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Court : Chennai

Decided On : Jul-02-2009

Reported in : (2009)6MLJ224

Judge : M.M. Sundresh, J.

Acts : Code of Civil Procedure (CPC) - Order 6, Rule 17

Appeal No. : C.R.P(PD)(MD) No. 86 of 2008 and M.P(MD) No. 1 of 2008

Appellant : Muthu and Gopal

Respondent : Padma

Advocate for Def. : S. Sivathilakar, Adv.

Advocate for Pet/Ap. : T. Lajapathi Roy, Adv.

Judgement :

ORDER

M.M. Sundresh, J.

1. The Civil Revision Petition has been filed by the plaintiff in the suit. The petitioners have filed a suit for declaration, permanent injunction and mandatory injunction against the defendant in O.S. No. 41 of 2005, on the file of the Subordinate Court, Paramakudi. The said suit has been filed claiming title to the

suit property. Pending the suit, an application was filed in I.A. No. 34 of 2007, seeking amendment under Order 6 Rule 17 of C.P.C., for amending the prayer for possession. The said application has been dismissed by the court below on the ground of delay. Challenging the same, the present Civil Revision Petition has been filed.

2. The learned Counsel for the petitioners submitted that the proposed amendment has not changed the cause of action or introduce a new case. He further submitted that the suit itself is filed for declaration and mandatory injunction. The application ought to have been allowed. According to the learned Counsel, the delay in itself cannot be a ground for rejecting the application. The learned Counsel would further submit that in as much as the main relief is for declaration, incidental relief of possession will have to be granted.

3. On the contrary, the learned Counsel for the respondent submitted that the petitioners have not taken steps earlier to file the application and the court below has rightly exercised its discretion in rejecting the application. According to the learned Counsel for the respondent, after the amendment under Order 6 Rule 17 of C.P.C, the petitioners have not taken due diligence in filing the application at an earlier point of time. The present application has been filed belatedly during the trial stage. Hence, the court below has rightly rejected the application.

4. I have heard the learned Counsel for the petitioners as well as the learned Counsel for the respondent.

5. In the case on hand, the suit has been filed for declaration and mandatory injunction. The averments made in the plaint would disclose that the petitioners have admitted the possession of the plaintiffs. The prayer for mandatory injunction is sought for, for removing the construction put up by the respondent. Therefore, amendment is only by way of abundant caution in order to get over the technical objection raised by the respondent. It is also seen that the petitioners are not introducing a new cause of action nor there is any change in the cause of action. The suit has been filed based upon the title. There is no change in the stand of the petitioner. This Court is of the opinion that the order passed by the trial court is liable to be set aside and the delay in filing an application alone cannot be a

ground for rejecting the prayer for amendment. The trial court is vested with discretion to decide the application. The petitioners have stated in their affidavit that they were constrained to file this application in view of the technical objection raised by the respondent. Hence, this Court is of the opinion that the order passed by the court below cannot be sustained.

6. The learned Counsel for the petitioners relied upon a decision in *Sanjeevi Ammal and three Ors. v. Narasimha Naicker and Anr.* reported in : 2000 (III) CTC 389, the Honourable High Court has held that even in a case where the suit is filed for declaration and permanent injunction and after the court finds that the plaintiff is not in possession, the prayer for possession can be sought for since the suit is based upon declaration of title. Similarly, he relied upon a decision in *Church of South India Trust Association, Tiruchirappalli-Thanjavur Diocesan Council, represented by its Diocesan Treasurer, Mr. R. Suresh Kumar and Ors. v. Kovil Pillai and Ors.* reported in : 2007(5) CTC 595, wherein, this Honourable Court has held that in a suit for declaration and injunction, the alternative prayer seeking title based upon adverse possession can be permitted. In the Judgement in *Ramachandra Sakaram Mahajan v. Damodar Trimbar Tanksale (dead) and Ors.* reported in : (2007) 6 Supreme Court Cases 737, the Honourable High Court was pleased to hold that the amendment will have to be allowed so as to enable the court to adjudicate upon the issues involved in the case. In the said case, the Honourable High Court was pleased to hold that the amendment for recovery of possession when the declaration is based upon title will have to be ordered.

7. On consideration of the above said judgements, this Court is of the opinion that in view of the specific plea of declaration taken by the petitioners, the consequential relief of possession will have to be necessarily to be allowed to be raised. Further as stated above, the petitioners shall also taken the plea of mandatory injunction. The plea of mandatory injunction and possession will have to be seen based upon the pleadings of the petitioners. Therefore, this Court is of the opinion that the application filed by the petitioners for amendment ought to be allowed.

8. The learned Counsel for the respondent relied upon a decision in D. Ramanujam v. R. Paneerselvam reported in : 2006(3) CTC 27 and contends that in the absence of due diligence by the party seeking amendment, the application will have to be dismissed. On a perusal of the said judgment, it is seen that the facts in the said judgment are not applicable to the facts of the present case. In the said case, the suit is filed for declaration and permanent injunction and therefore, the amendment is sought to be made. But in the present case, the suit is filed for declaration and mandatory injunction and mandatory injunction is sought for on the ground that the respondent is in possession and the construction put up by the respondent will have to be removed. The learned Counsel for the respondent also relied upon a Full Bench Judgment of the Honourable High Court in Hi. Sheet Industries, a partnership firm, carrying business at 61-D, D.V. Road, Ambur Town, Vellore District v. Litelon Limited, having its Office at No. 68, Sipcot Industrial Complex, Hosur represented by its Managing Partner, S. Gokul and Ors. reported in : 2006(5) CTC 609 and contend that in view of the negligence, the amendment cannot be ordered. A perusal of the said judgment of the Honourable High Court would show that it has been held that the court has got unfettered discretion to allow the amendment in its judicial discretion. Further the Full Bench has held that the other factors will have to be considered, namely, as to whether amendment affects the cause of action, creates a new case and whether it would cause serious prejudice to the opposite parties. The Honourable High Court has held that the trial court also will have to see whether such amendment is required in the interest of justice. Hence, the said judgment supports the case of the petitioner. In this case, in view of the judgments referred to above, this Court is of the opinion that on the facts of this case, Civil Revision Petition is liable to be allowed.

9. Accordingly, the Civil Revision Petition is allowed. Consequently, connected Miscellaneous Petition is closed. No costs. The respondent is given four weeks time from the date of receipt of a copy of this order to file his Additional Written Statement if any, and the trial court is directed to dispose of the suit in O.S. No. 41 of 2005 within a period of three months from the date of receipt of a copy of this order.

