

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2016

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

CRP (PD).No.97 of 2016

and

C.M.P.No.515 of 2016

K.Sampathkumar

.. Petitioner

Vs

1.Pushpa

2.K.Sathishkumar

3.N.Dillibabu

.. Respondents

Prayer:Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 24.11.2015 made in I.A.No.155 of 2015 in O.S.No.6691 of 2013 on the file of the XV Additional Judge, City Civil Court, Chennai.

For Petitioner : Mr.K.Raja

For Respondents : Mr.T.A.Shagul Hameed

ORDER

The Civil Revision Petition is filed against the order dated 24.11.2015 made in I.A.No.155 of 2015 in O.S.No.6691 of 2013 on the file of the XV Additional Judge, City Civil Court, Chennai.

2.The petitioner as a plaintiff filed a suit for partition of his 2/3 share in the suit property and injunction restraining the defendants from alienating or encumbering the property and also injunction restraining the defendants to alter the structure of item Nos.1 to 4 of the suit properties against his mother, brother and one Dillibabu. During the pendency of the suit, the plaintiff filed an application in I.A.No.155 of 2015 for amendment stating that after filing of the suit, from the month of July 2014 onwards the defendants refused to pay the rental income to him. Hence, he ought to filed an application claiming past and future mesne profits but instead of that he sought for a prayer directing the defendants to deposit the entire past and future profits arising from item Nos.1 to 4 of the suit properties from July 2014 into the credit of O.S.No.6691 of 2013 and to declare that the plaintiff is entitled to 50% share in the same. The Trial Court after hearing both sides dismissed the application stating that provision of law is not correctly given and it is further stated that mesne profits have to be decided during the final decree proceedings. It is also stated that the mesne profits does not apply for the suit for declaration of right or partition of joint family property. It was further held that the prayer itself is self-contradictory. On that basis, the Trial Court has dismissed the application. Against which, the present Civil Revision Petition has been filed.

3.Learned counsel for the petitioner submitted that at the time of filing the suit, he has received the rental income and so, he has not sought for past and future mesne profits. That factum has not been considered by the Trial Court. He further submitted that quoting of wrong provision of law is not a ground for dismissal. Hence, he prayed for setting aside the impugned order passed by the Trial Court.

4.Resisting the same, the learned counsel for the respondents submitted that the petitioner has not given any reason as to why amendment has been sought for? He further submitted that in the suit for partition, mesne profits has been decided only at the time of final decree proceedings and there was no particulars as to how he arrived at Rs.90,000/-. He would also submitted that the Court fee paid is not correct. He would further submitted that once the suit has been dismissed for default and subsequently it was restore and then only the plaintiff has filed the application and therefore, his main aim is to drag on the proceedings. Hence, he prayed for dismissal of the revision petition.

5.Considered the rival submissions made by both sides and perused the typed set of papers.

6.The petitioner as a plaintiff filed a suit in O.S.No.6691 of 2013 for the following reliefs:

- (a) To pass a preliminary decree of partition thereby partitioning the item No.1 to 4 of the suit properties by metes and bounds and allot 50% share in the item No.1 to 4 of the suit properties to the plaintiff exclusively and after such allotment partition the remaining 50% share in the item No.1 to 4 of the suit properties equally and allot 1/3rd share in the item No.1 to 4 of the suit properties to the plaintiff herein.
- (b) The grant permanent injunction restraining the defendants, their men, agents, servants, Power holders, Agreement holders, Contractors, Successors, Representatives and subordinates or anybody acting on their behalf from alienating or creating any encumbrances viz settlement, gift, mortgage, sale, Power of Attorney etc., over the item No.1 to 4 of the suit properties.
- (c) To grant permanent injunction restraining the defendants, their men, agents, servants, Power Holders, Agreement holders, Contractors, Successors, Representatives and subordinates, Mason, Engineer or anybody acting on their behalf from altering the structure of the item No.1 to 4 of the suit properties in any manner.

7.It is an admitted fact that the defendants filed their written statement and contested the suit. The suit was dismissed for default and subsequently it was restored. It is true that the application for amendment has been filed by the plaintiff before commencement of trial. It is submitted by the learned counsel for the respondents that correct provision of law has

not been mentioned. On perusal of the typed set of papers, application has been filed under order VI Rule 16 and 17 of CPC. But Order VI Rule 16 and 17 of CPC is contrary to each other. Order VI Rule 16 of CPC deals with striking out pleadings and Order VI Rule 17 of CPC deals with amendment of pleadings. But the learned Judge has taken much pain to decide the matter. Again and again this Court and the Apex Court has held that quoting of wrong provision of law is not a ground for dismissal. So, it is true that quoting of wrong provision of law is not a ground for dismissal but as soon as it was brought to the knowledge of the plaintiff, he ought to file an amendment application but he did not do so.

8. At this juncture, it is appropriate to incorporate Order VI Rule 16 and 17 of CPC, which is as follows:

“16. Striking out pleadings:- The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-

(a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or

(c) which is otherwise an abuse of the process of the Court.

17.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 questions in controversy between the parties.”

So, the application filed by the petitioner under Order VI Rule 16 and 17 of CPC is contradict with each other. Hence, the application is hereby dismissed.

9.The next point that has to be decided is whether there is any merit in the application and the averments made in the petition is sufficient to allow the petition. It is appropriate to consider the averment wherein nothing has been stated as to what is the monthly rent. In the affidavit, it was stated that Rs.30,000/- was given to him and the same was accepted without prejudice to his right to the suit. It is further submitted that from July 2014, the defendants did not paid 1/3rd share of Rs.30,000/- as given by them upto June 2014 and therefore he sought for the following prayer:

“aa. To direct the defendants to deposit the entire past and further mesne profits arising from item No.1 to 4 of the suit properties from July 2014, into the credit of the O.S.No.6691 of 2013 pending on the file of this Honourable Court.

ab. To pass a decree declaring that the plaintiff is entitled for 50% share in the mesne profits arising from item No.1 to 4 of the suit properties exclusively from July 2014 and pay the same to the plaintiff and after such allotment further declare that the plaintiff is entitled for 1/3rd share in the remaining 50% share in the mesne profits arising from item No.1 to 4 of the suit properties from July 2014 and pay the same to the plaintiff and pass such further or other orders as ti may deem fit and thus render justice.”

10. But the prayer sought for is not proper. In the suit for partition, the plaintiff who is out of possession is entitled to past profits for three years before the date of filing the suit and future profits till the payment of the amount, but he cannot sought for direction directing the respondent to deposit the past profits into the credit of the same. Further second prayer ab. is concerned, it is mere simple prayer for mesne profits, past and future profits is sufficient and so, the prayer moulded in the amendment sought for in prayer (d) is not proper.

11. Further, the learned counsel for the respondents submitted that the Court fee paid is not correct and there is no evidence as to how the petitioner has calculated that he receive Rs.90,000/- as past profits and paid the Court fee of Rs.6,750/-. But as already stated in the suit for partition, the person

who is out of possession of the property is entitled to past and future mesne profits and that can be decided at the time of final decree proceedings by way of examining the witness and marking the documents under Order XX Rule 18 of CPC. Therefore, the Trial Court has considered all the aspects in proper perspective and has rightly dismissed the application since the amendment petition itself is a bundle of contradict statement. Hence, I do not find any reason to interfere with the order passed by the Trial Court and the same is hereby confirmed. Consequently, the Civil Revision Petition is hereby dismissed as devoid of merits.

12.In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

27.01.2016

Index: Yes/No
Internet: Yes/No
cse

To

The XV Additional Judge,
City Civil Court, Chennai.

R.MALA. J.,

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