

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.03.2016

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.818 of 2016

&

C.M.P.No.4559 of 2016

1.Mrs.Vanjiammal

2.Ms.D.Anitha

3.Ms.D.Preetha

... Petitioners

VS.

Mr.N.Madhankumar

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order passed in I.A.No.588 of 2015 in O.S.No.1194 of 2013 passed by the III Additional Subordinate Judge, Coimbatore dated 05.11.2015.

For Petitioners : Mr.S.Ilamparithi

ORDER

The plaintiffs in the original suit O.S.No.1194 of 2013 pending on the file of the III Additional Subordinate Judge, Coimbatore are the petitioners in the present revision.

2. The suit came to be filed against 1) Myilsamy Gounder (since deceased), 2) his wife Palaniammal, 3) Son Nithiyanandham, 4) Grand daughter Vanitha and grand son Madhan Kumar arraying them as defendants 1 to 5 and seeking the relief of partition and separate possession. The petitioners herein/plaintiffs claim $1/3^{\text{rd}}$ share in the suit properties and they do admit that the remaining $2/3^{\text{rd}}$ share belongs to the defendants. During the pendency of the suit, the first defendant Myilsamy Gounder died and the fact of his death was intimated and an amendment noting his death came to be made by virtue of an order dated 11.11.2014 made in I.A.No.1013 of 2014. The suit was resisted on the basis of the written statement filed by the said Myilsamy Gounder (deceased first defendant) which was adopted by the other defendants.

3. The trial commenced and after the examination of PW1, the fifth defendant Madhan Kumar filed an application I.A.No.1194 of 2013 praying for permission to file an additional written statement enclosing the proposed additional written statement along with the application. In the affidavit supporting the application, the fifth defendant has stated that his grandfather Myilsamy Gounder, during his life time, executed a Will dated 20.02.2009; that since the Will was ineffective during the life time of the testator, it was not referred to in the written statement and that after the death of Myilsamy Gounder, it became necessary to make a pleading bringing it to the notice of

the Court regarding the Will left by Myilsamy Gounder as his last Will and testament. For the delay caused in making the additional plea, the fifth defendant made an averment in his affidavit to the effect that after the death of Myilsamy Gounder on 01.09.2013, he was busy with the ceremonies and thereafter, he had forgotten to instruct the counsel to file the additional written statement within a short time. The application for amendment was resisted only on the ground of belatedness.

4. The learned trial Judge, after hearing both sides, by order dated 05.11.2015, allowed the said application and permitted the fifth defendant to file the additional written statement. As against the said order of the trial Court dated 05.11.2015, the present revision came to be filed under Section 115 of the Code of Civil Procedure. The revision stands today listed for admission.

5. The arguments advanced by Mr.S.Ilamparithi, learned counsel for the revision petitioners are heard. Certified copy of the impugned order and copies of the pleadings and other documents produced in the form of typed-set of papers are also perused.

6. The application seeking permission to file additional written statement came to be field under Order VIII Rule 9 r/w.Section 115 of the Code of Civil Procedure. Before going into the facts of the case, the scope of

Order VIII Rule 9 CPC may be considered.

Order VIII Rule 9 CPC reads as follows:

"No pleading subsequent to the written statement of a 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; but 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 thirty days for presenting the same."

7. The first part of the rule deals with the right of the party facing a counter claim or set-off to file a written statement even without the leave of the Court and such right is preserved therein. Only other subsequent pleadings, namely a reply to the written statement, which does not contain a counter claim or set-off or an additional written statement are governed by the later part of the said provision. It does not totally bar the party from filing such additional plea. The provision says that such additional plea cannot be made except with the leave of the Court and upon such terms as the Court may thinks fit. The last part of the rule preserves the power of the Court to require any party either to file a written statement or additional written statement i.e., with a view to know whether the party is admitting or disputing the other party's claim and if he disputes, on what ground he disputes the claim?

8. Reading Order VIII Rule 9 CPC in isolation will not serve the purpose intended by the legislature in providing such a clause. It should be considered in the light of Order VI Rule 17 CPC. As per Order VI Rule 17 CPC, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments that are necessary for the purpose of determining the real question in controversy between the parties shall be allowed. Of course, the proviso to the rule provides an embargo on such amendment in case the party seeking amendment does not establish that despite his due diligence, he could not have raised the matter before the commencement of trial. Even regarding the same, the rule has been interpreted as the embargo shall apply in respect of first part of the main provision of Rule 17 under Order VI and the later part of the main provision shall not be controlled by the proviso, as it is intended to allow the parties to make all amendments which are necessary for the purpose of determining the real question in controversy between the parties. If not by way of an additional written statement, a party defendant may seek permission to amend the written statement to incorporate the additional plea.

9. Keeping the above said observations in mind, let us now consider the prayer of the respondent herein/fifth defendant for permission to file the additional written statement.

10. The suit filed by the petitioners herein/plaintiffs for partition claiming $1/3^{\text{rd}}$ share in the suit properties is resisted by the defendants denying their claim. During the pendency of the suit, the first defendant Myilsamy Gounder passed away. The other defendants are the wife, son and grand children of Myilsamy Gounder. As they were already on record in other capacities, the suit as against Myilsamy Gounder did not abate. What the plaintiffs did was to record the death of the first defendant Myilsamy Gounder alone. During the life time of Myilsamy Gounder, Myilsamy Gounder could not have incorporated an averment in his written statement that he had executed a Will in respect of the suit property or his share in the suit property, since it would have been a self-serving document. The question of relying on the Will arose only on the death of Myilsamy Gounder. The Will, if true, would have come into effect only on the death of Myilsamy Gounder. Of course, there is some delay on the part of the fifth defendant in approaching the Court with the application seeking permission to file additional written statement to bring forth the subsequent development, namely the Will left by Myilsamy Gounder coming into force. For the lapse alone, one cannot be shown the door, that too, when it is a vital issue which has got to be determined in the present suit itself, without relegating the parties to a separate proceeding. Even if the suit had ended in a preliminary decree, the legatees under the Will can very well, relying on the Will, seek further relief so far as the share of Myilsamy Gounder is concerned by way of a supplementary preliminary decree or a final decree. When such is the

position, it is quite unwarranted and unconscionable on the part of the petitioners/plaintiffs to resist such an application.

11. Further, the application came to be filed under Order VIII Rule 9 CPC because the written statement was not filed by the fifth defendant and it was filed by the deceased first defendant, which came to be adopted by all the defendants. Hence, the reliance made by the fifth defendant to invoke Order VIII Rule 9 CPC cannot be found fault with and it is a proper provision under which the petition could have been filed.

12. The learned trial Judge, understanding the context in which the application seeking permission to file the written statement, came to a correct conclusion applying the correct principles of law and allowed the application. This Court is not able to find any defect or infirmity in the said order. Apart from the merits of the said petition, the present revision filed under Section 115 CPC also is not maintainable because of the embargo provided in the first proviso to Sub-clause (1) of the said Section. The proviso says that the High Court shall not under its power of revision under Section 115 CPC vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of any party applying for revision would have finally disposed of the suit or the other proceedings. The nature of the order passed by the trial Court is reception of the additional written statement.

Had the order been otherwise, namely dismissal of the application, it would not have resulted in termination of the suit. Hence, the revision under Section 115 of CPC is not competent. Though citing a wrong provision may not be the sole ground on which one can be denied the relief and in appropriate cases, the Court can treat the petition as one under the proper provision and grant the relief, this is not a case which is worth to be treated as a petition under Article 227 of the Constitution of India and pass an order setting aside the impugned order of the trial Court in exercise of the power of superintendence of this Court.

13. For all the reasons stated above, this Court comes to the conclusion that there is no merit in the revision and the revision deserves to be dismissed at the threshold.

Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

15.03.2016

Index: Yes/No
Internet: yes/No
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To

The Subordinate Judge
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P.R.SHIVAKUMAR.J.,

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