Edara Venkayya Vs. Edara Venkata Rao

LegalCrystal Citation : legalcrystal.com/801062

Court : Chennai

Decided On : Aug-19-1938

Reported in : AIR1938Mad979; (1938)2MLJ642

Appellant : Edara Venkayya

Respondent : Edara Venkata Rao

Judgement :

Varadachariar, J.

1. In these revision petitions, the petitioner challenges the validity of four orders passed by the lower Court granting leave under Order 2, Rule 2(3), Civil Procedure Code, to the plaintiff to omit the claim for certain reliefs, in the circumstances to be presently mentioned. The orders have been questioned on two grounds (i) that the Court had no power to grant leave at the stage at which the applications were made, and (ii) that the circumstances alleged in the application for leave did not justify the grant of leave. The latter question relates to the exercise of the discretion which is vested by law in the lower Court and except in very exceptional circumstances, it is not proper for a Court of Revision to interfere with the way in which the lower Court has exercised its discretion. In the present case, I do not see sufficient reason for interfering with that exercise of discretion.

2. The question as to the power of the Court to grant leave at the stage at which the applications were made to it is not free from difficulty. The relevant facts are as follow. The plaintiff was entitled to recover a sum of Rs. 20,000 from the defendant in ten annual instalments of Rs. 2,000 each, the first instalment becoming payable on 31st March, 1929. As the first instalment was not paid on the due date, the plaintiff filed a suit for its recovery in April, 1929. Several defences were raised to that suit and the plaintiff apparently waited to see what the decision in that suit would be before he filed his next suit.

3. But it unfortunately happened that that suit remained pending for a number of years. In 1933 he filed his second suit O.S. No. 19 of 1933. By that time not only the second instalment but some later instalments had also fallen due. But O.S. No. 19 of 1933 sought the recovery of the second instalment only. O.S. No. 17 of 1934 was filed next year for the third instalment and two other suits, namely, O.S. No. 16 of 1935 and O.S. No. 13 of 1936 were filed for the recovery of the later instalment. Luckily or unluckily for the parties, all the four suits beginning from O.S. No. 19 of 1933 remain pending to this date. At some stage, the defendant raised the plea under Order 2, Rule 2, Civil Procedure Code, on the ground that as the claim for some of the later instalments had accrued due even before O.S. No. 19 of 1933 was filed, the later suits would be barred by the provisions of that rule. Similar pleas were sought to be raised

in the other suits as well. It was at this stage that applications were filed by the plaintiff on 1st October, 1936, for grant of leave under Order 2. Rule 2(3).

4. On the facts above stated, Mr. Somayya, the learned Counsel for the defendant, contends that on a proper construction of Clause 3 of Order. 2, Rule. 2, leave should have been asked for before O.S. No. 19 of 1933 was actually filed or at least at the time the suit was instituted, and that the Court has no power at a late stage to grant such leave. I may mention here that the lower Court has taken care to leave an allied question open, namely, whether the leave granted under the orders now challenged will be effective to obviate the bar under Order. 2, Rule. 2, Civil Procedure Code, in respect of suits that have been already instituted. I do not therefore wish to say anything on that question; not do I wish to be understood as expressing any opinion on the question whether Order. 2, Rule. 2(3) applies to these suits or not. These are questions to be considered in the suits themselves. The only question dealt with by the Court below and proposed to be dealt with by me here is whether assuming that the bar under Order. 2, Rule. 2(3) would have applied to each of the later suits, the Court had power to grant leave under that clause at a late stage of the pendency of the earlier suit.

5. The learned Judge has laid some stress on the fact that in re-enacting this provision in the Code of 1908, the legislature has omitted certain words which were found in the corresponding provision in the Codes of 1882 and 1877. In the last clause of Section 43 of the older Codes there occurred in parenthesis the words:

Except with the leave of the Court obtained before the first hearing' between the words 'omits' and 'to sue .

6. The learned Judge understands the reason of the omission to be that it was intended to leave the question of the time for making an application at large, subject only to the power of the Court to decline to grant leave if an application was made too late. Mr. Somayya suggests that that was not the real reason for the omission; he attributes it to a recognition by the legislature of the fact that the words found in the old rule were really inconsistent with the substantive provision that all reliefs arising out of the same claim must be claimed in one and the same suit. He points out that the question of omission or no omission in respect of some reliefs must be settled at the initial stage itself and could not be properly dealt with at later stages of the suit. I am not by any means satisfied that there is any inherent incompatibility of the kind suggested by Mr. Somayya. The older Code obviously contemplated that the application for leave might be made after the institution of the suit, though it fixed a time-limit by prescribing that leave should be obtained before the first hearing.

7. The question whether leave for particular purposes should be obtained before the institution of the suit or could be obtained later will, in cases not governed by any definite statutory time limit, have to be decided according to the bearing of the leave upon the jurisdiction of the Court to entertain the particular suit or its bearing upon the constitution of the particular action or the significance of other considerations. Taking.for instance the provision in the Letters Patent that the leave of the Court should be obtained before a suit of a particular kind is instituted in the High Court, it is obviously a provision by way of condition precedent to the jurisdiction of the Court. If, on the other hand, we take the rule relating to the necessity for leave for a suit against a Receiver or for a suit under Order. 1, Rule. 8, Civil Procedure Code, the leave is not one that bears on the jurisdiction of the Court; the requirement as to

leave is based on considerations relating to the interests of other persons or the authority of other Courts. The provision as to leave in this latter class of cases rests not so much even on the constitution of the particular suit as upon the expediency of granting relief in that particular suit in a manner that may affect the interests of other persons. That is why the preponderance of authority is in favour of the view that in this class of cases leave is not a condition precedent to the institution of the suit. Another class of cases which lies midway between these two groups is illustrated by the provision of Order. 2, Rule. 4, Civil Procedure Code, as regards the joinder of particular claims in one suit with a particular claim for the recovery of immovable property. Under the corresponding rule of the English practice, it has been held in England that the leave contemplated by this rule may be granted even at a later stage of the suit (see Lloyd v. Great Western Dairies Company (1907) 2 K.B. 727) The observations of Jessel, M.R., in In re Pilcher: Pilcher v. Hinds (1879) 11 Ch. D. 905 seem to suggest a stricter view, but they have been explained by Buckley, L.J., in the later case. Again, the leave contemplated by Section 20(b), Civil Procedure Code, in respect of defendants residing outside the jurisdiction of the Court has been held to be capable of being granted on an application made after the institution of the suit. These illustrations show that where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application for leave should be made before the institution of the suit itself or at least along with the plaint.

8. Where the objection under Order. 2, Rule. 2, Civil Procedure Code, arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for, it only entails a disability as regards subsequent proceedings. It therefore seems to me that there is even less reason in this class of cases for insisting that the application for leave to omit must precede or at least be contemporaneous with the plaint in the first suit. It may be that as a matter of prudence the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. So far as I can see, the Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. 1 am therefore unable to agree with Mr. Somayya's contention that the reason of the thing requires that such an application must have been made prior to the institution of the suit in which the application is made. In this view, the omission in the new Code of the words found in parenthesis in the third clause of Section 43 of the old Code justifies the inference that the legislature did not wish to insist upon leave being obtained before the first hearing. Some of the commentators on the new Code (including Sir Dinshaw Mulla) also take this view, and I am not satisfied that that view does not correctly represent the intention of the legislature.

9. The Civil Revision Petitions accordingly fail and are dismissed with costs in Civil Revision Petition No. 87 of 1937.