suit schedule property belonged to one Smt.Hombamma from Sri.Channagiriyaiah and had also failed to establish relationship between Sri.Channagiriyaiah and Smt.Hombamma by judgment and decree dated 21.03.2009.

5. Being aggrieved by dismissal of the suit plaintiff pursued her grievance before the Appellate Court by filling an appeal in R.A.No.51/2009 and she also filed I.A.No.2 under Order XLI Rule 3 read with section 151 CPC seeking permission to amend the appeal petition by raising a ground to remand the suit for trial Court for fresh adjudication; I.A.No.3 under Section 151 CPC came to be filed to remand the suit to trial Court for fresh adjudication and I.A.No.4 was filed seeking permission to amend the plaint O.S.No.167/2006 to incorporate clauses (a) to (h) in the plaint and for amendment of prayer also.

6. Appellate Court after considering the argument advanced by learned Counsel appearing for appellant formulated following points for its consideration:

1. Whether the I.A. Nos.2 to 4 are to be allowed under the circumstances?

2. Whether the judgment and decree passed by the Trial Court in O.S.No.167/2006 on 21-03-2009 is to be confirmed or to be interfered with?

3. What order?

7. Respondents 1 to 5 were absent before trial Court though served with notice and respondent No.6 was placed ex-parte.

8. Lower Appellate Court while adjudicating the points formulated by it has noticed that in the amended plaint plaintiff has claimed that she had purchased suit schedule property from its original owner Smt.Hombamma, w/o. Kardaiah and in the amendment she is now seeking in I.A.No.4 to contend that she became the absolute owner of suit schedule property under sale deed dated 12.09.1975 for having purchased suit schedule property from Sri. Channagiriyaiah and as such, it has been held that there is inconsistency in the pleadings. It has been further noticed by the Appellate Court that plaintiff has not pleaded or contended that she has purchased the suit land through a sale deed dated 12.09.1975 and she has also not stated that Sri. Channagiriyaiah is the son of Smt. Hombamma. To put it differently, Appellate Court has gone into the merits of amendment and that apart, rejected the said application-I.A.No.4 on the ground that it is not maintainable before Appellate Court and same had to be filed before trial Court only that too before commencement of trial. As such, it has dismissed I.A.No.4 and consequently held that I.A.Nos.2 and 3 have to be automatically fail on the ground of I.A.No.4 having been dismissed and as such, all the applications and appeal having been dismissed, this second appeal has been preferred.

RE. SUBSTANTIAL QUESTION OF LAW:

9. Application I.A.No.4 filed by plaintiff as could be seen from the Appellate Court records would indicate that appellant/plaintiff had sought leave of appellate Court to amend the plaint by answering Clauses (a) to (h) and also for additional prayer. At this stage itself it would be appropriate to notice that while considering the application for amendment Courts would not go into the correctness or falsity of case for amendment. Likewise, Courts would not record a finding on the merits of amendment sought for. Such adjudication at the stage of considering the prayer for allowing the application or dismissing the same would be alien. The Hon'ble Apex Court in Rajesh Kumar Aggarwal and Ors. Vs. K.K. Modi and Ors reported in AIR 2006 SC 1647 has held that while considering an application for amendment

of pleadings, Court should not go into the correctness or falsity of case proposed in the amendment. It has been held by the Hon'ble Apex Court as under:

20. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principal has not been followed by the High court in the instant case.

10. In that view of the matter, Appellate Court was not justified in entering into the merits of the claim, by examining the contents of proposed amendment and as such, on this short ground the judgment of the Appellate Court cannot be sustained.

11. Now turning my attention back to the issue in question namely whether First Appellate Court could have rejected the application for amendment also on the ground that it would not be maintainable before the Appellate Court and same ought to have been filed before the commencement of trial, is being examined in the background of Order VI rule 17 CPC which permits the amendment of pleadings. Said provision reads as under:

17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application, for amendment shall be allowed after the trial has commence, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial ?.

12. A bare reading of said provision would clearly indicate that object of this Rule is to avoid multiplicity of proceedings and rules of procedure are hand maid to the administration of justice. The power under Rule 17 of Order VI CPC is entirely

discretionary to be used judiciously and after consideration facts and circumstances of each case. There cannot be any straight jacket formula prescribed in this regard. Prior to amendment of Rule 17 all amendments, which satisfy two conditions namely; (1) not resulting injustice to the other side, and; (2) on being necessary for the purpose of determining real questions in controversies between parties, could have been allowed at any stage of the proceeding.

13. In the light of Rule 17 of order VI CPC having been amended and provision having been introduced by Act 22 of 2002, it will have to be examined as to whether such amendment is permissible at the appellate stage or not?

14. Order VI Rule 17 CPC consists of two parts; first part is discretionary, since the word used "may" enables the Court to order amendment of pleading at any stage of the proceedings; second part is imperative, inasmuch as, word "shall" enjoins the Court to allow all amendments which are necessary for the purpose of determining real questions or controversies between parties. This Rule declares that court may at any stage of the proceedings allow either party to alter or amend the pleadings in such a manner or on such term as may be purpose of determining real questions in controversy between the parties, same can be allowed. However, proviso substituted by Act 22 of 2002 with effect from 01.07.2002 places an embargo on the Courts for not allowing the application for amendment after commencement of trial. However, at the same time, later portion of proviso enables the court to allow such amendment if it comes to the conclusion that in spite of due diligence party could not have raised the same before commencement of trial. In other words, a discretion is vested to the Courts to allow the application for amendment even after commencement of trial.

15. There cannot be any dispute with regard to the proposition that appeal being a continuation of original proceedings. For this proposition the judgment of Hon'ble Apex Court in the case of State of Maharashtra Vs. Hindustan Construction Ltd. reported in AIR 2010 SC 1299 can be looked up wherein it had held that provision namely order VI, Rule 17 CPC would leave no manner of doubt that Appellate Court has power to grant leave to amend the memorandum of appeal.

16. Be that as it may. Issue involved in the present appeal relates to permitting the party in an appeal to amend the pleadings at appellate stage namely, whether it is permissible or not? Proviso to Rule 17 of Order VI CPC though places an embargo for Courts to permit the amendment of pleadings after the commencement of trial, said provision has also provided a succor to a bona fide litigant namely if Courts come to the conclusion that in spite of due diligence party could not have raised the matter before commencement of trial, it can permit such amendment. Appellate court possesses the power, which is co-terminus with the power of trial court and thereby it will necessarily have all the trappings of trial Court would have examined or in other words, appellate Court would exercise similar power as the trial Court would exercise, which is of course subject to satisfying twin tests namely, (i) such amendment is necessary for determining real controversy between the parties; and (ii) it would not cause injustice to the other side. If parties seeking amendment were to satisfy these two conditions, then necessarily such application for amendment will have to be allowed, as otherwise, it has to be dismissed.

17. Appeal being continuation of original proceedings and Appellate court having power to exercise all the powers vested with the trial Court, would necessarily have power to examine an application filed under Order 6 Rule 17 CPC and it cannot be said that such power to entertain the application for amendment by the Appellate Court would not be available on the ground of proviso to Rule 17 of Order VI CPC curtailing such power which in fact it does not for the reasons already indicated herein above. An appeal being proceedings in continuation of original suit, it can be safely concluded that First Appellate Courts is vested with similar power possessed by Court of original jurisdiction. Language employed in sub-section (2) of section 107 CPC is clear, unambiguous and explicit, which would clearly indicate that appellate Court shall have the same power and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. In that view of the matter, power available to the Appellate Court to entertain an application for amendment of pleadings is co-terminus with the power of trial Court and hence, it cannot be held that by virtue of proviso having been introduced to Rule 17 of Order 6 CPC by Act No.22/2002, such power of Appellate Court permitting amendment is wiped out.

18. In the light of what has been discussed hereinabove, this Court is of the considered view that Appellate Court was not justified in rejecting the application for amendment of plaint by going into the merits of the proposed amendment and also on the ground that such application would not be maintainable before Appellate court. Hence, Substantial Question of Law formulated herein above is answered in the negative i.e., in favour of appellant and against respondents.

Hence, for reasons aforesaid I proceed to pass the following:

ORDER

(i) Second appeal is hereby allowed.

(ii) Judgment and decree passed by Principal District and Sessions judge, Ramanagar dated 18.03.2014 in R.A.No.51/2009, is hereby set aside.

(iii) Matter is remitted back to First Appellate Court with a direction to consider application I.A.Nos.2, 3 and 4 on merits after extending opportunity to respondents, since they had been served and unrepresented and by issuing fresh notice to them.

(iv) Costs made easy.

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