

Orders on I.A. Dated 6-1-2021

The Plaintiff has filed this Application u/O.6R.17 of CPC seeking permission to amend the Plaint by incorporating the proposed amendment and also sought for Additional Prayer for damages at Rs.1,57,500/- per month from 1-1-2018 till 31-12-2020 for a sum of Rs.56,70,000/- and also to pay the current and future interest from 1-1-2020 till delivery of possession of schedule B property to the Plaintiff.

2. The brief facts as stated by the Plaintiff in the Affidavit annexed to the application are that he has filed this suit seeking declaration that sale deed executed in favour of Defendant No.3, by Defendants No.1, 2 and 4 on behalf of the Plaintiff, by 2nd Defendant, who claims and represent 4th Defendant, claiming to be the GPA holder of Plaintiff vide Power of Attorney dated 7-8-2013 in respect of schedule B-schedule property and other properties. The Plaintiff has not executed any Power of Attorney in favour of 4th Defendant authorizing to execute sale deed on his behalf and Defendants No.1 to 3 had any right to convey title in respect of schedule B property or to execute sale deed in respect of schedule B property. In terms of JDA and subsequent Supplementary agreement dated 27-1-2014, the plaint schedule B property is exclusively in the share of the Plaintiff and therefore, said property could not have been sold by either the 2nd Defendant claiming that it is in the share of 4th Defendant.

The Plaintiff being the owner of schedule A and B property, is entitled to possess and if need be dispose off the schedule B property. He has borrowed huge amount from Banks, financial institutions and is obliged to repay the loan amount with interest. He decided to sell few of the flats in his share in the building to be built in terms of the JDA dated 7-8-2013 entered in to with 4th Defendant and MOU and use the sale proceeds to liquidate the said loan. The Defendants No.1 to 4 have colluded with each other to deprive the Plaintiff of his possession and right to dispose off the schedule B property and use the proceeds for his benefit. Even after service suit summons, the Defendants have not come forward to surrender possession of schedule B property to the Plaintiff, resulting in further loss to the Plaintiff. Therefore, he is entitled to recover the loss caused to him and therefore he is seeking for award of damages. The Plaintiff would have sold the schedule B property for Rs.1,50,00,000/- and that he would have sold the same way back in 2016 and he could not sell the schedule B property in 2016 for the reasons stated above and therefore he is entitled to recovery interest at 18% p.a. from 1-1-2018 till he secures possession. The Plaintiff quantifies the loss at Rs.1,57,500/- p.m. @ 18% on Rs.1,05,00,000/- the value as on 17-2-2016 (sale value declared as per sale deed is Rs.93-lakhs below the agreed value of Rs.7,000/- as per MOU) for recovery of damages from 1-1-2018. The Plaintiff could not file this application earlier, as he had expected the

Defendants to surrender possession and as the cause of action to seek damages arises every month, the present application is not barred by time. The amendment does not alter the nature of the suit or the foundation of the suit and present amendment is supplementary to the relief already sought. On these grounds, he prayed to allow the application.

3. The Defendant No.4 has filed his objection statement by seriously objecting to allow the Application submitting that the application is bereft of merits, lacks bonafides and is contrary to the facts and circumstances of the case as well as contrary to settled principles of law. After nearly 4-5 years of institution of present suit, the Plaintiff has filed this application seeking to claim additional relief of damages and future interest, much beyond the period of limitation and contrary to settled principles of law. It is not the case of the Plaintiff that the alleged loans were obtained in pursuant to the JDA or any other transactions with the Defendants. The Plaintiff is not entitled to recover from these Defendant the amounts he may have spent or loans taken for his personal use. The trial of the suit has already commenced and Plaintiff has led his chief examination and has marked documents. The proviso to O.VI R.17 mandates that the Plaintiff seeking to amend the plaint after commencement of trial will have to prove that in spite of due diligence he could not have raised the said averments before commencement of trial. The Plaintiff has not set out any reasons to justify that despite exercise of his due diligence, he could not have sought for the reliefs sought in the proposed amendment. There are no change in circumstances, which may necessitate the relief sought in the amendment. There is inordinate delay of about 5 years. If the application is allowed, the Defendants would be put to irreparable loss

and injury. On the other hand, no harm will be caused to the Plaintiff. On these grounds, they prayed to dismiss the application with costs.

4. Heard the arguments from both the sides.

5. The only Points that arise for consideration are as follows:

1. Whether the Plaintiff has made out a ground to allow this Application?

2. What Order?

6. The answers to the above Points are:

Point No.1 – In the Affirmative,

Point No.2 - As per Final Order,

for the following:

REASONS

7. **Point No.1:** The Plaintiff has filed this suit against the Defendants for the relief of declaration, declaring that he is the absolute owner of suit schedule 'B' property and also for declaration, declaring that the sale deed dated 27-8-2015 in respect of B-schedule property is illegal, sham and void document and not binding upon him with respect to his right, title and interest over the suit property, with a consequential relief of Permanent Injunction.

Even according to the Plaintiff, he is the absolute owner of the property bearing Old No.981, marginal extent of land attached to site No.981, 991, property being marginal land attached to site No.991, which are totally measuring 6800 square feet, present Khatha No.39, (Old Nos.981/991/39) and he entered into a Joint Development Agreement with the 4th Defendant to develop the suit A-Schedule property, on 7-8-2013, for construction of residential apartment and to share a built-up area at the ratio of 45% to the developer and 55% to the owner, i.e., in his favour. It is his case that the 4th Defendant has developed the suit A-schedule property as per the Joint Development Agreement and subsequently, as per Sharing Agreement dated 27-1-2014, the Flat Nos.001, 002, 101, 102, 203, 301, 302, 303, 304, 403 and 404 were allotted to his share and accordingly, he is the absolute owner of the suit B-schedule property. It is his case that the Defendant No.4, having no any authority over suit B-schedule property, which has fallen to his share in the Sharing Agreement dated 27-1-2014, has illegally, by claiming that the said property has fallen to his share, sold the suit B-schedule property in favour of Defendant No.3 for the huge amount of Rs.85,00,000/-, by causing loss to him and as such, the sale deed executed by Defendant No.4 in favour of Defendant No.3 on 27-8-2005 in respect of B-schedule property is illegal and void document and the same is not binding upon him and he being the absolute owner of the suit B-schedule property, is having every

right to exercise his right, title and interest, much less, possession over the suit B-schedule property.

The Plaintiff has stated that he has borrowed huge amount from the banks and financial institutions and also from the private institutions and he has obliged to repay the loan with interest and he, in order to repay the said loan, decided to sell few flats which were allotted to his share in terms of the J.D.A. dated 7-8-2013 and at that point of time he has noticed that the Defendants No.1 to 4, colluding with each other to deprive his right over the suit B-schedule property, sold the said property and delivered vacant possession of suit B-schedule property in favour of the purchasers. It is his contention that, even after service of summons, the Defendants have failed to surrender the vacant possession of the suit B-schedule property and they continued to hold the illegal possession of the same, which resulted in huge loss for him and as such, he being the owner of the suit B-schedule property, is entitled for the damages at the rate of Rs.1,39,125/- per month.

The Plaintiff, in this application has claimed that even though he is entitled for the damages for the loss suffered by him, but however, he is restricting his claim since from the date 1-1-2018 and he is entitled for the damages from 1-1-2018 till 31-12-2020 totally amounting

to Rs.50,08,500/- and the said amount is liable to be paid by the Defendants No.1 to 4.

8) On the contrary, the Defendant No.4, in his objection statement filed to the said application, has seriously objected to allow this application on the ground that at this stage, after commencement of trial, the application filed by the Plaintiff is not maintainable and more over, as per the provisions of Order VI Rule 17 of CPC, which mandates that the amendment to the plaint, after commencement of the trial, the Plaintiff has to prove that in spite of his due diligence he could not able to raise the said averment before the commencement of the trial and in this case, the Plaintiff has not explained what is the impediment for him not to file this application at the earliest stage, before the commencement of the trial and without explaining the reason for delay in filing this application, the application is not maintainable and it has to be dismissed.

9) No doubt, the Plaintiff has filed this application at this stage, when the case is set down for further chief examination of P.W.1. Admittedly, the trial is still in initial stage. P.W.1 is yet to complete his examination-in-chief and he is yet to be cross-examined from the Defendants. No doubt, it is well settled principles of law that if any amendment to the pleading, it goes back to the date of filing of the suit. It is also an admitted fact that the Plaintiff has filed this suit in the year 2016 and

now, at this stage, after long lapse of more than 4 years, the Plaintiff filed this application. However, the Plaintiff is restricting his claim with respect to the damages since from 1-1-2018 and stated that he is entitled for the damages for the illegal use and occupation of the suit B-schedule property by these Defendants since from 1-1-2018 at the rate of Rs.1,39,125/- p.m. In order to avoid multiplicity of the proceedings, it is just and necessary to allow this application. If this application is not allowed, definitely, the Plaintiff may file one more case against these Defendants on the very same set of facts for claiming damages, which leads to multiplicity of proceedings. In order to avoid multiplicity of proceedings and to arrive at a just conclusion, it is just and proper to allow this application. The inconvenience caused to the Defendants can be compensated by awarding some costs to them. Per contra, if this application is rejected, the Plaintiff will be put to irreparable loss and hardship, which cannot be compensated in terms of damages. Hence, by considering all these facts and circumstances, it is just and necessary to allow this application. Hence, I answer this Point in the Affirmative.

10) Point No.2: For the aforesaid reasons, this Court proceeds to pass the following:

ORDER

The Application dated 6-1-2021, filed by the Plaintiff u/O.6 R.17 CPC is hereby allowed on payment of cost of Rs.2,000/- to the Defendants.

The Plaintiff is permitted to amend the Plaint as prayed in the I.A.

For amendment and to furnish Amended Plaint and further to file fresh Valuation Slip with respect to the damages claimed by the Plaintiff and to pay the Deficit Court Fee on the said prayer, by 21-08-2021.

(Ishrath Jahan Ara)
III A.C.C. & S.J., Bengaluru.