

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.01.2017

Coram

The Honourable MRS.JUSTICE PUSHPA SATHYANARAYANA

C.R.P.PD.No.1139 of 2014

and

M.P.No.1 of 2014

A.G.Abdul Hai

... Petitioner

vs.

1. A.G.Basheer Ahamed (Died)
2. B.Najmunnisa Basheer
3. B.A.Jamed Ahamed
4. B.A.Nazeer Ahamed
5. B.A.Shakila Banu
6. B.A.Haleela Banu
7. A.G.Mohammed Mustapha
8. A.G.Syed Mohideen
9. Aisha Nachiar
- 10.Meharunniuisa
- 11.Hameedunnisa
- 12.Shafiunnisa

... Respondents

Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and decretal order dated 17.02.2014 passed by the learned II Additional Subordinate Judge, Cuddalore in I.A.No.52 of 2014 in O.S.No.130 of 2010.

For Petitioner : Mr.N.Suresh

For Respondents : Mr.S.Kanniah for RR2 and 3
R1-died
RR4 to 12- Served, No appearance

ORDER

Heard the learned counsel for the petitioner, learned counsel appearing for respondents 2 and 3. It is represented R1 died and despite service of notice, RR4 to 12 remained absent.

2. The third defendant in the suit is the revision petitioner.

3. The brief facts are as follows:

(i) The respondents 1 to 6 herein filed a suit for partition. In the written statement, the defendants had raised a plea of partial partition as some of the properties belonging to the father of the revision petitioner were purposely omitted to be included in the suit filed by the respondents. Despite the same being mentioned in the written statement filed by the defendants, the plaintiffs have not amended the plaint. Therefore, the defendants themselves have filed the application in I.A.No.52 of 2014 seeking amendment of the plaint.

(ii) By the amendment, the defendants 3 and 5 sought to include certain properties in the description of the property in the plaint schedule, in addition to the existing suit properties, in order to have a complete adjudication.

(iii) The main objection raised by the respondents/plaintiffs is that the said application has been taken out by the defendants after the commencement of the trial and therefore, the same cannot be allowed.

(iv) The learned trial Judge, after hearing both the parties, had dismissed the said application by placing reliance on the Division Bench judgment of this Court, wherein it is stated that if the petition is contested by the plaintiff that those properties are not available for partition, the only course available to the defendant is to approach the Court with a separate suit for partition. The learned trial Judge had also further held that the suit was filed by the plaintiff in the year 2010 and the application to amend the plaint was filed by the defendants only in the year 2014. Accordingly, dismissed the application.

(v) Aggrieved by the same the present revision is filed.

4. No doubt, the trial has commenced in the suit and PW1 has also been examined in chief. But, however, being a suit for partition, all those properties that are available should be included for the complete adjudication of the dispute between the parties. Though it

has been stated that the defendants have not established that despite due diligence, prior to the commencement of the trial, they were not able to file the petition, so as to allow the same, it is only PW1 has been examined in chief. Even presuming that those properties that are now sought to be included in the plaint are not available for partition or the revision petitioner may not be entitled to a share in the same, it may be decided in the trial and the application to amend the plaint ought not to have been dismissed, at this stage, by the court below. The trial court has misdirected itself by holding that when there is an opposition by the plaintiff to include the property, the same should be dismissed. When the plaintiffs have not specifically taken a plea that the properties are not available for partition, the Court should have allowed the same. However, having allowed the plaintiffs to commence the trial, at this stage, if the application to amend the plaint is allowed, definitely that would cause hardship to the plaintiffs. Therefore, this Court is inclined to allow the application in I.A.No.52 of 2014 in O.S.No.130 of 2010 subject to terms.

5. Accordingly, the order dated 17.02.2014 passed by the court below in I.A.No.52 of 2014 in O.S.No.130 of 2010 is set aside and this **Civil Revision Petition is allowed**, however, on payment of cost

of Rs.3,000/- [Rupees three thousand only] by the revision petitioner to the respondents/plaintiffs, within a period of three weeks from the date of receipt of a copy of this order. No costs. Consequently, the miscellaneous petition is closed.

23.01.2017

vj2

Index: Yes/No

Internet: yes

To

The II Additional Subordinate Judge, Cuddalore

PUSHPA SATHYANARAYANA.J

vj2

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