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Court : Karnataka

Decided On : Nov-02-2010

Judge : A.N. Venugopala Gowda J.

Appeal No. : WRIT PETITION NO.25463/2010 (GM-CPC)

Appellant : K J Manjunath and ors

Respondent : A with a Ramesh @ K.J. Anitha and ors

Advocate for Def. : SRJ G.S.VENKAT SUBBARAO, ADV.

Advocate for Pet/Ap. : SRI P.D.SURANA, ADV

Judgement :

ORDER

1. Respondents 1 & 2/plaintiffs have filed suit against the petitioners and respondents 3 to 12 for relief of partition and separate possession claiming 1/4th share in the plaint schedule properties and consequential reliefs. The petitioners/defendants 1 S-. 2 have filed written statement on 27.10.2007 and prayed for dismissal of the suit. Issues were framed. 1st plaintiff filed I.A.No. 1/2009 dated 14.12.2009 under Order 6 Rule 17 CPC seeking leave of the court to amend the plaint and to incorporate the proposed amendment therein in the plaint. The 1st defendant filed statement of objections to the said application. The trial court has allowed LA No.1/2009. Aggrieved, defendants 1 & 2 have questioned the said order in this writ petition.

2. Sri P.D.Surana, learned counsel appearing for the petitioners firstly contended that, the properties sought to be incorporated in the plaint, according to the plaintiffs, were purchased in the name of the petitioners by their father late K.RJambukeshwar and trial of such a plea is barred under Section 3 of the Benami Transaction (Prohibition) Act, 1988 and hence, the question of allowing such contention does not arise. Secondly, the pleading in the plaint and the proposed pleading are inconsistent. The plaintiffs are not entitled to maintain inconsistent pleading. Learned counsel pointed out that, the plaintiffs on one hand contended that, the plaint schedule properties are the individual properties of late K.RJambukeshwar and by the proposed amendment, they have sought to plead that, the suit properties are joint family properties. Thirdly, the objections raised with regard to I.A.No. 1/2009 has not been considered taking into consideration the facts and circumstances of the case and in accordance with law and hence, the impugned order is irrational and illegal. Reliance was placed on the decision reported at AIR 2006 SC 2832.

3. Sri G.S.venkata Subba Rao, learned counsel appearing for the respondents 1 & 2, on the other hand pointed out the pleading in the penalty made portion of para 7 of the plaint and contended that, the plaintiffs did not had at the time of filing of the suit, the full particulars of the properties owned by their father K.RJambukeshwar and the reservation of their right to include other properties in the schedule of the plaint upon getting the information. Learned counsel submits that, subsequent to the filing of the suit, the plaintiffs having come to know of details of other family properties, filed LA No. 1/2009 to amend the plaint, incorporate the additional pleading and the items of properties of the joint family., which are liable for partition among the plaintiffs and defendants 1 & 2. Learned counsel submits that, or. the date I.A No.1/2009 was filed, only issues had been framed, trial as such had not commenced, no accrued rights of the defendants was affected and there being neither a change of cause of action nor the nature of the suit and since the defendants have the opportunity to file their additional written statement and the amendment being necessary for deciding the real question in controversy between the parties and to avoid multiplicity of proceedings between the parties, the trial court is justified in passing the impugned order.

4. It transpired at the time of hearing that, the objection by the petitioners is with regard to proposed pleading at para 7(a), 8(c) & (d) and the properties in relation thereto. Sri P.D.Surana submitted that, the petitioners have no objection for the amendment allowed being maintained with regard to the proposed pleading under I.A No.1/2009, namely pa-a 8(a) & (b).

5. The Hon'ble Supreme Court by an order dated 17.09.2010 passed in S.L.P Nos.36170 -36171/2009 has directed that, the suit be decided as expeditiously as possible, in any event, within a period of 9 months from the date of communication of the order.

6. Keeping in view the rival contentions, I have perused the record of the writ petition.

7. Order 6 Rule 17 CPC is with regard to amendment of pleadings. The provision makes it clear that, the court may at any stage of the proceedings allow either party to alter or amend the pleadings necessary for the purpose of determining the real questions in controversy between the parties, in such manner and on such terms as may be just. However, the proviso enacts that the application for amendment should not be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter for which amendment is sought before the commencement of the trial.

8. The object of the provision is that, the courts should try the real question in controversy between the parties by permitting the amendment, provided the amendment does not cause injustice or prejudice to the opponents. The first part of the provision under Rule 17 of Order 6 is discretionary. However, the second part is imperative i.e., all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

9. It is true that, as on the date I.A No.1/2009 was filed, issues in the suit had been framed. However, recording of evidence had not commenced. In the circumstances, the question was whether the plaintiffs were justified in seeking amendment of the plaint by incorporating additional pleading and whether the trial

court was justified in allowing the amendment. In that, whether it fell in the second part of the provision under Rule 17 of Order 6 CPC, namely the amendment being necessary for the purpose of determining the real controversy between the parties?

10. It is too well-settled that, while considering an application seeking permission of the court to amend, the court should not go into the correctness or falsity of the case in the proposed amendment and it is not permissible to record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated is not to be adjudged at the stage of considering the application and allowing the prayer.

11. In para 7 of the plaint, it has been stated as follows.

"The particulars of the above two properties and also some other properties owned by late K.R.Jumbukeshwar are not fully available to the plaintiffs at the time of filing of the suit, as such the plaintiffs reserve their right to include such other properties in the schedule in future as and when they get the information about the other properties owned by their deceased father".

12. In the affidavit in support of I.A No.1/2009, it was stated as follows:

"2. I submit that I have filed the above suit for partition and separate possession with respect to all the suit schedule properties and this Hon'ble Court on the last date of hearing was pleased to frame the issues and the evidence as such in the above case is yet to commence.

3. I submit that at the time when I filed the suit there was a threat of alienation with respect to the schedule properties and therefore on account of urgency I was not able to include certain properties to claim my share in the said properties. So much so, I had mentioned in the plaint that my father also had owned other residential buildings at Chitradurga and also an agricultural land and that I would include those properties after getting necessary documents.

4. I submit that recently I was able to secure all the required documents with respect to the said properties and I am including those properties in schedule to

the plaint as the subject matter of the suit.

5. I submit that my father during his life time had a permit to run a Transport Bus bearing Permit No. 102/92-93 and the said Transport Bus was panning from Chitradurga to Tirtipathi one round trip.

6. I submit that by mistake or otherwise, I could not mention in the schedule to the plaint the correct number of the Stage Carriage Permit. However, I have mentioned in the schedule the registration nos. of the Transport Bus that were used to comply between Chitradurga and Tirupathi and under the very same Stage Carriage Permit my father held. I submit that in fact, the defendants 1 & 2 who are my brothers clandestinely got transferred the permit that was in the name of my father into their names by producing forged and created documents. I had challenged such a transfer and the matter went upto the Hon'ble High Court of Karnataka, Bangalore and by virtue of the orders passed by the Hon'ble High Court of Karnataka. Bangalore in writ proceedings, the permit is also ordered to be run in the name of myself and defendants 1 & 2 on rotation basis.

7. I submit that there are sufficient pleadings to put forth my claim on the said Stage Carriage Permit but by inadvertence the said permit was not included in the schedule. I submit that by the proposed amendment I intend to include the details of the Stage Carriage Permit to avoid any technicality in future.

8. I submit that at the time when I filed the suit, I also did not have the correct measurements and boundaries with respect to item Nos.4 & 5 of the suit schedule properties and recently I was able to obtain all the documents with respect to these two properties and I have given the correct measurements and boundaries".

13. In the case of DONDAPATI NARAYANA REDDY VS. D'JGGIREDDY VENKATANARAYANA REDDY, reported in (2001) 8 SCC 115, it has been held that, amendment of pleadings should be liberally allowed, unless it is established that the result would cause such injustice and prejudice against the opposite side as could not be compensated by costs or as would deprive him of a right accrued due to lapse of time.

14. In the case of RAJESH KUMAR AGGARWAL VS. K.K.MODI, reported in (2006) 4 SCC 385, it has been held that, the courts should allow such amendments that may be necessary for determining the real question in controversy between the parties, provided it did not cause injustice or prejudice to the other side. It has been held that, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the. Real dispute between the parties.

15. The plaintiffs in para 7 of the plaint have clearly stated that, the particulars of the properties owned by late K.R.jumbukeshwar are not fully available to them and have reserved their right to include such other items in the schedule in future as and when they get information about the properties owned by their deceased father. It is not the case of the petitioners that, the plaintiffs had the particulars about the properties sought to be added by way of amendment, but they did not deliberately include them in the plaint schedule. When the plaintiffs did not had the particulars as had been clearly stated in the plaint, noticed supra, it was not possible for them to include in the plaint. An amendment of pleadings relating to the main controversy between the parties should not be refused on mere technical grounds since the merit can be considered at the time of final hearing of the suit.

16. The question that arises for consideration is, Whether the order in question has caused failure of justice or injury of irremediable nature to the petitioners i.e., on account of plaintiffs being permitted to incorporate in the plaint, the proposed pleading?

17.It is inconceivable how mere amendment of pleadings could possibly cause failure of justice or irremediable prejudice/injury to the petitioners. Amendment of pleading would not amount to decision on the issue involved. It would only serve advance notice to the other side as to the plea, proposed to be taken.

18. Sri P.D.Surana, submitted that, the objection of the petitioners is with regard to the proposed pleading as para Nos.7(a), 8(c) arid 8(d) and that, the petitioners have no objection to the remaining part of the proposed amendment.

19. The plaintiffs and defendants 1 & 2 are the children of late K.R. Jambukeshwar. The suit is for partition and separate possession. The plaintiffs are the daughters of deceased Jambukeshwar. It is reasonable to take that, the daughters might not have been posted with the assets held by their father or purchased out of joint family funds, in the names of the other family members and hence their statement made in para No.7, prima-facie appears to be correct. The reason stated in the affidavit in support of I.A No. 1/2009 coupled with the pleading in para No.7 of the plaint, has enabled the trial court to allow I.A No. 1/2009. The petitioners would get an opportunity to file additional written statement and they would be able to raise their defense. In the circumstances, the amendment allowed would not cause irreparable injury of irremediable nature to the petitioners to disallow the amendment prayed, that too, prior to the commencement of trial of the suit. In the circumstances, the trial court has not committed any procedural impropriety or irregularity, much less illegality in allowing the prayer for amendment of the plaint in terms of the proposed pleading in I.A.No.1/2009.

20. In the case reported at AIR 2006 SC 2832 on which reliance was placed by the learned counsel for the petitioners, the Hon'ble Supreme Court has held that, inconsistent pleas can be raised by defendants in the written statement although the same may not be permissible in case of plaint. Keeping in view the fact that, the plaintiffs are the daughters of deceased K.P.Jambukeshwar and appear to be having no knowledge of the estate of late Jambukeshwar, it is not possible at this stage, to hold as to whether there is inconsistency in the case of the plaintiffs. Even the said fact could be subject matter of trial. The said decision, in my opinion, has no application to the case on hand. In the result, the writ petition is devoid of merit and shall stand dismissed.

The petitioners may file the additional written statement with regard to the amendment permitted to be incorporated in the plaint, within a period of three weeks from today.

The trial court is directed to dispose of the suit by giving effect to the order dated 17.09.2010 passed in SLP Nos.36170-36171/2009.

In the circumstances of the case, parties are directed to bear their respective costs.

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