

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2015

C O R A M

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P.(PD) NO.3138 OF 2014
AND M.P.NO.1 OF 2014

S.Saravana Kumar

...

Petitioner

Vs.

1.M.Subbaiyan

2.S.Maheshwari

...

Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and final order dated 15.04.2014 passed by the learned II Additional District Judge, Tiruppur in I.A.No.729 of 2014 in O.S.No.239 of 2013.

For Petitioner : Mr.A.K.Kumarasamy
For Respondents : Mr.G.R.Suresh Kumar

ORDER

This Civil Revision Petition arises out of the order dated 15.04.2014 passed in I.A.No.729 of 2014 in O.S.No.239 of 2013 by the learned II Additional District Judge, Tiruppur.

2.The respondents herein, who are father and sister of the petitioner herein had instituted the suit against the petitioner for partition claiming 1/3rd share each in the suit property and to declare that the release deed of the petitioner / defendant is not binding on the plaintiffs. The suit was resisted by the defendant by filing a written statement.

3.The defendant filed an application in I.A.No.654 of 2014 for amendment as follows:

“1.In the second line of para no.9 of the written statement, to delete the year “2013” and to add “2011” in the same place.

2.In the second line of para no.15 of the written statement to delete the month and year “11.2013” and to add “10.2011” in the same place.

3.In the first line of para no.22 of written statement to delete the number “3rd ” “.

The application in I.A.No.654 of 2014 was allowed by the Trial Court on 07.04.2014.

4.Thereupon, the petitioner / defendant filed an application in I.A.No.729 of 2014 under Order XVIII Rule 17 read with Section 151 of the Civil

Procedure Code to recall D.W.1 for further chief examination by filing additional affidavit. The petitioner has averred in the affidavit filed in support of the application that due to typographical error and oversight, the year was wrongly mentioned as “2013” instead of “2011” and the application filed for amendment was allowed vide order dated 07.04.2014 and to clarify the ambiguity in the evidence, he want to give further evidence as D.W.1. The application was resisted by the plaintiffs stating that the proposed pleadings are mutually destructive and they are contradicting each other and on the basis of the commencement of trial, valuable rights have been accrued to them and by allowing the proposed amendment, serious prejudice would be caused to them and would also alter the basic structure of the said proceedings. The application was dismissed by the Trial Court on 15.04.2014. Challenging the same, the present Civil Revision Petition is filed.

5.Mr.A.K.Kumarasamy, learned counsel for the petitioner submitted that the application was filed only to clarify the ambiguity in the evidence; that due to the typographical error and oversight, the year was wrongly mentioned as “2013” instead of “2011”; and that the petition was dismissed on misconception that it was moved to fill up lacuna in the case of the petitioner.

6.Per contra, Mr.G.R.Suresh Kumar, learned counsel for the respondents submitted that the mistake was not committed due to typographical error and it was deliberately done by the petitioner herein. It is further contended that the petitioner has filed more than six applications in the suit deliberately and wilfully to prolong the litigation and that the witnesses cannot be recalled to cover up or fill up lacuna in the evidence of the witnesses and as per Order XVIII Rule 17 of the Civil Procedure Code, the Court alone has got power to clarify the ambiguity and the application filed by the petitioner is not at all maintainable in law.

7.Heard the submissions made by Mr.A.K.Kumarasamy, learned counsel for the petitioner and Mr.G.R.Suresh Kumar, learned counsel for the respondents and perused the materials available on record.

8.I do not agree with the contentions raised by the learned counsel for the respondents. The respondents have instituted the suit against the petitioner/defendant for partition and separate possession. The defendant in his written statement has categorically stated that in view of the release deed dated 24.10.2011 registered as document no.20493 of 2011 in the Office of the Sub Registrar, Palladam, the plaintiffs have got no right whatsoever in the suit property. In paras 6, 7 and 10 of the written statement, the defendant has

stated that the release deed was executed on 24.10.2011. But in para 9 of the written statement, the date was mentioned as 24.10.2013. Only to amend the typographical error, the application was filed for amendment and that was allowed by the Trial Court and thereafter to clarify the ambiguity in the evidence, the application was filed to recall the witness.

9. Further, in the judgment relied on the learned counsel for the respondents in ***M/S.BAGAI CONSTRUCTION VS. GUPTA BUILDING MATERIAL STORE [Civil Appeal No.1787 of 2013 - Dated 22.02.2013 arising out of S.L.P.(C) No.35268 of 2011; (2009 (4) SCC 410)]***, the Honourable Supreme Court has held as follows:

“12. After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable

reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff; still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.”

10. In the judgment relied on by the learned counsel for the respondents in **ASHOK KUMAR AGARWAL VS. PRAMOD KUMAR JAIN [S.B. Civil Writ Petition No.1753 of 2011 - Dated 05.08.2011]**, the Rajasthan High Court has held as follows:

“5.If the provisions of Rule 17 Order 18 CPC are read with Section 165 of Indian Evidence Act, it would be

tangible that the power under Rule 17 CPC and Section 165 of Indian Evidence Act are conferred on the court and not on the parties and, therefore, it is the court alone, which can exercise the powers under Rule 17 Order 18 CPC, if the court is of the opinion that it is necessary to recall any witness for the just decision of the case. The recalling of a witness for examination, which is contemplated by Rule 17 of Order 18 CPC and Section 165 of Indian Evidence Act is to be made by the Court and not by the parties. Viewed in this light, if the powers under rule 17 of Order 18 are used by the court for the purpose of enabling any party to examine or re-examine the witness, it would be impermissible to do so. Of course the court has unfettered powers to examine and re-examine any witness under Rule 17 of Order 18 CPC read with Section 165 of Indian Evidence Act at any stage and at any time.”

11. In ***M/s. Bagai Construction's case (cited supra)***, an application was filed to mark additional documents, which were in existence even prior to examination of witnesses and institution of the suit. In the above facts, the Supreme Court has observed that the party is not entitled to recall witnesses to fill up lacuna.

12. In the light of the judgment of the Supreme Court in *M/s. Bagai Construction's case (cited supra)*, I am not able to follow the judgment of the Rajasthan High Court in *Ashok Kumar Agarwal's case (cited supra)*. In the case on hand, the petitioner filed the application to recall D.W.1 to clarify the ambiguity in the evidence. The said application was filed only to clarify the ambiguity in the evidence and it was not filed to fill up lacuna. Hence, in my view, the judgments relied on by the learned counsel for the respondents are not applicable to the facts of this case.

13. Accordingly, the order dated 15.04.2014 passed in I.A.No.729 of 2014 in O.S.No.239 of 2013 by the learned II Additional District Judge, Tiruppur is set aside and the Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

20.03.2015

Index : Yes
Internet: Yes
TK

To

The II Additional District Judge
Tiruppur.

K.KALYANASUNDARAM, J.

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