

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 11.03.2016

CORAM

THE HONOURABLE Mr. JUSTICE P.R.SHIVAKUMAR

C.R.P.[PD] No.4745 of 2015
and M.P.No.1 of 2015

M.Venkatachalam

... Petitioner

Vs

1. Jayaraman

2. Vijayalakshmi

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 01.09.2015, made in I.A.No.536 of 2015 in O.S.No.260 of 2009, on the file of the District Munsif Court, Mettur, Salem District.

For Petitioner : Mr.C.Prabakaran

For Respondents : Mrs.S.T.P.Kuilmozhi

ORDER

This revision petition has been filed against the order of the learned District Munsif, Mettur dated 01.09.2015 made in I.A.No.536 of 2015 in O.S.No.260 of 2009, pending on the file of the said Court.

2. The plaintiff in the said suit is the petitioner in the revision and the defendants in the suit are the respondents in the revision.

3. The suit was filed by the revision petitioner against the respondents herein for a permanent injunction restraining the respondents from trespassing into the suit property and preventing the petitioner / plaintiff from lifting water from the Well situated in the suit properties and also for an injunction not to disturb his peaceful possession and enjoyment of the suit properties. In the description of property, third item is shown to be a Well situated in Survey No.482/1 fitted with electric motor pump set having electricity connection in S.C.No.437.

4. The suit is contested by the respondents herein on the basis of a written statement filed by the first respondent and adopted by the second respondent herein. In the written statement, the respondents have admitted the existence of the above said Well. However, they took a stand that the petitioner / plaintiff in the above said suit trespassed into the portion belonging to the respondents and put up a thatched hut and it was the petitioner who prevented the respondents from using the above Well, which prompted the respondents to file a suit against the petitioner in O.S.No.271 of 2009 on the file of the very same Court for mandatory injunction for the removal of the hut and for a permanent injunction not to prevent the

respondents herein from using the common Well. Both the cases are being tried jointly and the evidence for both the cases is being recorded in O.S.No.260 of 2009. After the completion of the evidence of the petitioner herein, who is the plaintiff in O.S.No.260 of 2009 and the defendant in O.S.No.271 of 2009, the petitioner filed the above said application I.A.No.536 of 2015 under Order VI Rule 17 C.P.C for amendment of the plaint so as to include an averment to the effect that pending suit and after the grant of interim injunction, the respondents using a poeline (earth mover) obliterated the common Well, and removed the thatched hut and on that basis, including a prayer for mandatory injunction for the reconstruction of the hut and for the restoration of the Well and the electric motor pump set connection.

5. The said application was resisted by the respondents herein simply denying the averments made in the supporting affidavit and contending that the petition was an attempt to prolong the case.

6. The learned trial Judge, upon hearing both sides, chose to dismiss the said petition by order dated 01.09.2015 opining that the petitioner had been taking steps to prolong the case and that the

petition without a prayer for re-opening the case could not be sustained. It is as against the said order, the present Civil Revision Petition has been filed.

7. Notice before admission was ordered and the respondents have entered appearance and they are represented by Counsel.

8. The arguments advanced by Mr.C.Prabakaran, learned counsel for the petitioner and by Mrs.S.T.P.Kuilmozhi, learned counsel for the respondents are heard. The certified copy of the impugned order, the ground of revision and the copies of other material papers produced in the form of typed set of papers are also perused.

9. The application filed by the petitioner before the trial Court seeking amendment of the plaint was dismissed on two grounds which are as follows:

(i) It was one of the attempts made by the petitioner to prolong the case; and (ii) Since the evidence of the petitioner was closed, the petition could not be maintained without a prayer for re-opening the case.

In support of the first reason assigned, the learned trial Judge referred to the fact that the petitioner filed an earlier application in I.A.No.283 of 2015 in the connected suit, which is being tried jointly with O.S.No.260 of 2009 for appointment of an Advocate Commissioner to note down the physical features of the suit properties more so to find out the non-existence of the admitted Well and the thatched shed. Such petition came to be dismissed by the trial Court on 01.06.2015. Since the amendment petition came to be filed thereafter, the learned trial Judge chose to observe that the petition for amendment was also a ruse to protract the case further. The counter statement filed by the respondents in the application for amendment does not contain any averment to the effect that the Well and thatched shed, which had been shown as part of the suit properties and were also admitted to be in existence in the written statement of the respondents herein are very much available and they have not been obliterated / demolished as contended by the petitioner. The averments found in the counter statement simply concentrate on the fact that the previous application for appointment of a Commissioner that was dismissed and the present application for amendment, were aimed at prolonging the case and delaying the final

verdict in the suit. Apart from that, no other concrete defence has been taken in their counter statement. The learned trial Judge, besides accepting the contention that the petition for amendment was an attempt to prolong the case, chose to include one more ground in support of his decision that the application for amendment could not be allowed and such additional ground is to the effect that the petitioner's evidence having been closed, the application for amendment of the plaint could not be entertained without a petition seeking re-opening of the case. If at all, the petitioner wants to lead further evidence on his side, then only, the necessity to file a petition for re-opening the case will arise. Therefore, the view expressed by the trial Court that in the absence of a petition for re-opening the case, the application for amendment is not maintainable cannot be countenanced. So far as the intention of the petitioner in filing an application for appointment of a Commissioner at the first instance and then an application for amendment of the plaint, this Court is of the view that the trial Court's finding cannot be sustained.

10. As pointed out *supra*, existence of the Well and the thatched shed were candidly admitted by the respondents in their written statement. It is also not in dispute that before filing of the

written statement, an order of interim injunction not to obliterate the Well and not to remove the thatched shed came to be granted. Even in the I.A seeking such interim injunction, the respondents did not deny the existence of the Well and the thatched shed and on the other hand, the respondents themselves filed a suit in the connected suit O.S.No.271 of 2009 for the removal of the hut and also for an injunction not to disturb the exercise of their right in respect the very same Well. In view of the same, the trial Court had granted an order of interim injunction in favour of the petitioners. There is no averment on the part of the respondents that the petitioner filled up the Well and obliterated the same. The averment sought to be made, namely that the Well is not in existence at present is not disputed in the counter. What the petitioner wants to do is, to bring to the notice of the Court by way of the additional plea that after filing of the suit and after the grant of interim injunction, the Well was obliterated and the thatched shed was removed by the respondents. By bringing it to the notice of this Court by way of additional plea, the petitioner wants to include a consequential prayer for mandatory injunction for the restoration of the Well and the thatched Shed.

11. The happenings that took place subsequent to the filing of the suit has given rise to a cause of action for seeking mandatory injunction against the respondents for the restoration of the Well and the thatched shed. All subsequent events have to be taken into account by the Court dealing with the matter and it cannot simply shut its eyes to such subsequent developments. The amendment sought for falls under the Second part Rule 17 of Order VI of the Code of Civil Procedure. As an amendment sought for is one made necessary for the purpose of determining the real question in controversy that has arisen subsequent to the filing of the suit, the embargo found in the proviso will not get attracted to the proposed amendment.

12. For the reasons stated above, both the reasons assigned by the Court below for dismissing the application for amendment cannot be countenanced. The learned trial Judge has failed to exercise the jurisdiction conferred on him and there is a defect in the exercise of the jurisdiction conferred on the trial Court regarding grant of permission to a party to the suit to amend the pleading. Viewed from any angle, the order of the trial Court, which is impugned in this Civil Revision Petition, cannot stand the scrutiny of this Court and the same deserves to be interfered with and set aside.

13. In the result, the Civil Revision Petition succeeds and the same is allowed. The order of the trial Court dated 01.09.2015 dismissing I.A.No.536 of 2015 in O.S.No.260 of 2009 is set aside. The said I.A. shall stand allowed and the petitioner herein / plaintiff in O.S.No.260 of 2009 is permitted to amend the plaint as per the proposed amendment. The amendment shall be carried out within a week from the date of receipt of a copy of this order. Thereafter, the respondent shall be given a chance to file an additional written statement and then the trial of the suit shall be proceeded with and the suit shall be disposed of as expeditiously as possible and in any case, not later than three months thereafter. In case, the petitioner files a petition for re-opening the case for his further evidence, the same shall be decided on its own merits, in the light of the fact that the amendment sought for has been allowed. No costs. Consequently, connected miscellaneous petition is closed.

11.03.2016

Index: Yes/No

Internet: Yes/No

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To

The XIV Judge, Small Causes Court,
Chennai.

P.R.SHIVAKUMAR, J

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