

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.08.2016

Pronounced on : 19.12.2016

CORAM

The Hon'ble Mr.Justice **M.V.MURALIDARAN**

**CRP(PD)No.3713 of 2013 and
M.P.Nos.1 and 2 of 2013 and
CMP.No.7147 of 2016**

P.Chinnaraj

... Petitioner

Versus

K.Govindasamy

... Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the Decree and Order made in I.A.No.355 of 2013 in O.S.No.189 of 2012, on the file of the Principal District Munsif-cum-Judicial Magistrate Court, Chengam, Additional District Munsif Court, Chengam.

For Petitioner : Mr.K.A.Ravindran

For Respondent: Mr.P.Mani

ORDER

The plaintiff is the revision petitioner before this Court, challenging the order passed in I.A.No.355 of 2013 in O.S.No.189 of 2012 dated 02.08.2013, on the file of the Additional District Munsif, Chengam.

2. The case of the petitioner/plaintiff is that he has filed the suit against the defendants suit for easement right in respect of 'B' schedule property and for permanent injunction.

3. Further case of the petitioner/plaintiff is that when the suit was filed, there was a cart track in the B schedule property is in existence, but the said cart track was destroyed by the respondent/defendant before two days of visiting by the Advocate Commissioner, since the petitioner has filed the application for appointing of the Advocate Commissioner and the Court passed an order of appointing an Advocate Commissioner to note down the existence of the cart track. While the Advocate Commissioner was inspected the suit schedule of property, he note down in his report that cart track was destroyed before 2 days of the visiting of the Advocate Commissioner. Accordingly, he filed the report by

mentioning the same.

4. The plaintiff also states that in the month of February 2013, this respondent/defendant engaged a tractor and destroyed the entire cart track in the B schedule of property and hence the petitioner/plaintiff has given a complaint to the concerned police by narrating the above said facts. But, the destroy of the cart track was not mentioned in the plaint, but the Advocate Commissioner report made clear that the said cart track destroyed before 2 days of the Advocate Commissioner visit. Therefore, he sought for to amend the plaint in the pleadings and the prayer as prayed for and hence, he filed the above I.A.No355 of 2013 to amend the plaint has given the detail in the petition and details of amendments are as follows:

"Add Para 8(A) in the plaint:

The plaintiff submits that even before the inspection of the 'B' schedule property by the Advocate / Commissioner, the defendant violated the injunction order and destroyed the portion of the 'B' schedule property during the 1st week of October 2012. Therefore during the 2nd week of February 2013 the defendant by engaging a tractor destroyed the entire cart-track in the 'B' schedule property

high handly for which the plaintiff preferred a complaint against the defendant. Therefore the plaintiff filed the suit to restore the cart-track in the 'B' schedule property and in default through the process of Court.

Add in the cause of action para 9: after through the 'B' schedule property “during the 1st week of October 2012 when the defendant destroyed the portion of the cart-track in the 'B' schedule property, during the 2nd week of February 2013 when the defendant high handly destroyed the entire 'B' schedule property”.

Remove in para 11(A) and for the grant of permanent injunction restraining the defendant, his men, agents and servants from in any manner obliterating the road in the 'B' schedule property property and insert the same place as follows: for the grant of mandatory injunction to restore the road as inexistence in the 'B' schedule property and indefault through the process of Court.

Remove in the Particulars of valuation for the grant of permanent injunction and insert in the

same place as for the grant of mandatory injunction to restore the road in the 'B' schedule property.

Remove the relief of permanent injunction

and add in the same as "The relief of mandatory injunction".

and hence he prayed the trial Court to allow the application by amending the plaint.

5. On receipt of the notice, the respondents/defendants has filed counter affidavit stating that in his counter the respondents/defendants has denied the entire allegations contended in the petition. He also states that under the guise of amendment sought for the by the petitioner in the plaint is trying to introduce new property for which he has not produced any documentary proof of evidence to substantiate the proposed amendment.

6. The respondents/defendants also come forward by saying that though the Advocate Commissioner was inspected and filed his report and he clearly indicated that there is no way in the B schedule property. The petitioner/plaintiff is not stated about the length and width of the cart track, since he has stated that the respondent/defendant has destroyed the cart track in the B schedule

property. Therefore, the proposed amendment is not necessary and the facts contended in the petition entirely false. Since as per the amendments it seems that the petitioner/plaintiff has made a new case, which is impermissible in law and hence he sought before the trial Court to dismiss the application.

7.Considering both side arguments, the learned District Munsif, Chengam was pleased to dismiss the application in I.A.No.355 of 2013 in O.S.No.189 of 2012 dated 020.8.2013 on the ground that the proposed amendment sought for by the petitioner/plaintiff can change the nature and character of the suit. Since the petitioner/plaintiff prayed in the main suit is that the grant of road as in existence in the B schedule property, and in default through process of court instead of declaring the plaintiff's easement right in respect of B schedule property, and for granting permanent injunction restraining the defendant from any manner obliterating the road in the B schedule property.

8.The learned Judge also states that the proposed amendment means a new claim made on a new basis constituted by new facts and the words new case means new wet of substance and also states that no amendment will be allowed to introduce the new set of facts

to the prejudice of any right acquired by any part. If any amendment is filed either in the plaint or the written statement that should not be caused any prejudiced to the other parties. But, in this case, the learned Judge says that the petitioner/plaintiff filed the petition by introducing new facts for creating new cause of action.

9.I have heard Mr.Ravindran, learned counsel appearing for the petitioner and Mr.P.Mani, learned counsel appearing for the respondent.

10.Admittedly, the plaintiff has filed the suit for granting of mandatory injunction to restore the road as in existence in the B schedule property and in default through process of court instead of declaring the plaintiff's easement right.

11.While pendency of the above suit, the Advocate Commissioner was appointed as per the application filed by the petitioner/plaintiff in I.A.No.493 of 2012 in O.S.No.189 of 2012. A report has been filed by the Advocate Commissioner in which the Advocate Commissioner stated that before two days the cart track was destroyed. In the Advocate Commissioner report, the Advocate Commissioner has stated in his report as follows:

"tHf;F brhj;Jf;fis ehd; ghu;itapl brd;wjw;F xd;W my;yJ
 ,uz;L ehl;fSf;F Kd;g[kz;ghijapd; tlf;Fg[w Xuj;jpy; mjhtJ vd;
 tiuglj;jpy; 5 mo. 6 mo vd Fwpg;gpl;Ls;s kz; ghijapy; xd;W Kjy;
 ,uz;L mo tiu mHpf;fg;gl;L fw;fs; njhz;obaLf;fg;gl;L jw;nghJ
 ,Uf;Fk; kz;ghijapd; nkny nghlg;gl;L ahUk; bry;yKoahj go
 bra;ag;gl;Ls;sJ/ mjid vd; tiuglj;jpy; rptg;g[epw g[s;spfspl;L
 fhl;oa[s;nsd;"

12.As per the above statement, it is made clear that the Advocate Commissioner on inspection as stated that the cart track was destroyed in the B schedule property, before 1 or 2 days of his inspection.

13.After filing the report, this plaintiff has filed the application of amendment for amending prayer in the plaint has given details in the petition.

14.The case of the plaintiff is that originally there was a mud road in the B schedule of property for reaching the A schedule of property, since right from the date of purchase the plaintiff is in possession and enjoyment of the A schedule property under

registered sale deed dated 17.04.1997, as absolute owner and has been enjoying the B schedule of property as an easementary right to reach the A schedule property till date, he has also stated that there is a well formed mud road in the B schedule property about 2½ ft height in the land and he has also stated that the plaintiff and his predecessors in title have been in continues possession and enjoyment of the B schedule property as easement of necessity to reach the A schedule property for more than 20 years and thereby prescribed the easementary right by prescription. Hence he prayed in the plaint declaration, declaring the plaintiff's easementary right in respect of B schedule property and for granting of permanent injunction restraining the defendant in any manner obliterating the road in the B schedule property. Now, after the Advocate Commissioner report, he sought for the prayer declaring the plaintiff's easementary right in respect of the B schedule of property and for granting permanent injunction and he also sought for the cause of action in such facts destroyed the cart track in the particular days.

15.As per the provision under Section 26 and Order 7 Rule 1 of CPC, if any amendment will be allowed to introduce new set of facts to the prejudice of any right acquired by any party and the amendment if any made in the plaint that would not be prejudiced to

the defendant.

16. In this case, it is made clear that on fair reading of the plaint there is no whisper about the destroying of the cart track before filing the suit and there is also no averment that the cart track was destroyed by the defendant. But, in the present petition the amendment sought for the petitioner/plaintiff states that the defendant destroyed the cart track in particular days, i.e. before two days of the Inspection of Advocate Commissioner. Therefore, it clearly gives a new cause of action to be wanted by the petitioner/plaintiff to insert the new facts in the plaint.

17. During the course of arguments, the learned counsel for the petitioner/plaintiff has produced a judgment of this Court reported in ***Vijayalakshmi v. Sadagopan and another*** reported in **2015-2-L.W.253**. In the said case originally the plaintiff has filed a suit for bare injunction, but subsequently, she wants amendment of the prayer into the declaration from the original prayer for permanent injunction, at the time of cross examination of PW1 in the said suit, that was allowed by the learned Judge of this Court, on condition to pay the cost. But, that case is not applicable in the present case, since that is only sought for amending the prayer in the said case,

but in this case the petitioner/plaintiff has prayed to amend the cause of action as well as the prayer. Therefore, the averments made in the proposed amendment has given new facts in the suit that means he introduced new facts while change of the case. This Court and the Hon'ble Apex Court very categorically held that the amendment, if any sought for either in the plaint or in the written statement that can be allowed, if the said amendment is either not to create new cause of action or introducing any new case or changing the structure of the case. But in this case, it is made clear that the amendment sought for in this petition is created new facts, which definitely would caused prejudiced since the plaintiff has not made out any case averments in the plaint that this defendant has destroyed the cart track. But, after filing the Advocate Commissioner report only this plaintiff has sought for the amendment by introducing the new facts that before two days of the Advocate Commissioner inspection, the defendant has destroyed the cart track.

18.Regarding the scope of rule 17 of Order 6, this Court held in ***State of Maharashtra v. Hindustan Construction Co. Ltd., 2010 (3) CTC 452*** as follows:

“Order 6, rule 17 provides for amendment of pleadings. It says that 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. The matters relating to amendment of pleadings have come up for consideration before Courts from time to time."

19. Apart from this , the principles governing the applications filed under Order 6, rule 17 are dealt with by this Court in ***Church of South India Trust Association v. Kovil Pillai, 2008 (1) MLJ 291; 2007 (5) CTC 595***, which read as under:

"13.A perusal of the judgments cited by the learned counsel for the petitioners would bring out the following principles that are governing the application filed under Order 6, Rule 17 of the Code of Civil Procedure, 1908.

(1) Amendment to the pleadings cannot be turned down by Courts merely on the score that they introduce an inconsistent plea or a new cause of

action.

(2)The true test is whether the amendment is foreign to the subject matter of the suit and if not whether it would be in the interest of justice to grant it.

(3)Amendment may be allowed irrespective of law of limitation, if the cause of action is not going to be changed and in the interest of justice.

(4)Since the amendment of the plaint being the discretion of the Court, it need not be refused on technical grounds.

(5)Alternative relief sought by way of amendment can be allowed even if belated, but the other side should be compensated with costs.

(6)Allowing of this application is a rule and rejection is an exception.

(7)Pre-trial amendment are to be allowed more liberally than those which are sought to be made after the commencement of trial or after the conclusion thereof.

(8)If it is permissible for the plaintiff to file an independent Suit, there is no difficulty in accepting

his Application for amendment of plaint.” [Also see Immanuel Rajachandran v. Chinnarajulu Reddiar, 2009 (3) MLJ 874].”

20.In a case in ***UCO Bank v. Nest Tours & Travels (P) Ltd., 2009 (3) CTC 522***, this Court held as follows:

“Adding, altering or substituting a new cause of action in the plaint may be objectionable.”

21.It is also held in another case by this Court in ***V.N.Surulivel Nadar v. Central Bank of India, 1997 (3) CTC 119*** as follows:

“The amendment of pleadings can be allowed at any time, provided that such amendment does not change the original cause of action or case of the plaintiff and is not barred by limitation.”

22.All the above Judgments will clearly says that no amendment could be allowed when the amendment sought for is either to change of cause of action or change of case of the plaintiff. Therefore, the above Judgments are squarely applicable to the case of the respondent. Therefore, it is my considered opinion is that no amendment should be permitted if the amendment sought for is

either change of cause of action or change of facts.

23. Though the suit was filed in the year 2012 and after numbering the suit at the time of admission an exparte order by appointing the Advocate Commissioner was ordered, pursuant to the appointment of Advocate Commissioner, the Advocate Commissioner has inspected the suit schedule of property only on 09.10.2012. Therefore as per the Advocate Commissioner report, the Commissioner stated that before two days only the defendant has destroyed the cart track from the date of his inspection. That means the destroying cart track only was made by the defendant after the filing of the suit. Therefore, the amendment sought for the plaintiff is that to amend the cause of action that the defendant as destroyed the cart track which was made only pursuant to the report filed by the Advocate Commissioner. Therefore, it is made clear that this is a new cause of action and new facts introduced by the plaintiff based on the Advocate Commissioner's report. Therefore, that should not be permitted and the plaintiff have no right to amend the new cause of action or introducing new facts in the plaint. Therefore, the order passed by the learned Judge in I.A. No.355 of 2013 for dismissing the I.A. petition is perfectly valid and this Court no warranting interference of the order passed by the learned Additional District

Munsif Court, Chengam. Hence, it is liable to be dismissed.

23. In the result:

(a) this civil revision petition is dismissed by confirming the order passed by the learned District Munsif Court, Chengam in I.A.No.355 of 2013 in O.S.No.189 of 2012, dated 02.08.2013.

(b) the learned trial Court namely District Munsif, Chengam is hereby directed to dispose the suit within a period of four months from the date of receipt of a copy of this order.

24. Accordingly, this civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

19.12.2016

vs

Index:Yes

Internet:Yes

To

The District Munsif Court,
Chengam.

M.V.MURALIDARAN,J.

VS

**Pre-Delivery Order made in
CRP(PD)No.3713 of 2013 and
M.P.Nos.1 and 2 of 2013 and
CMP.No.7147 of 2016**

19.12.2016