

P. Jayabaskar and 2 Others Vs. Saraswathi and 7 Others

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Court : Chennai

Decided On : Jul-23-1999

Reported in : 2000(1)CTC334

Judge : S.S. Subramani, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 115 -Order 6, Rule 17; [Limitation Act, 1963](#) -- Schedule -- Article 97; [Hindu Succession Act, 1956](#) -- Sections 22

Appeal No. : C.R.P. No. 527 of 1999

Appellant : P. Jayabaskar and 2 Others

Respondent : Saraswathi and 7 Others

Advocate for Def. : Mr. T.S. Sivagnanam, Adv.

Advocate for Pet/Ap. : Mr. V.K. Nachimuthu, Adv.

Judgement :

ORDER

1. Defendants 14 to 16 in O.S. No, 710 of 1996, on the file of District Munsif's Court, Erode, are the revision petitioners.

2. First respondent herein filed the suit for partition claiming 8/5.6 shares and also for putting her in exclusive possession of the same, she also prayed for a

permanent prohibitory injunction restraining defendants 14 to 16, their men and agents from demolishing the suit property, and for directing the defendants to pay costs of the suit.

3. In the body of plaint, it is alleged that plaintiff and first defendant are daughters of one Gurunatha Mudaliar, who died 35 years ago. Apart from plaintiff and first defendant, defendant 8 to 10. One Mariappan and one Duraisami are also the children of Gurunatha Mudaliar. Mariappan died and his widow is 2nd defendant, and defendants 3 to 7 are their children. The legal heirs of Duraisami are defendants 11 and 12. It is alleged that the property is the self-acquisition of plaintiff's father. On the date of death of Gurunatha Madaliar, he left his widow. Subsequently, she also died and plaintiff has claimed that her share has accumulated from 1/18th to 1/7th, i.e., 8/56 shares. It is further averred that plaintiff is in joint possession of the suit property. She caused a suit notice on 10.12.1994 to defendant 1 and 2 and defendants 8 to 11 and also to the father of 14th defendant, warning the 14th defendant not to purchase the suit property from them and also informing them that any sale executed behind her back would not be binding on her. Defendants 14 to 16 have purchased the suit property after a month. It is further said that the sale deed executed in favour of defendants 14 to 16 is not the real one, and it is sham and nominal, and plaintiff is not bound by the same.

4. Written statement was filed by defendant 14 to 16, i.e., petitioners herein. They denied the paternity of plaintiff and contended that late Gurunatha Mudaliar and Angammal did not have a daughter by name Saraswathi. They also denied the character of the property. According to them, it is not a self-acquired property of Gurunatha Mudaliar. It is further said that the 15th defendant purchased the eastern share of the property on 12.12.1994 for a consideration of Rs.90,000 and the 16th defendant purchased the western portion of the suit property on 12.12.1994 for Rs.1,10,000. They have also put up pucca terraced construction in the property and have improved the same by investing several lakhs of rupees.

5. The reason for filing this revision is that the plaintiff filed I.A.No.1297 of 1998, seeking to amend the plaint by incorporating an additional relief on the existing

facts. She claimed that she is entitled to the benefits of section 22 of the Hindu Succession Act and, therefore, she is entitled to a right of presumption and consequently to compel defendants 1 to 16 to execute the sale deed in favour of the plaintiff in respect of share of defendants 1 to 13, on receipts of proportionate sale price.

6. Amendment was seriously opposed by petitioners by mainly putting forward a contention that the claim is barred by limitation. The amendment application is dated 4.9.1998. They also contended that on the basis of the existing contentions, this is not a matter to be resolved and no ground is made out for allowing the amendment. He also alleged that the very nature of the suit will change and the cause of action also will become different. They prayed for dismissal of the interlocutory application.

7. By the impugned order, the court below allowed the amendment. It found that whether the plaintiff is entitled to a right of pre-emption could be decided only at the time of trial, and the proposed amendment is not going to alter the nature or character of the suit.

8. Learned Counsel for petitioners urged that by allowing the amendment, their vested right on the question of limitation would be taken away, and the order of the courts below has gone far for beyond the scope of Order 6, Rule 17, C.P.C. It is further argued that the pleadings as they stand are inconsistent and consequently the amendment is without any bona fides. It is also contended that it is not a case where the plaintiff was not aware of the sale deed since it is made mention of in the plaint itself. What the plaintiff claims is that the sale deeds are not binding on her and she ignores the same. Having stated so, she cannot put forward a cause or pre-emption.

9. As against the said contention learned counsel for first respondent submitted that under Section 115 of the Code of Civil Procedure the discretion exercised by the Court below is not to be disturbed unless it is found to be capricious or illegal or one without jurisdiction. It was further argued that the question of pre-emption will arise by establishing a right of co-ownership, and it is on the basis of that cause of action, the amendment is sought for. So, there is no change of nature or

character of the suit, and, it is only an additional relief claimed on the existing facts.

10. The dictionary for the word 'pre-emption' is the legal right of buying a thing before to others. Even though a co-owner has no inherent right to acquire the share of the other co-owners, but in case of transfer by one co-owner of his share of the common property sometimes a preferential right is conferred upon the co-share or a right of pre-emption is given to the other co-owners. Such rights are conferred on the ground of public policy and avoidance of an inconvenience which might be caused to the non-alienating co-owners by the introduction of a stranger. This right is also conferred on others by custom or by statute. Apart from the statute or custom, a right of pre-emption as prior right of purchase is sometimes agreed to amongst the co-owners for their mutual benefit. Such an agreement is held to be valid and binding. B. B. Mitra's 'The Limitation Act' - Twentieth Edition (1998) (Page 911).

11. Section 22 of the Hindu Succession Act has also conferred upon certain-sharers a preferential right intended to be transferred by one of the heirs when the property devolves upon two or more heirs specified in class I of schedule to the Hindu Succession Act. Article 97 of the Limitation Act governs the period of limitation for application under that section. Such a right could be exercised not only in the stage of proposal but also after conclusion of the sale.

12. The contention of learned counsel for petitioner that by amendment, the cause of action and nature of suit have changed, is without any merit. In A.K.Gupta and Sons Ltd., v. Damodar Valley Corporation : [1966]1SCR796 , Their Lordships considered as to what is 'cause of action' for the purpose of amendment of pleading and what is the cause of action for the purpose of a suit. Their Lordships made a distinction between the two. In that case, the appellant before the Honourable Supreme Court filed a suit claiming a declaration that on a proper interpretation of the clause it was entitled to an enhancement of 20 percent over the tendered rates as the sole difference between the parties was about the interpretation. Subsequently an amendment application was filed as one for recovery of money based on the cause of action. On the date of amendment, if a

suit for money had been filed, it would have been barred. While considering this question, in paragraphs 7 to 9, Their Lordships have held thus:-

'It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred. *Weldon v. Neale*, 1887 (19) QBD 394. But it is also well recognised 'that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed after the expiry of the statutory period of limitation: see *Charan Das v. Amir Khan*, 47 I.A 255 : AIR 1921 PC 50 and *L.J. Leach And Co. Ltd. v. Jardine Skinner And Co.* : [1957]1SCR438 .

The principal reasons that have led to the rule last mentioned are, first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes *Cropper v. Amith*, 1884 (26) Ch. D.700 and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended *Kisandas Rupchand v. Rachappa Vithoba*, ILR (1909) 33 Bom. 644 approved in *Pirgonda Hongonda Patil v. Kalgonda Shidgunda* : [1957]1SCR595 .

The expression 'cause of action' in the present context does not mean 'every fact which it is material to be proved to entitle the plaintiff to succeed' as was said in *Cooke v. Gill*, 1873 (8) CP 107, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Unicos Property Corporation Ltd.*, 1962 2 All ER 24, and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas'. *Dornan v. J.W.Ellis & Co. Ltd.*, 1962 (1) All. ER 303. This also seems to us to be a reasonable view to take. No amendment will be

allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time.' (Italics supplied)

In that case, Their Lordships held that the amendment ought to be allowed since the claim for money is based on the same facts and not on the basis of a new case. Their Lordships interpreted the word 'new case' to mean 'new set of ideas'. In view of the said decision rendered by the Honourable Supreme Court, it has to be held that the contention of petitioner that a new cause of action has arisen and a new case has also been pleaded, cannot be accepted.

13. I have already extracted the meaning for the word 'pre-emption'. It arises due to the relationship and it is that relationship which is the basis of the suit. What are the reliefs to which the plaintiff is entitled consequent to the relationship, in case it is proved by plaintiff, is a matter to be decided during trial. The parties have joined in issue as to whether the plaintiff is a co-owner along with defendants 1 to 13. Petitioners have denied the paternity of the plaintiff.

14. It is true that under normal circumstances, a relief which is barred on that date is not usually allowed to be incorporated by way of amendment. But that is also a matter of discretion to be exercised by Court. In *L.J. Leach & Co. Ltd. v. M/s. Jardine Skinner & Co.* : [1957]1SCR438 , in paragraph 16 of the judgment, Their Lordships have held thus:-

It is no doubt true that Courts would as a rule, decline to allow amendments, if a fresh and on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice. In *Charan Das v. Amir Khan*, 47 I.A 255: AIR 1921 PC 50, the Privy Council observed:

That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special

circumstances of the case'.

15. In the same volume, at page 363 P.H.Patil v. K.S.Patil : [1957]1SCR595 . Their Lordships have considered as to what is the scope of Order 6, Rule 17, C.P.C.. In paragraph 10 of the judgment, their Lordships have approved the decision in Kisandas Rupchand v. Rachappa Vithoba, 33 Bom. 644 and held thus:-

'Learned counsel for the appellant referred us to the decision in Kisandas Rupchand v. Rachappa Vithoba, 33 Bom. 644 and placed great reliance on the observations of Beaman, at page 655:

In my opinion, two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment. If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs. If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed.'

He contended that the first test laid down in the aforesaid observations was not fulfilled in the present case. We do not agree with this contention. First, it is not feasible nor advisable to encase a discretionary power within the strait jacket of an inflexible formula. Secondly, we do not think that the 'quantity of relief', an expression somewhat difficult of appreciation or application in all circumstances, was in anyway affected by the amendments allowed to be made in this case. What happened in the present case was that there was a defect in the plaint which stood in the way of the plaintiff asking for the reliefs he asked for that defect was removed by the amendments. The quality and quantity of the reliefs sought remained the same; whether the reliefs should be granted or not is a different matter as to which we are not called upon to express any opinion at this stage. We think that the correct principles were enunciated by Batchelon, J. in his judgment in the same case, viz., Kisandas Rupchand v. Rachappa Vithoba, 33 Bom. 644,

when he said at pp.649 - 650:

All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties... but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same; can the amendment be allowed without injustice to the other side, or can it not?' (Italics Supplied)

16. When the Court below has exercised the discretion in allowing the application for amendment, unless it is found as illegal or capricious, ordinarily, under Sec.115, Civil Procedure Code, this Court will not interfere. In this case, the lower Court has left every other matter to be decided during trial, including the question of limitation. It is said that the sale deeds are dated 12-12-1994, and, to file a suit for pre-emption, the period of limitation is only one year under Article 97 of the Limitation Act. Even on the date of suit, a claim is barred. By allowing the amendment, that vested right of limitation has been taken away, is the argument. I do not think that the said submission could be accepted. Even if the amendment relates back to the date of the plaint, if the claim is already barred, the contention of petitioner is still open to be decided by the trial Court. It is further argued that it is a new relief unconnected with the existing relief. Really it is in the nature of additional relief that is sought for. It is true that the amendment sought for is in the nature of an additional relief and that was sought for only on 4-9-1998 when the amendment application was filed. What is the period of limitation in such cases, whether the amendment relates back to the date of plaint, or it takes effect only from the date of application for amendment, is to be decided only by the trial Court

when the parties join in issues. It is further argued that the existing claim is inconsistent with the allegations in the plaint. The argument is based on allegations in paragraph 7 of the plaint wherein it is said that the sale deed purported to have been executed by some of the defendants 14 to 16 is not real one but a sham and nominal one.'. According to learned Counsel, if that is the contention, a right of pre-emption cannot be exercised, the reason being that the right of pre-emption could be exercised only if there are valid sale deeds. I agree with the learned Counsel that there is some inconsistency if we look at the pleadings in that way. But it is well-settled that inconsistent pleadings can also be put forward. But the plaintiff will have to choose at the time of trial, where she is going to opt the allegations made in paragraph 7 of the plaint or whether she recognises that sate deeds executed in favour of the petitioners herein.

17. In the result, I do not find any merit in the revision, and I dismiss the civil revision petition reserving the right of the petitioners herein to raise all the legal and factual contentions, which she is legally entitled to. The Court below will also permit them to file additional written statement, relating to the amendment. While disposing of the suit, the trial court will also take into consideration the observations made above in this Order. No costs. CMP No.2632 of 1999 for stay is closed.