

BEFORE THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 25.09.2015

CORAM

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

C.R.P.No.592 of 2010

and

M.P.No.1 of 2010

Manickam

... Petitioner (Defendant)

Versus

1.Vadivambal
2.Indirani
3.Rajamani
4.Sinivasan
5.Aamul
6.Babu
7.Balu
8.Mohana

... Respondents (Plaintiffs)

Prayer: Revision petition is filed against the fair and decreetal order dated 05.01.2010 and made in I.A.No.940 of 2009 in O.S.No.305 of 2004 on the file of the learned Principal District Munsif at Krishnagiri.

For Petitioner : Mr.V.Lakshminarayanan

For R1 to 5 : Mr.S.N.J.Hariharan for
and R7& R8 Mr.V.Nicholas

ORDER

Impugning the fair and decreetal order dated 05.01.2010 and made in the Interlocutory application in I.A.No.940 of 2009 in O.S.No.305 of 2004 on the file of the learned District Munsiff, Krishnagiri, the revision petition is preferred by the defendant.

2. Originally, this suit was filed by the deceased first plaintiff Ramanathan as against the revision petitioner/defendant, seeking the relief of mandatory injunction directing the revision petitioner/defendant to remove the super structures

put up by him on the suit property and if, in case he fails to do so to permit the plaintiff to have the super structure removed by the process of Court.

3. During the pendency of the suit, the plaintiff Ramanathan had passed away and thereafter, the respondents 2 to 8 being his LRS, were brought on record.

4. This suit was resisted by the revision petitioner/defendant by filing his written statement. Thereafter, the said suit was transferred to Additional Sub Court, Krishnagiri on the ground of jurisdiction. During the pendency of the suit, the respondents/plaintiffs had filed an application in I.A.No.940 of 2009 under Order VI, Rule 17 to permit them to amend the plaint as detailed in the petition.

5. This petition was contested by the revision petitioner/defendant. After hearing both the sides, the trial Court had proceeded to allow the petition on 11.12.2009 on payment of cost of Rs.500/- payable to the revision petitioner/defendant on or before 21.12.2009. When the cost was tendered, the revision petitioner/defendant had refused to receive the cost. Hence, on the order of the court, it was deposited before the Court by the respondents/plaintiffs on 05.01.2010. On their compliance with the order of the Court that petition was allowed on 05.01.2010, after recording their memorandum to that effect. This order dated 05.01.2010 has been challenged in this memorandum of civil revision.

6. Heard Mr.V.Lakshminarayanan, learned counsel appearing for the revision petitioner/defendant and Mr.V.Nicholas, learned counsel appearing for the respondents/plaintiffs.

7. Mr.V.Lakshminarayanan, learned counsel appearing for the revision petitioner/defendant has mainly projected his argument on the following two grounds.

(i) Whether the plaint could be amended, after the enormous delay to incorporate the plea of res judicata in the plaint,

(ii) Even at the time of filing the suit, the plea of res judicata was available.

At the time of filing their reply statement to the written statement filed by the revision petitioner/defendant, the plea of res judicata was available and they could have very well taken the plea of res judicata in their reply statement.

8. Under these circumstances, he has raised a question as to 'whether the respondents/plaintiffs could be allowed to seek amendment only for the purpose of incorporating the plea of res judicata in their plaint.'

9. Mr.V.Lakshminarayanan, has also submitted that the suit in O.S.No.183 of 1991 was originally instituted by the deceased plaintiff on the file of the learned Sub Judge, Krishnagiri in the month of February 1991. He had also filed his additional written statement on 25.11.2002. The judgement of High Court in S.A.No.460 of 1989 was pronounced on 08.11.2001. In this connection, he has maintained that from 2001, till the respondents/plaintiffs had filed their reply statement in the month of January 2003, they had sufficient time to amend the plaint but they had unfortunately failed to make use of their opportunity. The respondents/plaintiffs had filed their reply statement on 29.01.2003. Even in their reply statement also they had not raised the plea of res judicata and estoppel which were very well available to them. Without making use of the available opportunities they had proceeded with the Trial of the suit. He has also argued that in fact proof affidavit and xerox copy of the judgement of the High Court were produced and on objection it was scored out in the proof affidavit. He has also pointed out that the respondents/plaintiffs had never produced the copies of the plaint and written statement relating to the earliest suit in O.S.No.713 of 1980 connected with the second appeal in S.A.No.460 of 1989.

10. As argued by Mr.V.Lakshminarayanan, the trial was commenced and the process of recording evidences on both the sides was completed and only on the end of the trial, they had deliberately opted to file the petition in IA.No.940 of 2009 under Order VI, Rule 17 to amend the plaint for the purpose of incorporating the plea of res judicata. In support of his argument, he has placed reliance upon the following decisions:-

(1)Bhagavatula Gopalakrishnamurthi and Others Vs.Dhulipalla Sreedhara Rao and another (AIR 1950 Mad 32).

(2)J.R.Arun Kumar & Others Vs.K.Boopalan (LNIND 2012 MAD 3862).

In Bhagavatula Gopalakrishnamurthi and Others cited first supra, Mr.Krishnaswami Nayudu.J., has observed as under:

"During the pendency of the suit, the Provincial Insolvency Act was amended by the addition of S.28A and by reason of the amendment the official Receiver, who was in

possession of the estate of the insolvent became entitled to sell the son's share as well and that the Amending Act was declared to have retrospective effect. The plaintiffs filed I.A.No.1047 of 1948 for amendment of the plaint by seeking to introduce paragraph 5A.

.....

The learned Subordinate Judge granted the amendment. The question is whether the order of the learned Judge is correct. In para.5 of the original plaint, except the plaintiffs relied on the position of law, they did not choose to make any statement as regards the nature of the sale, consideration therefor and its invalidity otherwise than under the provisions of the Provincial Insolvency Act before the enactment of S.28A of the Act. But they have now chosen to give certain facts and want to plead those facts in order to entitle them to have the sale set aside. It is argued on behalf of the petitioner that the court was not entitled to allow such an amendment as a new case was set up on fresh facts, which facts were available even when the plaint was originally filed but no mention was made in para.5 of the plaint. In the counter affidavit it is also stated that this is clearly an afterthought. In the affidavit in support of the application it is stated that by reason of the amendment of the Provincial Insolvency Act by Act XXV (25) of 1948 it became necessary to examine the question from this new standpoint and therefore the plaintiff prayed that the amendment might be allowed. The learned counsel for the respondents cited Bhimudu Vs.Pitchayya, 1946-1, M.L.J 462:(AIR(33)1946 Mad 497), Venkataratnam Vs.Venkamma, 23 M.L.W.618:(AIR (13)1926 Mad.754 and Sakkaraja Vs.Muthuswami, 71, M.L.J.166:(AIR(23) 1936 Mad.632) in support of his contention that by reason of subsequent events occurring after the filing of the plaint it was open to the Court to grant amendment. But on examining those decisions, I find that if by reason of the subsequent events certain rights accrued to the plaintiff the plaintiff would be entitled to claim reliefs under those

rights. But in this case certain facts are alleged which facts were available to the plaintiffs and which the plaintiffs have not chosen to mention in the original plaint and I do not think it would be open to Courts to permit such an amendment as it would, in the words of their Lordships of the Privy Council in the case reported in Ma Shwe Mya Vs. Maung Mo Hmaung 48 Cal.832: (AIR (9) 1922 P.C.249), permit a new case to be made on facts which were available but were not pleaded. I think that the result of allowing the amendment would be to introduce a new element which was absent in the original plaint and that the plaintiffs are not entitled to any such amendment. I hold that the learned Subordinate Judge was in error in granting the amendment.

(2) In J.R.Arun Kumar & Others Vs.K.Boopalan, cited second supra, a learned single judge of this Court has observed in paragraph Nos.25, 26 and 28 as under:

para.25:"It is stated by the plaintiff in the affidavit filed in support of the amendment application that since the defendants are in collusion, now trying to dispute the title of the plaintiff based on some forged and concocted documents, it has become just and necessary for him by way of abundant caution to amend the plaint suitably with necessary averments for declaration of title and to implead the respondents 4 to 6 as party/defendants in the above suit for the effective disposal of the reliefs sought for. It is further stated by the plaintiff that he could not have raised the above matter before the commencement of the trial in spite of any account of diligence and the acts committed by the defendants came to be noticed, and investigated with all diligence in the manner as submitted by him. Therefore, according to the plaintiff, the application for amendment is a bonafide one and it is fully covered under the proviso to Order VI, Rule 17 CPC and such application for amendment though filed after the commencement of trial is maintainable both on facts and in law.

Para26. However, these submissions cannot stand the scrutiny, if the written statement filed by the defendants in O.S.No.4312 of 2007 is considered carefully.

Para.28:If that being so, the reasons given by the plaintiff in the affidavit filed in support of the amendment application cannot be accepted and therefore, the vital ingredient namely the due diligence is very much lacking on the part of the plaintiff and therefore the proviso appended to Order VI, Rule 17 CPC will definitely come into play and consequently the amendment application is not at all maintainable as the same has been filed after the commencement of trial. It is not at all in dispute that P.W.1 was already cross-examined thoroughly in both the suits in a joint trial and therefore, the plaintiff woefully failed to satisfy that in spite of the due diligence, he could not have raised these things before the commencement of trial. Therefore, I am in entire agreement with the submission made by the learned senior counsel for the petitioner that the trial court has committed an illegality in allowing both these applications and consequently any order passed by the trial court on 19.11.2009 in I.A.Nos.6547 and 6548 of 2009 in O.S.No.4312 of 2007 is set aside.

11. Mr.V.Nicholas, learned counsel appearing for the respondents/plaintiffs, while refuting the arguments advanced by Mr.V.Lakshminarayanan has submitted that in paragraph No.7 of the plaint, the respondents/plaintiffs had stated that the appeal in S.A.No.460 of 1989 filed by their father and the respondents/plaintiffs 2 to 4 was pending at the time of the institution of the present suit and subsequently it was allowed. He has also indicated that as the second appeal in S.A.No.460 of 1989 was allowed on merits, after hearing both sides, the revision petitioner/defendant was bound by the above decree and judgement as the subject matter of the present suit and the subject matter of the earlier suit in O.S.No.713 of 1980 in respect of which S.A.No.460 of 1989 was filed, were one and the same. He has also argued that the contention of the revision petitioner/defendant projected in his written statement was barred by the Doctrine of res judicata and therefore he could not deny the title of the respondents/plaintiffs. He has also

argued that due to inadvertance and by over sight the plea of res judicata was not raised earlier, and since the plea of res judicata was a vital point available for the respondents/plaintiffs, the revision petitioner/defendant would not be prejudiced in any way, if this plea was included in the plaint by way of amendment.

In support of his contention, he has placed reliance upon the following decisions.

1.Rethinam @ Anna Samuthiram Ammal and Others Vs. Syed Abdul Rahim (2005(3) CTC 321).

2.Mohammed Seraj, Vs. Adibar Rahaman Sheikh and Others (AIR 1968 CALCUTTA 550(Vol.55,C.99)).

3.S.Kanthimathiammal and Others Vs. Nagammal and Others (2015 (4) CTC 666).

4.Nagindas Ramdas Vs.Dalpatram Locharam @ Brijramand and Others.(AIR 1974 SUPREME COURT 471).

1.Rethinam @ Anna Samuthiram Ammal and Others Vs. Syed Abdul Rahim cited first supra, a learned Single Judge of this court has observed in para Nos.6 and 7 as under:

Para.6: Section 16 of the Code of Civil Procedure(Amendment) Act, 2002 contains provisions relating to Repeal and Savings. Provision under section 16, so far as relevant for the present purpose, is as follows:

"16.Repeal and Savings,-

(1).....

(2).....

(a).....

(b) the provisions of Rules 5, 15, 17 and 18 of Order 6 of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of this Act.,

©.....

The aforesaid provision makes it clear that the provisions of Order 6, Rule 17, which had been omitted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and which had

been inserted by Section 7 of the code of Civil Procedure (Amendment) Act, 2002 shall not apply to in respect of any pleadings filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of the Code of Civil Procedure (Amendment) Act, 2002. As already indicated, the Code of Civil Procedure (Amendment) Act, 1999 and the Code of Civil, Procedure (Amendment) Act, 2002 came into force with effect from 01.07.2002. From the bare reading of the provisions contained in Section 16(2) (b) of the Code of Civil Procedure (Amendment) Act, 2002, it is clear that such amended provision as contained in proviso shall not apply to in respect of any pleadings filed before the commencement of the amended Code. Pleadings in, this context obviously include the plaint and written statement. Therefore, in respect of the plaint or written statement filed before 01.07.2002, the proviso to Order 6, Rule 17 would have no applicability.

Para.7: In the present case, the trial court has relied upon the proviso to Order 6, Rule 17 of the Code of Civil Procedure (Amendment) Act, 2002. The amendment of plaint was necessitated on account of the fact that as per the plaintiffs' case, the defendant had disturbed the possession during the pendency of the suit which necessitated the relief for declaration of title and recovery of possession. Such an amendment, by applying the principles relating to amendment of plaint as applicable before 01.07.2002, would have been allowed notwithstanding the fact that such amendment was sought for after the commencement of actual trial. The trial Court has rejected the application for amendment mainly applying the proviso as interpreted by the learned Judge of this Court in the decision P.Subba Naicker Vs.Veluchamy Naicker, 2004(2) CTC 742. However, the clear language contained in section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 2002 makes it clear that the petition for amendment under Order 6, Rule 17, should have been considered de hors the proviso

which had been introduced for the first time in the Code of Civil Procedure (Amendment) Act, 2002. The impugned order is, therefore, liable to be set aside. The revision petition is accordingly allowed and the amendment prayed for by the plaintiffs is also allowed, however, subject to the condition that the petitioners shall pay a cost of Rs.1000/- to the respondent directly or deposit such cost before the trial Court within a period of four weeks from the date of receipt of a copy of the present order.

12. On coming to the present case on hand, it is obvious to note here that the learned trial Judge, after banking heavily on the observation of a single Judge of this Court in Rathnam @ Anna Samuthiram Ammal and Others cited first supra had proceeded to allow this application in I.A.940 OF 2009, permitting the respondents/plaintiffs to amend the plaint and to incorporate the plea of res judicata.

13. It is significant to note here that it is an admitted fact that initially the suit was filed by the deceased first plaintiff in the year 1991 before the Additional Subordinate Court, Krishnagiri (O.S.No.183 of 1991). The revision petitioner/defendant had filed his written statement in the year 1992. He had also filed his additional written statement in the year 2002. Thereafter, the suit was transferred to the District Munsiff Court, Krishnagiri on the ground of jurisdiction and renumbered as O.S.No.305 of 2004. The earlier suit in O.S.No.713 of 1980 was filed by the revision petitioner/defendant as against the grand mother of the plaintiffs and thereby sought the relief of specific performance of oral agreement of sale. During the pendency of the said suit, the plaintiffs maternal grand mother had passed away and after her demise, the deceased first plaintiff and his sisters were impleaded as defendants 2 to 4. The said suit was dismissed. Against the judgement of dismissal, the revision petitioner/defendant had preferred an appeal in A.S.32 OF 1986 before the District Court, Krishnagiri and the said first appeal was allowed in favour of the revision petitioner/defendant. The deceased first plaintiff and his sisters, who were the defendants in the above said suit had filed the second appeal before this court in S.A.No.460 of 1989. During the pendency of the second appeal, the deceased first plaintiff in the present

suit had filed another suit in O.S.No.27 of 1987 and he had also obtained an order of temporary injunction.

14. The second appeal in S.A.No.460 of 1987 was allowed in favour of the father of the plaintiffs herein, who is the deceased first plaintiff, herein. In this connection Mr.V.Nicholas, has indicated that the property, which is described in the plaint schedule of the present suit and the property described in the suit in O.S.No.713 of 1980 are one and the same. The judgement passed in favour of the deceased first plaintiff in the second appeal No.460 of 1989 would definitely bind upon the revision petitioner/defendant and the judgment passed in S.A.No.460 of 1989 would therefore definitely operate as res judicata or estoppel against the case of revision petitioner/defendant.

15. He has also argued that since this vital fact was omitted to be looked into by the counsel for the respondents/plaintiffs at the time of filing of the suit and also at the time of filing their reply statement, now it had become necessary to incorporate the plea of res judicata in the plaint by way of amendment, otherwise, the respondents/plaintiffs would be put into hardship.

16. Mr.Nicholas, has also pointed out that the court could also Suo Motu consider the fact of res judicata, which would go against the case of the revision petitioner/defendant, as it is the mixed question of law and fact.

17. As afore stated, this suit was filed prior to the commencement of code of Civil Procedure(Amendment) Act 2002. Mr.Nicholas, has therefore submitted that, as rightly held by a learned single Judge of this Court in Rathnam @ Anna Samuthiram Ammal and Others, since the plaint of the present suit was filed in the 1991 i.e., prior to the commencement of the code of Civil Procedure (Amendment) Act 2002, which came into effect from 01.07.2002, the proviso of Rule 17, of Order VI of CPC was not made applicable to the present case and therefore the question of long delay would not be an impediment in granting the order in favour of the respondents/plaintiffs to amend the plaint.

18. It may be significant to note here that the provisions of Order VI, Rule 17 of Civil Procedure Code, as it originally stood, permitted the amendment of pleadings at any stage. However, in the code of Civil Procedure(Amendment) Act 2002, which came into force with effect from 01.07.2002, a proviso has

been added to Order VI, Rule 17. As per the proviso to Rule 17, no application for amendment shall be allowed, after the trial has commenced unless the courts come to the conclusion that in spite of due diligence, a party could not have raised the matter before the commencement of trial.

19. In this case, this court finds that the respondents/plaintiffs are not trying to set up a new set of plea, but it is already in existence. It also appears that the property described in the suit in O.S.No.713 of 1980(S.A No.460 of 1989) and the property described in the present suit in O.S.No.305 of 2004 are one and the same. This cannot be denied by the revision petitioner/defendant. The earlier suit in O.S.No.713 of 1980, which was filed by the revision petitioner/defendant was dismissed against him. In the first appeal in A.S.No.32 of 1986, it was decreed in his favour but this Court in the second appeal in S.A.No.460 of 1989 has reversed the judgement of the first appellate court and restored the judgement of dismissal of the Trial court.

20. Since the decree of trial Court in O.S.No.713 of 1980 has merged with the judgement of this court in S.A.No.460 of 1989, it will definitely bind upon the revision petitioner/defendant. Therefore, the plea of res judicata or estaple, what ever may be the case is very much available to the respondents/plaintiffs and hence they are entitled to incorporate this plea in their plaint.

21. Keeping in view of the above fact, this Court is of the opinion that the ratio laid down in the decisions in Bhagavatula Gopalakrishnamurthi and Others Vs. Dhulipalla Sreedhara Rao and another (AIR 1950 Mad 32) and J.R.Arun Kumar & Others Vs. K. Boopalan(LNIND 2012 MAD 3862) which are relied upon by Mr.V.Lakshminarayanan, learned counsel is not made applicable to the present case on hand.

22. Section 16 of the Code of Civil Procedure (Amendment) Act 2002 (22 of 2002) deals with repeal and savings. Sub Clause (b) to Sub Section (2) of Section 16 enacts as under:

(b) the provisions of rules, 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by section 16 of the Code of Civil Procedure (Amendment) act,1999 and by section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of

section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and section 7 of this Act.,

23. From the wordings compiled in the above provisions, this Court finds that since the present case was filed prior to the commencement of the Code of Civil Procedure(Amendment) Act 2002 (22 of 2002), the Proviso to Rule 17 of order 6 CPC will not be applicable to the present case and hence the respondents/plaintiffs are deserved to avail the plea of res judicata.

24. This court having regard to the related facts and circumstances, finds that the order of the trial Court does not require the interference of this Court. Hence, the revision petition filed by the revision petitioner/defendant is liable to be dismissed.

25. In the result, revision petition filed by the revision petitioner/defendant is dismissed. Impugned order is confirmed. The Trial Court after getting the plaint amended is directed to dispose the suit in O.S.No.305 of 2004 within a period of three months after granting adequate opportunities to both the parties so as to enable them to produce the additional evidence(if they desire) both oral and documentary pertaining to the plea of res judicata. No order as to costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

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To

Sub Assistant Registrar

The Principal District Munsif,
Krishnagiri.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.52670
+1cc to Mr.V.Nicholas, Advocate, S.R.No.52314

C.R.P.No.592 of 2010
and
M.P.No.1 of 2010

CA(CO)
CA(26/10/2015)