

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 30.03.2016

Delivered on: 11.05.2016

CORAM

THE HONOURABLE Mr. JUSTICE P.R.SHIVAKUMAR

C.R.P.[PD] No.2338 of 2013
&
M.P.No.1 of 2013

1.Devendran
2.Selvakumar
3.Ramesh

... Petitioners

Vs

P.V.Palani

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution against the fair and decretal order of the learned District Munsif, Madurantakam made in I.A.No.1330 of 2012 in O.S.No.370 of 2008 dated 12.03.2013.

For Petitioners : Mr.C.R.Rukmani

For Respondent : Mr.N.Nagusah

ORDER

This revision has been filed under Article 227 of the Constitution of India by the defendants in the original suit

challenging the order of the trial Court dismissing their application filed under Order VIII Rule 9 CPC seeking permission to file additional written statement.

2. The sole respondent has entered appearance through counsel. The arguments advanced by Ms.C.R.Rukmani, learned counsel for the petitioners and by Mr.N.Nagusah, learned counsel for the respondent were heard. The certified copy of the impugned order and copies of the other documents produced in the form of typed-set of papers were also perused.

3.P.V.Palani, the respondent herein filed O.S.No.370 of 2008 on the file of the trial Court, namely the Court of the District Munsif, Madurantakam, for declaration of his title in respect of the suit property and for consequential injunction against the revision petitioners herein/defendants not to disturb his peaceful possession and enjoyment of the suit property. An extent of Hectares 0.03.0 comprised in S.No.146/4 and an extent of Hectares 0.02.0 comprised in S.No.146/5A1 at Melavalam Village, Maduranthakam Taluk, Kancheepuram District have been shown as Items 1 and 2 in the plaint schedule. It is in respect of the said properties, the respondent herein/plaintiff filed the suit for declaration and consequential injunction.

4. The respondent herein/plaintiff claims to have got title to the suit property by virtue of a sale deed dated 04.07.1979 executed by Lakshmipathy and his brother Sathiamoorthy in favour of the plaintiff's father who inturn had got the property as testamentary legal heir of Jegatheesa Mudaliar. It is also his contention that the said Jagatheesa Mudaliar got the suit properties under a registered Exchange Deed dated 27.03.1960 from one Kuppammal, who had got it under a registered settlement deed dated 11.09.1956 from the original owner Venu Mudaliar. It has also been contended by the respondent herein/plaintiff that though the vendor of his father intended to convey the entire properties comprised in S.No.146, by inadvertence, the suit properties were omitted to be included in the sale deed; that nevertheless, the father of the respondent herein took possession of the entire property including the suit properties; that by virtue of two settlement deeds dated 19.10.2007 and 18.11.2000 respectively, the first and second items of the suit properties came to be settled on him and that in any event, since the suit properties were enjoyed in succession by Kuppammal, Jegatheesa Mudaliar and Lakshmipathy, the father of the respondent/plaintiff and the respondent/plaintiff for more than 60 years, he had acquired title to the suit properties by adverse possession.

5. The suit is contested by the revision petitioners / defendants based on the averments found in their written statement which was filed long back. In the said written statement, besides denying the plaint allegations one by one, the revision petitioners /defendants have contended that Item No.1 comprised in S.No.146/1 was not sold by Lakshmipathy and Sathiamurthy to Viswanatha Mudaliar, the father of the plaintiff; that at no point of time, either Lakshmipathy or Sathiamurthy or Viswanatha Mudhaliar possessed the suit first item; that the suit first item of the property comprised in S.No.146 of 2004 was sold orally by Kuppammal during the year 1959 to one Amaravathy Mudaliar, the father of the first petitioner/first defendant; that on the death of the said Amaravathy Mudaliar in the year 1974, the first petitioner/first defendant became the absolute owner of the said property and he was in possession and enjoyment of the same; that in turn he executed a settlement under a registered document dated 21.11.2007 to the petitioner 2 & 3/ defendant 2 & 3 and the same was acted upon; that the revision petitioners/defendants do not claim any right in respect of the second Item of the suit properties, namely the property comprised in S.No.146 /5A1 and that the suit first item is in the exclusive possession and enjoyment of the revision petitioners /defendants.

6. Based on the pleadings, the trial Court framed necessary issues and commenced trial. After the completion of the examination of plaintiff's side witnesses and when the suit stood posted for adducing evidence on the side of the defendants, they filed I.A.No.1330 of 2012 under Order VIII Rule 9 CPC to receive the additional written statement, contending that though they had made all pleadings regarding their possession and enjoyment of the first item of the suit properties, by inadvertence, they failed to include specifically a plea of perfection of title by adverse possession in respect of the first item of the suit properties and that hence, they should be permitted to file the proposed additional written statement. The said application came to be filed on 17.09.2012 and the same was resisted by the respondent/plaintiff contending that it was belated and that was filed with a view to drag on the proceedings.

7. The learned trial Judge, after referring to the fact that after the completion of examination of Pws 1 to 3 in the suit, the revision petitioners /defendants filed an application for recalling PW1 for further cross-examination and that the said application came to be filed belatedly after completion of the further examination of PW1 and when the suit stood adjourned for evidence to be adduced on the side of the defendants for supplying the pleading omitted to be

made in the written statement, dismissed the said application by the impugned order dated 12.03.2013. It is as against the said order, the present Civil Revision Petition came to be filed.

8. Ms.C.R.Rukmani, the learned counsel for the petitioners would contend that all the facts necessary to make a plea of perfection of title by adverse possession had been made in the written statement, but by inadvertence, it was omitted to be stated specifically in the written statement that the revision petitioners/defendants perfected title to the first item of the suit properties by adverse possession and that the said omission caused by inadvertence alone is sought to be rectified by the proposed additional written statement, for the reception of which the interlocutory application was filed under Order VIII Rule 9 CPC.

9.Of course, the learned counsel for the petitioners is conscious of the fact that the application filed for reception of additional written statement was belated. That is the reason why the learned counsel for the petitioners relies on two judgments of the Hon'ble Supreme Court and an order of a learned single Judge of this High Court. They are

1. ***Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others*** reported in ***(2007) 5 Supreme Court Cases 202***;

2. ***Olympic Industries Vs. Mulla Hussain Bhai Mulla Akberally and Others*** reported in **(2009)15 Supreme Court cases 528**; and
3. ***Thiyagarajan Vs. Manivannan*** reported in **2007-1-L.W.429** (High Court of Madras)

10. In ***Usha Balashaheb Swami's case***, the Supreme Court held that a prayer for amendment of the plaint and a prayer for amendment of the written statement (by filing an additional written statement) stand on a different footing; that the general principle that an amendment of pleading cannot be allowed so as to alter materially the cause of action or nature of claim shall apply to plaint and it has no application to the written statement and that in case of amendment of a written statement, courts would be more liberal in allowing the application as the question of prejudice would be far less in case of amendment of written statement than in case of amendment of plaint. It was also observed by the Hon'ble Supreme Court that even a new ground of defence which may result in inconsistent pleas in the written statement can be allowed as long as the amended pleadings do not result in causing grave or irretrievable prejudice to the plaintiff or displacing him completely. At the same time the Hon'ble Supreme Court struck a note of caution that by such amendment it would not be open to a party to wriggle out of an admission.

11. In ***Olympic Industries' case***, the Hon'ble Supreme Court dealt with the propriety of dismissal of an application under Order VIII Rule 9 CPC on the ground of delay, when no prejudice was caused to the other party. Of course the said case arose out of a rent control proceeding. But, the Hon'ble Supreme Court held that while dealing with the application seeking permission to file additional written statement/additional counter statement, courts should only see whether the real controversy between the parties could not be decided, if such additional written statement /counter written statement is not accepted. Referring to the observations made in ***Usha Balashaheb Swami's case*** cited supra, the Hon'ble Supreme Court held that the additional counter statement filed therein could be accepted subject to the payment of cost to the opposite party. The relevant passages in the said judgment are found in Paragraphs 18, 20 and 21. They are extracted hereunder:

18. It is now well settled by various decisions of this Court as well as those by High Courts that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bonafide one. In this connection, the observation of the Privy Council in the case of Ma Shwe Mya v. Maung Mo Hnaung may be taken note of. The Privy Council observed:

"All rules of courts are nothing but provisions intended to secure the proper administration of

justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit."

(Underlining is ours)

20. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case [see *B.K. Narayana Pillai v. Parameswaran Pillai and Baldev Singh & Ors. v. Manohar Singh.*] Even the decision relied on by the plaintiff in *Modi Spinning (supra)* clearly recognises that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in *Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary*. In that case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in *Basavan Jaggu Dhobi's case (supra)* as follows :-

"3. As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6 Rule 17 CPC by taking a contrary stand than was stated originally in the written statement. This is opposed to the settled law open to a defendant to take even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action."

21. As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the Courts in the administration of justice between the parties. In the case of *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co.*, this Court observed

"that the Courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event".

In that case this Court also held

"that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice."

12. Similarly, a learned single Judge of this Court in Thiagarajan's case, cited supra, held that belatedness alone cannot

be the reason for refusing to receive the additional written statement. Referring to various earlier decisions, the learned Single Judge held that when the person seeking leave to file additional written statement is not attempting to plead a different case than what has been pleaded in the original written statement, leave can be granted to file additional written statement even after settlement of issues. The learned single Judge also held in that case that the plaintiff therein would be compensated by cost while permitting the defendant to file additional written statement.

13. Referring to the said order of the learned single Judge in ***Thiyagarajan's***, cited on behalf of the petitioner, the learned counsel for the respondent would contend that the said order came to be passed at a stage when trial had not commenced, whereas in the case on hand the application for reception of additional written statement came to be filed after the completion of evidence adduced on the side of the plaintiffs and after further cross-examination of PW1 after he was recalled for such further cross-examination.

14. Order VI Rule 17 proviso puts on embargo on the power to allow either party to amend the pleadings at any stage of the proceedings with a rider that no application for amendment shall be

allowed after the trial has commenced unless the Court comes to the conclusion that in stead of due diligence, the party could not have raised the matter before the commencement of trial. Order VIII Rule 9 CPC deals with pleadings subsequent to the filing of the written statement other than by way of answer to a plea of set-off or counter claim. It simply states that no pleadings subsequent to the written statement of the defendant other than by way of defence to set-off or counter claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit. The rule proceeds further to state that the Court, may, at any time require a written statement or additional written statement from any of the parties and fix a time of not more than 30 days for presenting the same.

15. The Supreme Court while dealing with the question of permitting the defendant to file additional written statement made it clear in ***Olympic Industries' case*** that delay alone shall not be the ground on which the permission to file additional written statement/additional counter statement could be refused. In ***Usha Balashaheb Swami's case***, the Hon'ble Supreme Court advocated liberal approach in case of amendment of the defence plea, namely by way of additional written statement, which has also been referred to by the Supreme Court in *Olympic Industries' case*.

16. In the case on hand, it is an admitted fact that the plaintiff and the defendants have taken similar pleas. The respondent/plaintiff has taken a plea that though the vendor of his father had not included the suit properties in the sale deed executed in favour of his father, his father got possession of the suit properties and was in possession of the same and he himself continued to be in possession and thereby perfected title by adverse possession. The respondent/plaintiff raised a plea of derivative title and also a plea of perfection of title by adverse possession. Similar is the case of the revision petitioners / defendants. They claim oral sale of the first item of the suit properties in the year 1959 by Kuppammal to Amaravathy Mudaliar, the father of the first petitioner/first defendant. Necessary pleading regarding their possession right from 1959 has been made. However, the plea of perfection of title by adverse possession was omitted to be included in the written statement. The omission is technical and it is the result of inadvertence of the counsel for the revision petitioners/defendants in preparing the written statement. In the proposed additional written statement no attempt has been made to plead new facts and only the specific plea of having perfected title by adverse possession in respect of the first item of the suit property, based on the facts pleaded in the original written statement, is sought to be made. For the mistake committed by the

advocate, the party, who does not know the niceties of the pleadings should not be allowed to suffer.

17. In fact, except the plea that the application for reception of additional written statement was belated and it was intended to drag on the proceedings, which is found in paragraph 4 of the counter statement of the respondent herein, no other ground has been alleged in the counter statement,. The contents of the previous paragraphs simply deal with the merits of the case. They are not germane for the enquiry in an application for reception of additional written statement. There is no plea made by the respondent/plaintiff that an attempt has been made by the revision petitioners / defendants to change the nature of the suit itself by the proposed additional written statement. However, the learned trial Judge, besides referring to the ground of belatedness, chose to erroneously hold that the proposed written statement would change the very nature of the suit, as the ground dismissing the application for reception of additional written statement. The said ground is not available and the above said observation made by the learned trial Judge is baseless. For the delay caused in filing the application for reception of additional written statement, at the best, will entitle the respondent/plaintiff to press for cost. In line with the judgment of the Supreme Court in Olympic Industries' case, this Court comes to

the conclusion that the revision petitioners/defendants shall be allowed to file the proposed additional written statement provided they pay a cost of Rs.5000/- to the respondent/plaintiff.

18. In the result, the revision succeeds and the same is allowed. The order of the trial Court dated 12.03.2013 is set aside. I.A.No.1330 of 2012 in O.S.No.370 of 2008 shall stand allowed and the additional written statement shall be received on the defendants' paying a cost of Rs.5,000/- (Rupees Five Thousand Only) to the respondent/plaintiff. No costs. Consequently, the connected miscellaneous petition is closed.

11.05.2016

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Internet: Yes
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To

The District Munsif
Madurantakam

P.R.SHIVAKUMAR, J

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