SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Surinder Kumar and ors. Vs. Swarn Singh

Surinder Kumar and ors. Vs. Swarn Singh

SooperKanoon Citation : sooperkanoon.com/699992

Court : Delhi

Decided On : May-21-2008

Reported in : 150(2008)DLT294; 2008(104)DRJ93

Judge : C.J. and; S. Muralidhar, J.

Acts : Income Tax Act - Sections 34A; Transfer of Property Act, 1882 - Sections 53(A); Limitation Act; Code of Civil Procedure (CPC) - Order 6, Rule 17

Appeal No. : FAO (OS) 103 of 2008 and CM No. 3002/2000

Appellant : Surinder Kumar and ors.

Respondent : Swarn Singh

Advocate for Def. : Pramod Ahuja, Adv.

Advocate for Pet/Ap. : Neeraj Kaul, Sr. Adv. and; Jyoti Mendiratta, Adv

Disposition : Application dismissed

Judgement :

S. Muralidhar, J.

1. This appeal is directed against an order dated 24th January, 2008 passed by the learned Single Judge allowing the plaintiff's is No. 3002/2000 under Order 6 Rule 17 of the Code of Civil Procedure ('CPC') seeking to amend the plaint in CS

(OS) No. 166/1997.

2. The aforementioned suit was filed by the respondent plaintiff on 25th January 1997 against the appellants defendants for specific performance in relation to an agricultural land in Village Malikpur Kohi alias Rangpuri, Tehsil Mehrauli, New Delhi (hereafter the property). The case set up by the plaintiff was that the total sale consideration had been agreed at Rs. 29,25,000/-. According to the plaintiff, he had paid Rs. 6,00,000/- on 16th June, 1993, Rs. 5,00,000/- on 11th December, 1993 and Rs. 17 lakhs on 11th January, 1995. He claimed that on each of these occasions receipts-cum-agreements had been executed. Although Rs. 28 lakhs had been paid to the defendants, no regular receipts were issued but a formal receipt for Rs. 1,25,000/- was executed on 23rd May, 1993 by defendant No. 3 (appellant No. 3 herein) on behalf of all the defendants. According to the plaintiff, despite the statutory permission being granted for the sale of the property, the defendants did not come forward to execute the sale deed.

3. In para 20 of the plaint, which is relevant for the present purpose, the plaintiff described the different dates on which the causes of action arose. The said paragraph reads as under:

20. That the cause of action has arisen on the dates i.e. 16th June, 1993, 11th December, 1993 and 11th January, 1995 when the Receipts-cum-Agreement for the sale of agricultural land were executed. The cause of action further arose when the application to the A.D.M. was moved for getting the permission for the sale of agricultural land was moved on 13th January, 1995. The cause of action further arose when the permission was accorded by the A.D.M. on 12th May 1995 and thereafter the cause of action further arose on 26th December 1996 when the telegram was received by the plaintiff from the defendant No. 2. The cause at action further arose when the plaintiff got the sale deed ready and the same were to be executed and registered at the residence of the plaintiff the cause of action is continuing as the defendants gave not turned up even inspire of their telegram on 26th December 1996 and have started demanding huge premium amount from the plaintiff which the plaintiff have refused to pay as such the defendants have refused to execute the sale deed and are threatening that they will be transferring

the property in favor of some body else as such the case of action is continuing.

4. The defendants in their written statements admitted that they were the registered owners of the property. However, it was stated that a receipt-cum-agreement had been executed between the plaintiff and the defendants on 15th March, 1993 and the sale price was fixed at Rs. 35,00,000/- per acre. The total consideration worked out to Rs. 1,89,94,791/-. It had been agreed that Rs. 85,00,000/- would be paid as earnest money. Rs. 7,50,000/- was paid on 15th March, 1993. The receipt-cum-agreement of that date was in fact executed on 15th April, 1993. Although in the said agreement it was stated that a sum of Rs. 85,00,000/- was being paid by the plaintiff, he informed the defendants that he was able to arrange only for Rs. 11.5 lakhs. The agreement was then retyped and the same sum of Rs. 11.5 Lakhs was shown as having been paid to four of the defendants by separate cheques. According to the defendants, the agreement provided that if the sale deed was not executed by 15th July, 1993, the amount received as an advance/earnest money stood forfeited. The defendants further admitted that the plaintiff paid Rs. 1,25,000/- to the defendant No. 3 on 23rd May, 1993. Further a sum of Rs. 6,00,000/- was paid on 16th June, 1993 to defendant No. 3. thereforee, up to 15th July 1993, the plaintiff had managed to pay only Rs. 26.25 lakhs as against the total consideration of Rs. 1,89,94,791/-. Later, the plaintiff paid Rs. 5,00,000/-, the defendant No. 2 on the assurance that the total amount would be paid up to 31st December, 1993. Since this was unable to be complied with, a notice was issued to the plaintiff informing him that the agreement stood cancelled and the amount paid thus far stood forfeited. This was followed by a new agreement between the parties whereby it was agreed that the property would be sold at the rate of Rs. 1 crore per acre. If the plaintiff paid 50% of the consideration, after adjusting the amount already paid by 31st January 1995, the defendants would go ahead with the sale. It was averred by the defendants that pursuant to the fresh agreement the sum of Rs. 17 lakhs was accepted on 11th January 1995. Since the plaintiff did not meet this commitment a notice was issued to the plaintiff informing him that the fresh agreement also stood cancelled and that the plaintiff could collect the sum of Rs. 17 lakhs. However, the plaintiff asked for the return of the sum of Rs. 48.25 lakhs which included the sum already paid.

5. The plaintiff thereafter filed is No. 3002 of 2000 under Order 6 Rule 17 CPC seeking to extensively amend the plaint. The reasons for filing the application were explained in paragraphs 4 and 5 which read as under:

4. That the necessity to move the present application has arisen with the changed circumstances and because of the fact that the defendants have filed a detailed written statement before this Hon'ble Court stating that they have received Rs. 48.25 lacs from the plaintiff and not Rs. 29.23 lacs as mentioned.

5. That the defendant have further stated that the deal was at the rate of Rs. 35 lacs per Acre and the total consideration was Rs. 12,89,94,791/- (Rupess one crores eighty nine lacs ninety four thousand seven hundred and ninety one only). This fact is not denied that the total deal was agreed at Rs. 1,89,94,791/- but as desired by the defendant it was not to be allowed.

6. In paras 10 and 11 of the said application, the plaintiff sought to explain why facts which were now being stated by the plaintiff, were not earlier stated in the plaint. The said paragraphs read as under:

10. That in the present case the defendants have received the whole consideration amount but the plaintiff has got at his disposal receipts for only Rs. 1,22,75,000/- (Rupess one crore twenty two lacs and seventy five thousand only). Rest of the receipts were destroyed as per the asking of the defendants.

11. That this fact is not denied that by mistake and commission instead of the payments made by the plaintiff to the defendants by cheques were not mentioned in the suit and were rightly not mentioned because there was no receipt of the same as the payments were mentioned in the agreement to sell and which agreement to sell dated 15.3.1993 was not to be disclosed by the plaintiff before this Hon'ble Court as it was a condition precedent/agreement arrived at between the parties that the sale deed will be for a sum of Rs. 28 lacs and that was the reason 14 sale deed for Rs. 1,90 lacs each were got prepared by the plaintiff which were to be signed by the defendants. Everything was done at the instance of the defendants to save permission under Section 34A of the Income Tax Act.

7. It also appears that in the said application the plaintiff admitted that the agreement was in fact executed on 15th March, 1993 and that the sale consideration agreed upon was different. This is apparent from paras 20, 21, 22 and 23 of the application which read as under:

20. That though the agreement dated 15.3.1993 was superseded with the receipts executed by the defendants in favor of the plaintiff as per the receipts dated 23.5.1993, 16.6.1993 and 11.1.1993 whereas on the basis of the last receipts the possession was given by Shri Sukhdev Kumar also as per the receipt given by him on 11.12.1993 and last receipts dated 11.1.1993 executed by the defendant No. 4 in favor of the plaintiff after receipts of Rs. 17 lacs and on that day also the completed balance payment was paid by the plaintiff to the defendants and that is the reason they executed the No Objection form in favor of the plaintiff.

21. That to the heading of the suit the plaintiff may be allowed to add/substitute the words 'agreement dated 15.3.1993' before the words 'dated 16.6.1993.

22. That the plaintiff may be allowed to add a depurate para after Para No. 2. The following para may be allowed to be substituted as para No. 2 (A).

2(A) That the defendants executed an agreement to sell dated 15.3.1993 in favor of the plaintiff which agreement was not to be implemented as stated by the defendants to the plaintiff as they never wanted to obtain permission from Income Tax authorities for the sale of their agricultural land.

23. That in para No. 6 instead of words 'Rs. 28 lacs'. It may be allowed to be amended as Rs. 1,89,94,791/- was paid to the defendants on different dates as per the receipts executed by them of their own convenience. The same was executed after receiving the consideration amount by all of the defendants on separate occasion and on separate dates. The plaintiff is not having it his disposal the receipts for Rs. 67,19,791/- (Rupees sixty seven lacs nineteen thousand seven hundred and ninety one only) though he has paid the whole amount to the defendants.

23. (A) That the below mentioned para may be allowed to be added in the existing para No. 7 after the words 'also owned by the plaintiff'. Now the para No. 7 of the plaint shall read as under:

7. That right from the day of execution of the receipts, the plaintiff is in exclusive uninterrupted and continuous possession of the agricultural land from the date of execution of receipts. The plaintiff purchased the agricultural land from defendants because the adjoining land is also owned by the plaintiff. In part performance of the contract between the parties the plaintiff took possession of the agricultural land as mentioned in para 1 of the plaint and his possession is also protected under Section 53(A) of the Transfer of Property Act, 1882.

8. The defendants (the appellants herein) filed a detailed reply to the said application objecting to the changes sought to be carried out. They pointed out that these amendments would fundamentally alter the very nature of the suit and that if the amendments were allowed, it would be permitting the plaintiff to set up a claim which was plainly barred by limitation. It was also pointed out that the plaintiff admittedly was guilty of suppression of material facts and, thereforee, should be not permitted to carry out the amendments.

9. The learned Single Judge in a short order allowed the application giving the following reasons:

Having considered the averments of the parties, this Court is of the opinion that though there is variation or inconsistency regarding the nature of the claim sought to be introduced with existing pleadings. Yet, in the circumstances, the ends of justice require the same should be allowed. However, these amendments shall relate back only to the date of filing of the application.

10. Appearing for the appellant Mr. Neeraj Kaul, the learned Senior counsel urged that the amendments sought to be carried out by the plaintiff were impermissible in terms of the law explained by the Hon'ble Supreme Court in several judgments. He further submitted that on his own admission the plaintiff had suppressed the material facts in the plaint. The Explanationn that they were not mentioned at the instance of the defendants, was unbelievable. He submitted that the application

seeking amendment was itself an abuse of the process of law and should have been dismissed by the learned Single Judge with exemplary costs. He further added that the cost of Rs. 30,000/- directed to be paid by the plaintiff to the defendants by the learned Single Judge had not been accepted by the defendants.

11. Appearing for the respondents Mr. Pramod Ahuja, the learned Counsel first submitted that the costs of Rs. 30,000/-, as directed by the learned Single Judge had in fact been paid to the learned Counsel for the defendants and that having accepted the said costs, it would not open to the defendants to challenge the impugned order of the learned Single Judge. According to him, the right to file an appeal would stand waived in the event that costs awarded to the defendants were accepted by them. Secondly, he submitted that the ends of justice required the amendments to be allowed. According to him, the Explanationn furnished by the plaintiff for not stating the complete facts in the first instance was a plausible one. The defendants ought not to be allowed to take advantage of the fact that the plaintiff had not stated the full particulars which in any event was in the knowledge of the defendants. According to him this was merely a technical plea. He also sought to place reliance on certain judgments to which a reference will be made hereafter.

12. On a consideration of the plaint, the written statement, the application seeking amendment to the plaint and the reply thereto, it is clear to this Court that the nature of the amendment sought to be carried out by the plaintiff would materially alter the suit itself. In the first place, the plaintiff approached the Court stating that an agreement had been entered into between the parties on 16th June, 1993 as evidenced by the receipt-cum-agreement of that date. The further reference was made in the plaint to the receipts-cum-agreement of 11th December, 1993 and 11th January, 1995. There is absolutely no whisper of any agreement of 15th March, 1993. After noticing what was stated in the written statement filed by the defendants, the plaintiff seeks to fundamentally alter the very basis of the suit as is evident from para 21 of the application where it is prayed that 'the plaintiff may be allowed to add/substitute the words 'agreement dated 15.3.1993' before the words 'dated 16.6.1993'. There is also a material alteration as regards the amount agreed to be paid. In the plaint the total consideration was stated to be Rs. 25.95

lacs. Now it is sought to be substituted in para 23 'that in para No. 6 instead of words 'Rs. 28 lacs', it may be allowed to be amended as Rs. 1,89,94,791/-....'

13. By no stretch of imagination in a suit for specific performance, can it be said that these amendments are of a minor nature. In fact, to this Court it appears plainly that the plaintiff did not come to the Court with clean hands and was suppressing the complete facts. The Explanationn now furnished in the application is indeed preposterous. The plaintiff now states in the application under Order 6 Rule 17 CPC that 'this fact is not denied that the total deal was agreed at Rs. 1,89,94,791/- but as desired by the defendants it was not to be disclosed.' Then in para 10, it is asserted that 'the defendants have received the whole consideration amount but the plaintiff has got at his disposal receipts for only Rs. 1,22,75,000/- (Rupees one crore twenty two lacs and seventy five thousand only). Rest of the receipts were destroyed as per the asking of the defendants.' Then in para 11 it is asserted that 'Everything was done at the instance of the defendants to save permission under Section 34A of the Income Tax Act.'

14. The above statements in the application leave no manner of doubt that the plaintiff suppressed material facts before this Court. When the defendants pointed out in the written statement that the factual position was something else, the plaintiff turned turtle to justify his suppression of facts on the ground that he did it at the instance of the defendants. This is nothing but a plain abuse of the process of law. It was recently pointed out by the Hon'ble Supreme Court in Usha Balasaheb Swami v. Kiran Appaso Swami : AIR 2007 SC1663 that 'the general principal that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. thereforee, addition of a new ground of defense or substituting or altering a defense or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.'

15. In view of the above discussion of law, the decision cited by the learned Counsel for the plaintiff (Andhra Bank v. ABN Amro Bank : AIR 2007 SC2511 and

B.K. Narayana Pillai v. Parameswaran Pillai : AIR 2000 SC614 do not apply on the facts of the present case. The decision in Punjab National Bank v. Indian Bank : [2003]3SCR836 also appears to have turned on its own facts. As far as the present case is concerned, it requires to be considered if permitting the amendment to the prayer in the plaint would be granting a relief which was barred by limitation. It requires to be pointed out that in the written statement it had been specifically mentioned that the agreement had been terminated on 31st December, 1993 and, thereforee, the remedy for filing the suit for specific performance was latest by 31st December, 2006. It was pointed out that the suit had been filed on 25th January, 1997 which is far beyond the limitation as stipulated under the Limitation Act. The present amendment seeks to shift the date of the agreement which forms the basis of the claim for specific performance to 15th March, 1993 which is even earlier than the date of the agreement as pleaded in the first place. Even the amendment, thereforee, would require to be decided on the plea of limitation. In this context, the decision of the Hon'ble Supreme Court in Muni Lal v. Oriental Fire & General Insurance Co. Ltd. : AIR 1996 SC642 which was followed in Virender Kumar Goel v. Kusum Bhuwania : (1997)11SCC457 would be relevant.

16. However, as far as the present case is concerned, the Court is satisfied that the plaintiff has suppressed the material particulars, in the suit filed by him. It is evident that the application for amendment was filed three years after the suit was filed. The Court is satisfied that the application for amendment is an abuse of the process of law and, thereforee, ought not to have been permitted by the trial court.

17. As regards the plea that costs of Rs. 30,000/- have been paid, the learned Senior counsel appearing for the defendants has clarified that the cheques for Rs. 30,000/- was never encashed. Although it was sought to be urged that the said cheque was drawn in the name of the counsel who was not the counsel for the defendants on record, this Court does not wish to examine the point any further since admittedly, the learned Counsel for the plaintiff does not dispute that the cheque has not been encased till date. In any event, the mere acceptance of the costs by the defendants would not result in the waiver of their right to file an appeal.

18. For the aforementioned reasons, the impugned order dated 24th January, 2008 allowing the is No. 3002 of 2000 in CS (OS) 166 of 1997 is hereby set aside and the application is No. 3002/2000 under Order 6 Rule 17 CPC hereby stands dismissed. The appeal is accordingly allowed with costs of Rs. 20,000/- to be paid by the respondents to the appellants within a period of four weeks from today.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com