

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.11.2015

CORAM:

THE HON'BLE **MS. JUSTICE R.MALA**

C.R.P.(PD).No.2187 of 2015

and

M.P.No.1 of 2015

B.Kayalvizhi
W/o.Balakumar Chettiar

.. Petitioner/Plaintiff/Revision Petitioner

Vs.

Augustin
S/o.Periyanayagam

.. Respondent/Defendant/Respondent

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decretal order dated 17.02.2014 made in I.A.No.24 of 2014 in O.S.No.56 of 2007 on the file of the District Munsif -cum- Judicial Magistrate, Kattumanarkoil.

For Petitioner : Mr.N.Suresh

For Respondent : Mr.C.T.Mohan

ORDER

Heard the learned counsel appearing for the revision petitioner and the learned counsel appearing for the respondent.

2. The revision petitioner has come forward with the present Civil Revision Petition challenging the impugned order passed by the Trial Court dated 17.02.2014 made in I.A.No.24 of 2014 in O.S.No.56 of 2007, wherein the application filed under Order 6 Rule 17 CPC came to be dismissed.

3. The revision petitioner as plaintiff has filed the suit for declaration of title and recovery of possession stating that the property was owned by the mother of the plaintiff viz., Ramani Ammal and she was in possession and enjoyment of the same. However, the respondent herein had putforth his case as though he had purchased the property from Ramani Ammal through oral sale and from that date onwards, he is in possession and enjoyment of the property and he had also put up superstructure and raised trees in the property. Further, an Advocate Commissioner was appointed and she filed a report after inspecting the suit property stating about the existence of

house of the respondent, fish pond and tress in the suit property. Even though the said report was filed in the year 2009, only in the year 2014, the revision petitioner filed an application to incorporate the prayer of mandatory injunction for removal of superstructures and trees from the suit property. However, the Trial Court after hearing both sides, dismissed the said application, against which the present Civil Revision Petition has been preferred.

4. The learned counsel for the revision petitioner would submit that the suit has been filed for declaration of title and for recovery of possession. The respondent herein has put forth his defence stating that he is the owner of the property on the basis of the oral sale entered into between him and one Ramani Ammal, the mother of the plaintiff. The issue whether the oral sale is true or not has to be decided only at the time of trial. But if the suit is decreed, since there is a superstructure in the suit property, to remove the same, the plaintiff need to seek for the prayer of mandatory injunction. So, the learned counsel for the revision petitioner would submit that in order to avoid the technicalities and to minimize the litigation, this Court in the judgment reported in **2014 (3) MWN (Civil) 806, E.K.Palanisamy v. Manonmani and others** has held that

amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper technical approach. Further, it was held that the amendments seeking determination of real question of controversy between parties shall be permitted at any stage of the proceedings in the interest of justice. Thus, he prayed for allowing the revision.

5. Resisting the same, the learned counsel for the respondent would submit that in the written statement itself the existence of the superstructure has been specifically mentioned. Further, even in the report of the Advocate Commissioner, it has been specifically stated about the existence of the superstructure. However, the plaintiff has kept quiet all along and now when the matter was in part heard stage, he has come forward with the present application only with a view to protract the proceedings. As per Order 6 Rule 17 CPC, after the commencement of trial, the application for amendment shall not be allowed and the said factum was rightly considered by the Trial Court. Thus, the learned counsel for the respondent prayed for dismissal of the Civil Revision Petition.

6. Considered the rival submissions made by both sides and

perused the typed set of papers.

7. The revision petitioner/plaintiff has filed the suit for declaration of title and recovery of possession stating that the suit property was owned by his mother and so, he would succeed the property. However, the respondent herein had denied the same stating that he has purchased the suit property from the mother of the plaintiff through an oral sale. At the time of filing of the suit, he has not mentioned about the superstructure. Further, it is admitted by both sides that the Commissioner has visited the property and filed a report in the year 2009, wherein the existence of the superstructure, trees and fish pond has been mentioned. However, the revision petitioner/plaintiff has not filed the application for amendment immediately and he filed the said application only when P.W.1 was in the witness box.

8. Now this Court has to decide whether the decision reported in **2014 (3) MWN (Civil) 806, E.K.Palanisamy v. Manonmani and others** is applicable to the facts of the present case?

Once the respondent/defendant has proved the factum of oral sale, then the suit has to be dismissed and there will be no say for the

plaintiff. However, once the Trial Court disbelieved the oral sale, then the plaintiff will be entitled for declaration of title and recovery of possession. Since there is a superstructure, trees and fish pond in the suit property, the revision petitioner/plaintiff ought to file another suit seeking for mandatory injunction, at the EP stage. So, the amendment now sought for is necessary for determination of real question of controversy between parties. So, the amendment can be allowed at any stage of the proceedings in the interest of justice. It would be appropriate to incorporate paragraph 15 and 16 of the said decision:

"15.Considering the aforestated circumstances along with the above decisions, the suit was filed on 17.06.2008 and the written statement was filed by the defendant during July 2009 disputing the plaintiffs' title to the suit property. Hence, the plaintiffs have filed the application to amend the plaint for declaration of title to the property only on 05.01.2011. As per the dictum of the Apex Court in (2009) 2 SCC 409 ([Vidyabai and others v. Padmalatha and another](#)), proviso to Order VI Rule 17 of C.P.C. is mandatory.

16.At this juncture, learned counsel for the plaintiffs

would take me through the affidavit filed in support of the application and submitted that since the previous counsel has given an instruction to withdraw the suit and file fresh suit, the plaintiffs have changed their counsel and traced the title deed stands in the name of their grand father and at this stage, it is necessary for the plaintiffs to file the application for amendment instead of withdrawing the suit. So due diligence, the plaintiffs unable to file the amendment application at an earlier point of time.”

9. So, I am of the view that the above citation is squarely applicable to the facts of the present case. Further, in paragraph 2 of the counter filed by the respondent, it has been stated that the suit is in the part heard stage and in paragraph 3, it has been stated that the report of the Advocate Commissioner has been filed 4 years before the commencement of trial. It was further stated in the said paragraph that the suit was once decreed exparte and it was set aside on payment of costs. Furthermore, in paragraph 4 of the counter, it was stated that if the application for amendment is allowed, the plaintiff ought to have paid the appropriate Court fee for the relief of mandatory injunction. But the learned Trial Judge without considering

the above averments in the counter had dismissed the application filed by the revision petitioner/plaintiff.

10. In these circumstances, to minimize the litigation between the parties, I deem it fit to set aside the impugned order passed by the Trial Court. However, the Trial court has to decide whether the mandatory injunction sought for by the revision petitioner/plaintiff is barred by limitation, as the same is a mixed question of law and fact and it can be decided only at the time of trial and not in the application for amendment.

11. So, I am of the view that the reasoning given by the Trial Court is unsustainable and consequently, the Civil Revision Petition stands allowed on payment of costs of Rs.25,000/- (Rupees Twenty Five Thousand Only) to the respondent on or before 03.12.2015, failing which the Civil Revision Petition stands dismissed automatically. Connected miscellaneous petition is also closed.

12. For reporting compliance, call the matter on 04.12.2015.

04.11.2015

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Note: Issue order copy on 23.11.2015

To

The learned District Munsif
-cum- Judicial Magistrate,
Kattumanarkoil

R.MALA, J.

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Dated : 04.11.2015