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Petitioner Vs. Respondent

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Court : Chennai

Decided On : Aug-01-2016

Judge : The Honourable Mrs. Justice Pushpa Sathyanarayana

Appeal No. : Application No. 7164 of 2015 in C.S.No. 925 of 2010

Appellant : Petitioner

Respondent : Respondent

Judgement :

Pushpa Sathyanarayana, J.

1. This application is filed by applicants / plaintiffs 2 to 7 for amendment of plaint.

2. Originally, the suit was filed by the sole plaintiff M.V.Krishna Rao (since deceased) for the relief of declaration that the registered sale deed dated 19.03.2010, bearing registration no.976 of 2010, executed by him in favour of the defendants 1 and 2, as null and void; for permanent injunction and for other reliefs. Pending suit, the original plaintiff died on 21.12.2010. The third defendant sought for impleadment of himself on the basis of a testamentary document, being the alleged last will of the deceased, dated 24.12.2009. The said application was allowed by this Court on 19.10.2011. The original defendants in the suit preferred an appeal against the said order objecting to the impleadment of the appellant in O.S.A.No.123 of 2012, which was allowed and remanded to the learned Single

Judge.

3. Thereafter, the matter was taken up by this Court and held that the present third defendant, who sought himself to be impleaded as plaintiff, is not permissible and impleaded him as the third defendant in the suit. As the third defendant has sought for relief under the will, it is mandatory on his part to probate the will, though it may be a registered one. Admittedly, till today, no order of probate has been obtained by the third defendant.

4. In the meanwhile, the applicants, who are the wife and children of the deceased plaintiff impleaded themselves as plaintiffs 2 to 7 in the suit, vide order dated 19.07.2013, in Application No.5709 of 2011. It is further stated by the applicants that they are in occupation of the entire second floor of the suit property and the defendants 1 and 2 are in occupation of the first floor eastern side, by virtue of orders obtained by them, in Crl.O.P.No.9394 of 2010, dated 23.04.2010. One another tenant inducted by the defendants 1 and 2 is in occupation of the first floor western side, from whom the defendants are collecting rents. The ground floor is an extent of 2758 Sq.ft, which is under the use and occupation of the defendants 1 and 2. The defendants 1 and 2 claimed to be purchasers from the deceased first plaintiff and the third defendant claims on the basis of the will alleged to have been executed by the deceased first plaintiff. As stated earlier, the said will is yet to be probated and no steps have been taken till today.

5. The applicants are the actual legal heirs of the deceased first plaintiff, being wife and children. The applicants contended that the defendants 1 and 2 are enjoying the premises under the questionable sale deed and the third defendant is making claim based on an un-probated will. The applicants are in possession of a portion of the suit property. When the right, title and interest of the defendants 1, 2 and 3 are under challenge, the applicants, being the legal heirs of the deceased first plaintiff are the rightful owners. Therefore, the newly impleaded plaintiffs sought amendment to the plaint, by improving upon the plaint filed originally by the deceased first plaintiff.

6. As per the original plaint, the deceased first plaintiff had pleaded that the first defendant was his advocate, subsequently, had become his lessee and finally,

taking advantage of his helpless position, had got executed a sale deed in his favour, of the suit property, resulting in the suit being filed for declaring the sale deed as null and void. It was further stated in the plaint that the defendants had occupied the suit property by force. However, the applicants are now introducing new set of facts stating that the superstructure was built up by the deceased first plaintiff by pooling of resources with his wife. It was stated that originally the suit property was a vacant site and it was built with the funds given by the second plaintiff, who hails from a rich family.

7. Accordingly, narrating several other facts, the applicants submit that they had contributed money in the construction of the building in the suit property. The applicants also had sought for relief of mandatory injunction, directing the defendants 1 and 2 to deliver vacant possession of the suit schedule property and for direction to the defendants 1 and 2 to pay Rs.75,000/- per month from April 2010 to till handing over of the property being damages for use and occupation of the suit building.

8. The application was resisted by the respondents 1 and 2 / defendants 1 and 2 and the third respondent / third defendant by filing separate counter affidavits. According to the respondents 1 and 2, the allegations made in paragraphs 23 and 24 are fresh and new pleadings, which would create a new cause of action. It is the case of the respondents that even according to the deceased first plaintiff, there was no cordial relationship with his wife and children, which led to his mental agony. The said situation was allegedly taken advantage of by the defendants and got the sale executed in their favour. It was further objected to by the respondents that the applicants were impleaded only after the third defendant was impleaded as a legatee under the alleged will. The applicants have come up with the present application after their impleadment, but much beyond the period of limitation. The respondents also refer to the other proceedings between the parties, in which the second plaintiff had admitted the relationship and about the sale in favour of the defendants 1 and 2.

9. No doubt, the applicants / plaintiffs are the legal heirs of the true owner. However, the allegations sought to be incorporated in the plaint on the pretext of

amendment was seriously opposed by the respondents. The relief of mandatory injunction sought for by the applicants also was stated to be time barred, though according to the applicants, the relief is well within time from the date of their impleadment.

10. The third defendant, who claims his right under the un-probated will also had opposed the amendment, by filing a separate counter affidavit. Admittedly, the third defendant was assisting the deceased first plaintiff, when he was alone. He was also not allowed to be impleaded as a plaintiff, however, permitted to be impleaded as a party defendant. According to him, in the event of success in the probate proceedings, that has been initiated by him, he would become the absolute owner. Hence, the amendment that is sought for by the plaintiffs are unsustainable.

11. Heard the learned counsel appearing for the parties and perused the materials available on record.

12. The bone of contention in the suit is the only property situated in the prime locality of the Metropolitan City. The original owner, namely, the first plaintiff, who had got the same in a civil suit, had raised three storied building measuring an extent of 3815 SFT. In the original plaint, it was stated that there was a serious matrimonial discord between the first plaintiff and his wife. However, they were living under the same roof separately in different portions of the plaint schedule property. In the year 2006, the problem got aggravated, resulting in matrimonial proceedings before the Family Court. At the same time, the first plaintiff who was a chronic diabetic patient, underwent amputation of his left foot toe and also had kidney failure and was on dialysis since 2007. As per the allegations in the original plaint, since he was neglected by his family, he had to rely on others, for food and medical assistance. As the medical expenses was enormous, he was forced to raise funds through his friends. Such a helpless situation of the first plaintiff resulted in the sale deed being executed in favour of the defendants 1 and 2, who were the tenants in the property and also was the lawyer for the first plaintiff.

13. Now, in the amendment application, the plaintiffs, who are the legal heirs, are only elaborating as to how the monies were raised by the first plaintiff in raising the

building. The ownership of the first plaintiff is not disputed by any of the parties. The applicants are only introducing the statements as to how the funds were raised by the first plaintiff, when the family was together to put up construction. The entire focus in the plaint is only as to how the sale deed sought to be impeached, was brought into existence. The story prior to that, as sought to be introduced in the amendment, will not take away the claim of the plaintiffs or the defendants. The original vendor, namely, the first plaintiff has specifically mentioned about the attitude of the first and second defendants, before and after the execution of the sale deed. When the very prayer is only for declaring the sale deed as null and void, which action was brought in by the vendor himself, the amendment now sought for may not make much difference, as no new cause of action is introduced.

14. The additional prayer that has been sought for by the applicants is with respect to mandatory injunction, which according to the respondents, is time barred. Admittedly, the original legal heirs were brought on record only in 2013 and within the time prescribed, the said prayer has been sought for by them. However, it is open to the defendants to raise the question of limitation at the time of trial.

15. While allowing or disallowing amendment under Order VI Rule 17 of the Code of Civil Procedure, the Court has to only satisfy two conditions, namely, (i) of not working injustice to the other side (ii) of being necessary for the purpose of determining the real questions in controversy between the parties.

16. Admittedly, in the present case, the amendment introduced to the pleadings in the prayer, does not take away the place or position of the respondents prior to the amendment. In other words, if the amendment is allowed, would cause them injury, which could not be compensated in costs. The applicants also had stated that the sale deeds are null and void having obtained by fraud. The pleadings are only elaborated after they are impleaded.

17. The learned counsel appearing for the respondents 1 and 2 placed his reliance on a judgment of this Court in V.T.ELAYA PILLAI VS. RAMASAMI JADAYA GOUNDAN [AIR 1974 MAD 165] wherein it has been held as follows:

7..... that a Court should not permit the plaintiff to amend the plaint by the addition of a new plea based on quite a different ground, namely, that though the suit transactions were valid they would not be binding on the successors to the plaintiff or binding on the estate after the lifetime of the plaintiff. The result of allowing such an amendment would be to introduce a completely new element unconnected with and in essence even inconsistent with the grounds originally alleged in support of the plaintiff's claim. Authority is not needed that there are limits to the discretion of a Court when permitting an amendment to be made to the plaint. The leading judgment in 48 Cal. 832 enunciates in clear terms such limitation. I am therefore of opinion even assuming that the original plaintiff would have been entitled to institute a suit for a declaration that the suit transactions were not binding on his successors and on the estate after his lifetime, it is not proper to permit such a plea to be raised by way of amendment even if the amendment had been applied for by the original plaintiff himself.

Based on the above decision, the learned counsel Mr.M.V.Venkataseshan, appearing for the respondents 1 and 2 contended that the amendment sought is one, which the deceased plaintiff himself could not have asked for. Therefore, it cannot be allowed.

18. The contention of the learned counsel may not be correct, as the applicants are the legal heirs of the deceased first plaintiff and the amendment is only with respect to how the property was purchased. However, the ownership of the deceased first plaintiff is not disputed by anybody.

19. It is settled principle that while deciding application for amendment, bonafide, legitimate, honest and necessary amendments should not be refused. However, the basic test for allowing the amendment is whether such an amendment is necessary for the determination of the real question in controversy.

20. In REVAJEETU BUILDERS AND DEVELOPMENTS VS. NARAYANASWAMY AND SONS AND OTHERS [2009 (10) SCC 84] the Honourable Supreme Court has set out the factors to be taken into consideration, while dealing with the applications for amendments, which reads as follows:

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

21. Applying the above principles, it is not the case of the defendants that a new cause of action has been introduced by the applicants / plaintiffs. In fact, the defendants have no objection to the amendment sought for, for the prayer for mandatory injunction. Admittedly, the defendants 1 and 2 have let out the ground floor and first floor of the suit property to the third party, after the death of the first plaintiff. The applicants are in occupation of the second floor of the suit property and the defendants 1 and 2 are in occupation of a portion of the first floor of the suit property. As the defendants 1 and 2 are in occupation of the entire first floor of the suit property, the letting it out to the tenant is subsequent to the death of the first plaintiff. Therefore, the prayer for damages is also sustainable taking into consideration the subsequent events.

22. As stated earlier, the amendment now sought for by the applicants are only bonafide, legitimate and hence, the same cannot be denied. So far as the mandatory injunction is concerned, the third defendant had specifically mentioned in his counter affidavit that he has got no objection in allowing the same. Admittedly, the defendants 1 and 2 have occupied the entire building excepting the second floor subsequent to the death of the first plaintiff. Hence, the subsequent event also has to be taken judicial note of for including the relief of mandatory injunction. The relief of claim of damages can only be decided in the trial, as three different claims are made to the suit property, viz., one by the legal heirs of the original owner, secondly by the alleged purchasers and thirdly by way of testamentary succession. Hence, this Court is of the view that the application may be allowed.

23. Accordingly, the application for amendment to the plaint is allowed giving liberty to the defendants to file additional written statement, if required. Two weeks time is granted for carrying out the amendment and file the copy of the amended plaint.

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