

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

Civil Revision Petition (PD) No.3724 of 2010
and
M.P.No. 1 of 2010

Duraisamy Reddiar

... Petitioner

..Vs..

1.Saroja Ammal
2.Duraisamy
3.Sadagopan
Respondents

...

Prayer: This Civil Revision Petition has been filed under Article 227 of Constitution of India, praying to set aside the Fair and Decretal order in I.A.No.1030 of 2010 in O.S.No.76 of 2007 dated 17.09.2010 on the file of the Additional District Munsif, Villupuram.

For petitioner : Mr.N.Suresh
For R1 : Mr.K.Thirumavalavan
For R2 : No appearance
For R3 :Mr.R.Saseetharan

ORDER

The Fair and Decretal order, dated,17.09.2010 and made in the application in I.A.No.1030 of 2010 and made in the suit in O.S.No.76 of 2007 are under challenge in this revision.

2) The Revision Petitioner herein is the plaintiff in the suit whereas the respondents herein are the defendants.

3) Heard Mr.N.Suresh, learned counsel appearing for the revision petitioner and Mr.K.Thirumavalavan, learned counsel appearing for the first respondent and Mr.R.Saseetharan, learned counsel appearing for the third respondent. Despite service of notice on the second respondent, he has not chosen to appear either in person or through his counsel. Hence, he was called absent.

4) The application in I.A.No.1030 of 2010 was filed by the petitioner under Order 6 Rule 17 of the Code of Civil Procedure, to amend the plaint as detailed thereunder. This petition was resisted by the third respondent by filing his counter statement.

4) After heard both sides, the learned Trial Judge viz., the Additional District Munsif, Villupuram had proceeded to dismiss the said petition on the following grounds:-

a) The petitioner wants to introduce an inconsistent prayer when comparing with the existing one;

b)Petitioner wants to introduce a new case as well as a new case of

action;

c) If the amendment is allowed the respondents would be seriously prejudiced;

6) Having been aggrieved by the impugned order, dated 17.09.2010, present Civil Revision Petition is filed by the petitioner/plaintiff.

7) As it is revealed from the records, the petitioner herein had filed the suit in O.S.No.76 of 2007 as against the respondents and thereby sought the relief of declaration, to declare his right over the suit property and for the consequential relief of perpetual injunction as against the respondents. The declaration and permanent injunction, he was advised to seek for the alternative prayer of partition in respect of his 1/3rd shares in the properties and therefore he has filed this petition to amend the plaint without change of cause of action.

8) The respondents 1 and 2 have adopted the counter statement filed by the 3rd respondent. They have contended that the petitioner is not having any right over the suit property and under the initial stage of filing of the suit, the plaint was returned on 12.01.2007 with an endorsement saying that *"Any proof of documents in respect of plaintiff's possession from the year 1961 not filed. No document has been filed in plaint in the stated para No.4"*.

9) They have contended that the above said return were not complied with and subsequently that plaint was re-presented and admitted. Secondly, they have also contended that the suit was mainly based on the unregistered settlement deed which is the suit document in this case and that the suit document has to be registered under Section 17 of the Indian Registration Act which is mandatory. However, the suit was taken on file without considering this lacuna and discrepancy. Further, they have contend that in the petition seeking for amendment no cause of action was shown and that the revision petitioner had also not explained as to how the suit is maintainable on the basis of unregistered settlement deed dated 25.08.1961. Further, in respect of the amendment, the revision petitioner has not stated about the appropriate court fee which is to be paid and the law and prayer for partition is valid. Prayer of partition could be maintained.

10) Only on those grounds, the respondents has strongly resisted the petition. They would further contend that by way of seeking amendment, the revision petitioner wanted to introduce a new case as well as a new cause of action and if the prayer of amendment is allowed definitely it would change the character and nature of the suit.

11) The contention raised by the respondents were accepted by

the Trial Court and after placing reliance upon the decision in ***Ramesh Ramanujam Vs.Varadammal and others (2005 (2) CTC 432)***, the learned Trial Judge had proceeded to dismiss the application. It is significant to note that the above petition is filed under Order VI Rule 17 of the code of civil procedure. It is also relevant to note here that after filing of the proof affidavit (chief examination) the revision petitioner, he has come forward with this petition for amending the prayer of the suit seeking alternative relief of partition.

12) It is to be pointed out that the following crucial question has arisen in this case for the consideration of this Court:-

when the suit itself is filed for declaration and injunction whether it could be converted into a suit for the partition under the guise of seeking alternative relief?

This question was already decided in ***Kenchegowda (since deceased) by legal representatives Vs.Siddegowda Alias Motegowda, 1994(4) SCC 294***. In this case, the Apex Court has observed that the suit for declaration of title and injunction against the sale of property cannot be converted into one for partition merely on the basis of plaintiff's application Order VI Rule 17, as the cause of action and reliefs being different in nature and this being so, a decree for partition could not have been granted on a mere application for amendment. It is also held that the relief of declaration and injunction are larger relief and smaller relief for partition could be granted is incorrect .

13) In the other case in ***Revajeety Builders and Developers Vs. Narayanasamy and Sons and other (2009) 10 SCC 84***, the Apex Court has also held that an amendment changing the nature and character of the case cannot be allowed.

14) But in so far as this case is concerned, the question as to whether the amendment, seeking the alternative prayer for partition is really going to change the nature as well as the cause of action of the suit is to be decided.

15) In ***Firm Srinivas Ram Kumar Vs. Mahabir Prasad and others AIR (38) 1951 (SC) 177***, Mukherjea, J, while penning down the judgment on behalf of a three judges bench of the Supreme Court has observed as under:-

"A pltf., may rely upon different rights alternatively & there is nothing in the Civil P.C. to prevent a party from making two or more inconsistent sets of allegations & claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Ct. to give him relief on that basis. The rule undoubtedly is that the Ct. cannot grant relief to the pltf. on a case for which there

was no foundation in the pleadings & which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the pltf., could have made, was not only admitted by the deft., in his written statement but was expressly put forward as an answer to the claim which the pltf., made in the suit, there would be nothing improper in giving the pltf., a decree upon the case which the deft., himself makes. A demand of the pltf., based on the deft's own plea cannot possibly be regarded with surprise by the latter & no question of adducing evidence on these facts would arise when they were expressly admitted by the deft., in his pleadings. In such circumstances when no injustice can possibly result to the deft., it may not be proper to drive the pltf., to a separate suit."

Secondly, in an another case, in ***Krishna Ayyar's Vs.Gomathi Ammal and others AIR (32) 1945 MADRAS 33***, King J, has observed that where the relief clause has been amended after the period of limitation, but the facts upon which the reliefs as amended were claimed were already part of the plaint when it was first presented, there can be no question that it is only at this stage that the plaintiff is putting forward a new case against, the defendant and the amendment should be allowed.

Amendments should normally be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. In ***North Eastern Railway Administration, Gorakhpur V.Bhagvan das (D) by Lrs) 2008-4-LW-80***, while speaking on behalf of a Division Bench, Hon'ble Mr.Justice D.K.Jain in paragraph 15 has observed as under:-

"15.In so far as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil Vs.Kalgonda Shidgonda Patil & others* AIR 1957 SC 363, which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

Under these circumstances, it may be necessary to extract the provisions of order Rule 6 Rule 17 of the Code of Civil Procedure. It reads as under:-

Rule 17 of Order VI:-

Amendment of pleadings:-

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

16. It is pertinent to note here that Rule 17 was originally omitted by the Code of Civil Procedure (Amendment) Act 46 of 1999 and again substituted by Code of Civil Procedure (Amendment) Act 22 of 2002 with effect from 01.07.2002.

17. Prior to substitution (before Act 46 of 1999) Rule 17 read as follows:-

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

18. It may be placed on record that the original provisions of Rule 17 has been brought back by way of substitution by the Code of Civil Procedure (Amendment) Act 22 of 2002 with effect from 01.07.2002 along with a proviso.

19. It is explicit from the provisions of Rule 17 that it is the discretion of the Court to allow either party to alter or amend his pleadings at any stage of the proceedings in such manner and on such terms as may be just. Secondly, it exemplifies that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

20. It is thus, made clear that for the purpose of determining the real question in controversy between the parties, all such amendment shall be made; Provided the proposed amendments are absolute by necessary.

21. The proviso to Rule 17 contemplates that no application of

amendment shall be allowed after the trial has commenced. The rigidity of the first portion has been elasticated in the second portion of the proviso and the legislators have carefully inter twined with "the word" unless the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of trial, no application for amendment shall be allowed after the trial has commenced. Rule 17 enables either party to alter, or amend their respective pleadings at any stage of the proceedings. The proviso says that no such application for amendment shall be allowed after the trial has commenced.

22. On coming to the instant case on hand as already observed in the forgoing paragraphs that the revision petitioner has filed the above suit seeking the relief of declaration of his right over the suit property and also permanent injunction as against the respondents.

23. The plaintiff has specifically stated in his plaint that after the death of Subba Reddiar, his wife Chinnammal had joined with Ramasamy Reddiar and they were living together as husband and wife. Since the property was purchased by Ramasamy Reddiar privately it is separate property. He is also entitled to get 1/3rd share. But the property is belonging to Ramasamy Reddiar he had claimed title over the property and since the respondents have specifically averted in their written statement that since he is birth to the suspect

and his birth is suspected is illegal. He cannot claim the right over the property. It is to be noted that the Trial court admittedly was not yet commenced only with the proof affidavit was along filed by the petitioner. only at that stage on the ground of amendment action he taken out the application seeking relief of amendment for the alternative for the parties.

24. Mr.N.Suresh, learned counsel appearing for the revision petitioner has contended that there was nothing to prevent the petitioner from claiming the alternative relief as there was specific provision available in the code of Civil Procedure. In order to support of his contention he has placed reliance upon the following decisions:-

1) Kesavalu Naidu Vs.Doraiswami Naidu (died) and others in 1958-2-MLJ-189

2) Rajendra Tiwary Vs.Basudeo Prasad and another in AJR-2002-SC-136

3) Abdul Rehman and another Vs.Mohd.Ruldu and others in 2012(5)-CTC-803

4) Rameshkumar Agarwal Vs.Rajmala Exports Private Limited and others in (2012)5 - SCC - 337

1) In Kesavalu Naidu first cited supra, Ramaswamy,J., has observed that:

"Where a plaintiff claims more than what he is entitled to, the Court should not dismiss the suit, but give the plaintiff only such relief as he is entitled to. The fact that the plaintiff asked for a relief larger than the facts attested by him would warrant is no ground for refusing him the lesser, to which, on the facts found he is entitled. The Court should not refuse to grant a relief not automatically claimed in the plaint, if such relief is obviously required by the nature of the case and is of a formal issue is immaterial when the defendant has not been taken by surprise. Pleadings in mufusil are to be construed liberally and not strictly".

2) Rajendra Tiwary case second cited supra, at paragraph No.14, the Apex Court has observed that:

"14. Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, O.VII, R.7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted".

3) In Abdul Rehman and another cited third supra, while speaking on

behalf of the Division Bench of this Apex Court, Hon'ble Mr. Justice P. Sathasivam has observed that:

"The relief sought to be added would not change nature of suit but would only protect interest of plaintiffs. Adding of relief would avoid multiplicity of litigation held, change in nature of relief ought not to be considered as change in nature of suit and power of amendment to be exercised in larger interests of doing full and complete justice between parties".

4) In Ramesh Kumar Agarwal's case cited fourth supra, the Apex Court has also held in para 20 as under and para 21 is also very much essential:-

25. In another case 'viz' **Revajeetu Builders & Developers V. Narayanaswamy & Sons** the Apex Court has once again considered the scope of amendment of pleadings. In para 63, which is extracted as under:-

"Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case;and

(6) as a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

21) It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order 6 Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. 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. Liberal approach should be the general rule, particularly in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

26. On the other hand, Mr. R. Sasidharan, learned counsel appearing for the respondents has contended that the proposed amendment is revolving around an unregistered settlement deed dated 26.08.1961. He would further contend that the execution of settlement deed itself is questioned. This document, which is an unregistered one cannot be permitted to be placed reliance upon and it cannot also be permitted to receive in evidence. He has also invited the attention of this Court to **Sec.16 of Hindu Marriage Act, 1955.**

With reference to legitimacy of children of void and voidable marriages, Sec.16 enacts as under:-

16. Legitimacy of children of void and voidable marriages -

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

27. In para 5 of their written statement the respondents have stated that since the revision petitioner is said to have been born to chinnammal through ramasamy reddiar out of their illegal relationship, the revision petitioner cannot claim any right over the property. They have also stated that neither chinnammal nor the plaintiff had been in possession and enjoyment of the property and therefore the revision petitioner cannot claim any partition much less 1/3rd share in the suit property.

28. Mr.R.Sasidharan in support of his continuation has placed reliance upon the following decisions:-

1) Ramesh Ramanujam S/o.V.R.Seshadri Vs.Varadammal and others in 2005(2) CTC 432

2) Kasiappa Gounder, S/o.Manthiriappa Gounder Vs.Karuppan, S/o.Karuppan in 2005 (3) CTC 412

3) P.A.Ahammed Ibrahim Vs.Food Corporation of India in AIR 1999 SUPREME COURT 3033

4) Manickam Vs.Vadivamabal and Others in 2016-1-L.W.570

1) In Ramesh Ramanujam S/o.V.R.Seshadri Vs.Varadammal and others cited first supra, a learned Judge of this Court has observed in para 9 & 12 as under:-

9. However, after the amendment of the said provision on and from 1.7.2002 as per Amendment Act (Central Act 46 of 1999), the legislature thought it fit to introduce a proviso to

Rule 17. The said proviso contemplates two stages viz., application which can be filed prior to the commencement of the trial and after the commencement of the trial. Since the amendment itself restricts about pre-trial and post-trial stages, the intention of the legislature is very clear that no application seeking amendment of the pleadings is permissible after the completion of the trial.

The said amendment seems to have been made with a view to prevent parties to the proceedings from approaching the Courts seeking necessary amendment of the pleadings at the earliest stage, so as to avoid frivolous petitions being filed at any stage of the proceedings. That is the reason as to why the above provision is amended in such a manner that a party should not be permitted to file an application for amendment after the commencement of the trial, except in the circumstances, he is able to satisfy the Court to the effect that in spite of due diligence, he could not have raised the matter before the commencement of trial.

12. In the light of the various decisions rendered by the Apex Court and this Court, while interpreting Order 6, Rule 17 prior to amendment, it is clear that though liberal approach can be made in permitting the amendment prior to the

commencement of the trial, after the commencement of the trial, the party seeking amendment of the pleadings is expected to adduce necessary materials as to why he was not able to make necessary pleadings at the prior point of time. No decision of this Court as well as the Apex Court is placed before me to the effect that amendments can be permitted even after the disposal of the suit, subsequent to the amendment of CPC with effect from 1.7.2002.

2) In Kasiappa Gounder, S/o.Manthiriappa Gounder Vs.Karuppan, S/o.Karuppan cited second supra, a learned Judge of this Court has observed in paragraph No.16 as under:-

16.Order 6, Rule 17 C.P.C has been amended by the C.P.C Amendment Act with effect from 1.7.2002. A new proviso has been added to the rule, namely that no application for amendment of the pleadings shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. Thus after the trial of the case has commenced, no application for amendment of the pleading shall, be allowed unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of Trial. In

this case, Chief-examination of P.W.1 was completed and the Amendment petition filed after the Trial is not maintainable.

29. Insofar as this case is concerned, the facts are not new to the parties of the suit. The revision petitioner is not going to introduce a new case. The facts are already in existence in the plaint and the revision petitioner/plaintiff has made reference to the settlement said to have been executed by his father Ramasamy Reddiyar in favour of his mother Chinnammal. Of course, it is an unregistered document and its evidenciary value shall have to be decided by the trial Court at the time of trial.

30. However, this Court is of view that by amending the plaint, the respondents would not in any way get prejudiced and no injury would be caused and hence, this Court finds that the impugned order may be set aside.

31. In the result, the revision petition is allowed. The order impugned dated 17.09.2010 and made in the application in I.A.No.1030 of 2010 is set aside and the application in I.A.No.1030 of 2010 is allowed. The trial Court is directed to make necessary amendment in the plaint. The respondents/defendants shall be given opportunity to file their additional written statement if any and the trial Court is further directed to dispose the suit within a specific period of four months from the date of receipt of a copy of this order. However, there shall be no order as to costs.

06.10.2016

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Index:Yes/No

Internet:Yes.

T.MATHIVANAN,J.,

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To

The Additional District Munsif Court, Villupuram

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06.10.2016