

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.06.2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. PD Nos.537 & 600 of 2017
and
C.M.P.Nos.2769 & 3105 of 2017**

Judgment reserved on 15.06.2017	Judgment pronounced on 30.06.2017
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CRP PD No.537/2017

1.C.Elumalai
2.E.Senthil Kumar
3.E.Sridhar ... Petitioners
Vs

1.A.G.L.Irudhayaraj
2.P.M.R.Sarkar
(Set exparte. Hence given up) ... Respondents / 3rd & 1st defendants

K.Ganesh Singh (since decd)

3.G.Rushtham Singh
4.G.Vasantha Bai ... Respondents / 4th & 5th defendants
(Set exparte. Hence given up)

CRP PD No.600/2017

Mr.R.Rustham Singh
Rep.by his Power Agent
Mr.Chidambaranathan
Ward-18, 38th Street,
Sathuvachary,
Vellore – 632 009. ... Petitioner

Vs

Prayer in CRP PD No.537/2017 : Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the order dated 24.01.2017 in I.A. No.16844 of 2016 in O.S.No.12065 of 2010 on the file of VI Additional Judge, City Civil Court, Chennai.

Prayer in CRP PD No.600/2017 : Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated made in 16844 of 2016 in O.S.No.12065 of 2010 on the file of VI Additional Judge, City Civil Court, Chennai.

For Petitioner : Mr.R.Thiagarajan
In CRP PD No.537/2017

For Petitioner : Mr.Pass Associates
In CRP PD No.600/2017

For Respondents : Mrs.Chitra Sampath
in both CRPs Senior Counsel for
M/s.Rajnish Pathiyil

COMMON ORDER

The parties and the issues involved in both the Civil Revision Petitions are one and the same and hence this common order is passed.

2. The petitioners in CRP PD No.537 of 2017 are the plaintiffs and they are respondents 1 to 3 in I.A.No.16844 of 2016. The said I.A was filed by the first respondent herein who is the 3rd defendant in the suit. The petitioner in CRP PD No.600 of 2017 is the fourth defendant in O.S.No.12065 of 2010 and 6th respondent in I.A.No.16844 of 2016.

3. The parties are referred to as per their rank in the suit in O.S.No.12065 of 2010.

4. The plaintiffs filed suit for declaration to declare that the settlement deed dated 25.11.1968 registered as Document No.4807 of 1968, sale deed dated 05.11.1975 registered as Document No.90/76 as sham and nominal and not binding upon them and for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the property. Originally, the plaintiffs filed suit in O.S.No.597 of 2006 against three defendants in

this Court on 07.08.2006. Since the 2nd defendant, viz. K.Ganesh Singh died, the defendants 4 & 5 were impleaded as legal heirs of the 2nd defendant. The 3rd defendant filed written statement on 16.08.2007 while the suit was pending in this Court. Subsequently, the suit was transferred to City Civil Court, Chennai and re-numbered as O.S.No.12065 of 2010. The 4th defendant filed written statement on 24.06.2014 making counter claim against the plaintiffs as well as against the 3rd defendant.

5. The issues were framed and the suit was posted for trial. The plaintiffs filed memo for filing reply statement to the counter claim of the 4th defendant and the same was ordered. The plaintiffs filed reply statement on 14.11.2014. After filing the reply statement, additional issues were framed and trial commenced. The plaintiffs were examined as PW1 & 2 and was cross examined by the learned counsel for defendants 3 & 4. The 3rd defendant was examined as DW1 and he was cross examined by the learned counsel for the plaintiffs and 4th defendant. He made an endorsement that there is no further evidence on his behalf. The Power of Attorney of the 4th defendant was examined as DW2, he was cross examined by the learned counsel for the plaintiffs and the case was posted for cross examination by the 3rd

defendant. At that stage, the 3rd defendant filed application in I.A.No.16844 of 2016 in O.S.No.12065 of 2010 for permission to file additional written statement.

6. According to the 3rd defendant, the 4th defendant has filed written statement with counter claim against the plaintiffs as well as the 3rd defendant. The 3rd defendant was under the impression that only the plaintiffs can file reply statement and therefore, he did not file any additional written statement to the counter claim of 4th defendant. Subsequently, on the advise of the learned counsel, the 3rd defendant came to know that he can file additional written statement as per Order VIII Rule 9 CPC. The delay in filing the additional written statement is due to oversight and on bonafide belief that only the plaintiffs can file reply statement. The plaintiffs and 4th defendant filed two separate counter affidavit and opposed the said application. According to them, the reason given by the 3rd defendant is not a valid reason and if the 3rd defendant is permitted to file additional written statement, that will amount to re-opening of trial and evidence already let in would become nullity. The 4th defendant will not have opportunity to cross examine the 3rd defendant on additional written statement filed by the 3rd defendant.

7. The learned Judge, considering the averments, counter affidavit and the judgments relied on by the learned counsel for the parties, allowed the application holding that no opportunity was given to the 3rd defendant to file additional written statement to the counter claim of the 4th defendants, on condition that the 3rd defendant shall pay a sum of Rs.10,000/- as cost to the District Legal Aid Fund, on or before 02.02.2017 failing which the petition shall stand dismissed.

8. Against the said order dated 24.01.2017 in I.A. No.16844 of 2016 in O.S.No.12065 of 2010, the plaintiffs and the 4th defendant have preferred the Civil Revision Petitions.

9. The learned counsel for the plaintiff / petitioner in CRP No.537 of 2017 submitted that co-defendant is not entitled to file reply statement for counter claim made by another co-defendant. In any event, the third defendant / 1st respondent has not given sufficient and valid reason for not filing the reply statement or not filed the application for permission to file reply statement earlier. In the present case, the Trial commenced, plaintiff examined three witnesses and marked 17 documents. The 3rd defendant cross examined the witnesses of the plaintiff. He also examined as DW1 and was cross

examined by plaintiff and fourth defendant. At this stage, the third defendant filed present application for permission to file additional written statement. The application is a belated one and the learned Judge failed to see that by allowing the said application, the evidence already recorded has to be eschewed, additional issues have to be framed and trial has to be commenced from the beginning. By allowing the application, the learned Judge failed to see that great prejudice would be caused to the plaintiff.

10. The learned counsel for the plaintiff relied on the following two judgments reported in -

(i) AIR 1976 Mad 302 **[Murthi Gounder v. Karuppanna Gounder]**

11. This is a case where nearly 2 years after having filed his written statement, the first defendant had acquired some further information and wanted to set up a case which is different from the case which he had originally set up in his written statement. Considering the stage at which such an application has been filed, undoubtedly, prejudice would be caused to the plaintiff who will now be forced to file a reply statement and as a consequence thereof, fresh and different issues will have to be framed and the trial would have to begin once over again. Taking these circumstances into consideration, I am of the view that the learned District Munsif rightly refused to permit the revision petitioner to file the additional written statement. I see no ground to interfere.

(ii) 2016 (6) CTC 763 **[Thangammal v. Saraswathi]**

4. The petitioners after cross examining D1 to D3 filed an application to receive additional written statement. The petitioners by way of additional written statement wanted to take up a plea of non-joinder of necessary parties. The petitioners for the reasons best known to them failed to take up the plea of non-joinder at the earliest point of time. The learned Trial Judge very correctly held that the plea of non-joinder cannot be raised at the fag end of the trial. In fact, it was only at the stage of arguments, the petitioners have filed the application. In case, the application is allowed, the Trial Court has to implead the parties and thereafter, the process should commence once again including recording evidence on behalf of the parties. The learned Trial Judge was perfectly correct in dismissing the application filed by the petitioners. I do not find any error or illegality in the said order warranting interference by exercising the revisional jurisdiction under Article 227 of the Constitution of India.

11. The learned counsel for the fourth defendant / petitioner in CRP PD No.600 of 2017 contended that the 4th defendant has filed written statement long back and issues were framed. After plaintiff was permitted to file reply statement, additional issues were framed on 07.11.2014. After the same, the trial commenced. The plaintiff and third defendant had let in evidence. Their witness were cross examined and closed. When the trial is at fag end of recording evidence, the learned Judge, without considering the scope of Order VIII Rule 9 CPC, allowed the application. The third defendant has filed

application for permission to file additional written statement on the ground that he was ignorant of the legal position that defendant also can file a reply statement to the counter claim made by a co-defendant against him. This is not a valid reason for permitting him to file additional written statement when recording of evidence is almost concluded. The learned Judge failed to consider that by allowing the said application, the trial already conducted is set aside and fourth defendant is greatly prejudiced.

12. The learned counsel for the fourth defendant / petitioner relied on the following judgment -

(i) CDJ 2010 MHC 2046 [Tajdeen V. Abdul Muthalif]

5. The Lower Court, without adverting to these vital points, simply as a matter of routine, allowed the I.A. for filing the additional written statement. In the original written statement, the settlement deed dated 173.1960 was denied, whereas, in the additional written statement the versions are such as though it was acted upon. After the major part of the trial was over, the defendants have chosen to take an antithetical stand in the additional written statement quite contrary to what they committed themselves in black and white in their earlier written statement.

13. Per contra, the learned Senior Counsel for the 3rd defendant in both the Civil Revision Petitions contended that even after commencement of trial and completion of evidence on the part of the plaintiff and defendant, court can permit filing of written statement. The additional written statement is filed to supplement existing pleading and to avoid any technicality. The plaintiff and 4th defendants have not stated that which portion of additional written statement is contrary to original written statement. They have not stated the reason for the delay in filing additional written statement and filing of additional written statement would prejudice their right. The learned Judge has properly appreciated Order VIII Rule 9 CPC and permitted the 1st respondent / 3rd defendant to file additional written statement and there is no reason to interfere with the the said order.

14. The learned Senior Counsel for the 3rd defendant relied on the following judgments -

(i) 2005 (4) MLJ 119 [Muthusamy v. Thangaraj]

9. In this case, the only grievance, if at all for the revision petitioner, as urged before me, must be that when P.W. 1 was in the box, that too pending cross examination, subsequent pleadings should not be allowed. By allowing the subsequent pleadings, the right of the plaintiff is not going to be affected and it is for the defendant to prove the subsequent

pleadings by letting in evidence, since in the original written statement, he has opposed the claim of plaintiff. The plaintiff can also re-examine P.W.1, if he desires, with the permission of the Court, even to deny the allegations in the written statement. Thus, it is seen, ample opportunity is available to P.W.1, to deny or accept the case projected in the additional written statement, which would go to show, no prejudice would be caused to the plaintiff, though the suit is a part heard one. Order 8, Rule 9, C.P.C. does not say, after commencement of trial, no subsequent pleading shall be entertained by the Court, as said in Order 6, Rule 17, C.P.C. proviso.

(ii) 2005 (4) MLJ 625 [Radhabai Ammal & Anr. v.

N.Loganathan & ors.

8. The dictum laid down with regard to the powers of the Court in granting leave for filling additional written statement is that the Court should take a lenient view, it should be positive and should have a liberal approach. The said proposition has been enunciated in the [Judgment Subramanian and Ors. v. Jayaraman](#), 1999 (3) CTC 52 : 1999 (3) LW 458, "(9) The approach of Law in permitting the Court to grant leave in such cases is positive. But, the Court while granting the leave could direct the petitioner to comply with certain terms that the Court thinks fit and hence absolutely there is no impediment or hurdle or legal barrier put forth by the Rule in allowing any additional statement subsequent to the written statement and the only shot provided in the arms of the Court for granting leave is that it could allow the application on such terms as it thinks fit.... Therefore, it could be safely concluded that in all such cases, wherein the defendant approached the Court with an application under Order 8, Rule 9 of the Civil Procedure Code praying to grant leave, Courts are expected to be liberal in granting the leave but of course on terms as the Court thinks fit in the circumstances of the individual case."

9. In *Soundaraessane v. Pouchapavady and two Ors.*, 2002 (3) LW 597, it has been held as follows:

"9. Yet another consideration in exercising the discretion and granting leave under Order 8, Rule 9, C.P.C. would be to see whether the plaintiff is prejudiced by such subsequent pleadings in any way. In the absence of any prejudice by such subsequent pleadings, in my considered opinion, the discretion conferred on the Court under Order 8, Rule 9, C.P.C. should be exercised liberally; as otherwise, it will not be possible for the parties to the litigation to prove their respective case, in consolidate, as a result of which, finality of the litigation will not be reached, giving way for multiplicity of litigation, and consequently, ends of justice will not be met."

(iii) Manupatra/TN/8808 / 2007

[Ponnuchamy & others v. N.Singaravelu]

8. While approaching the issues involved in this case, the principles laid down by the Hon'ble Supreme Court in the Judgment reported in 2006 (5) Supreme 943 (cited supra), is to be remembered wherein, the Hon'ble Supreme Court has stated that, unless serious injustice or irreparable loss is caused to the other side, the Court should be very liberal in allowing the amendment of pleading in such manner and on such terms as it appears to the Court just and proper. The Hon'ble Supreme Court has further held that adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the Courts are inclined to be more liberal in allowing the amendment of the written statement than of plaint and

question of prejudice is less likely to operate with same rigour in the former than in the later case. Keeping the above principles laid down by the Hon'ble Supreme Court, I am of the considered view that the additional written statement which is sought to be filed to add a new defence in the present case, would not be prejudicial to the plaintiff.

12. The one another ground on which the lower Court has dismissed the said application is that, the plaintiff could be prejudiced if the additional written statement is received at that stage since already the plaintiff has given evidence and also completed evidence on his part and he may not have a chance to rebut and to lead evidence with reference to the stand taken in the additional written statement. It may be true that the plaintiff would be deprived of leading any evidence in respect of the additional written statement. But, on that ground alone, the additional written statement cannot be refused to be received. At the same time, the interest of the plaintiff also is to be protected by affording sufficient opportunity to him to lead further evidence on his part in respect of the stand taken in the additional written statement.

(iv) Manu/TN/0569/2009 [V.Palanivel v. A.Sivasubramaniam]

5. Perused the additional written statement. In my opinion, the additional written statement does not contain any antithetical stand with the stand already taken by the petitioner in the written statement. It is a trite proposition of law that while considering the application under Order 8 Rule 9 of CPC, the prayer of the defendant could be dealt with liberally, but not with same rigour as that expected to be applied for considering

the prayer for amending the plaint. The observation made by the lower Court that there was delay in filing the application to some extent would weigh with the court as there should be no second thought over it. However, that could be compensated by awarding cost but the delay should not stand in the way of allowing I.A. Hence in these circumstances, the order of the lower Court is set aside by allowing this civil revision petition and the I.A.No.68 of 2007 shall stand allowed on cost of Rs.500/- (Rupees five hundred only) payable by the defendant in favour of the plaintiff within a period of 15 (fifteen) days from the date of receipt of a copy of this order, failing which this order shall not enure to the benefit of the revision petitioner. Accordingly, this civil revision petition is allowed. Consequently, connected miscellaneous petition is closed.

(v) 2010 (5) CTC 198 [S.Sathish and S.Raji v.Dr.Sumathi and Ors.]

7. After the trial has commenced and after the examination of the plaintiffs witnesses and after filing of proof affidavit by the first defendant, the defendants 1 and 2 filed application in I.A.No.91 of 2005 in O.S.No.11 of 2005 seeking permission to file additional written statement and in the affidavit filed in support of the said application, it has been stated that the 4th and 5th defendant viz., the respondents 4 and 5 herein played fraud on them and in order to emphasis some vital facts, they are advised to file the additional written statement and therefore, sought the permission of the Court to file the additional written statement and in the additional written statement, the revision petitioners contended that after the death of their father, the 4th defendant was in contact with them and they trusted the 4th defendant and believed that he would not go against their interest. It is further

stated that the 4th defendant engaged their counsel and conducted the case on their behalf and the written statement filed by them was also prepared at the instance of the 4th defendant and they never knew about the contents of the written statement filed in their name and without informing them, the 4th defendant sold the property to the 5th defendant and the sale deed is not a valid one and the sale is a sham transaction and with the intention of grabbing that property, the 4th defendant by misusing the power given to him created a sale deed in favour of the 5th defendant and the sale in favour of the 5th defendant in respect of Item No.5 is not valid.

26. In this case, even after allowing of additional written statement, the plaintiff will not be prejudiced as they will have to prove their status for getting a decree for partition. In so-far as the respondents 4 and 5 are concerned, they cannot seek any relief in the suit for partition filed by the plaintiffs and hence, by allowing the additional written statement, their rights will not be prejudiced and they will have to establish their right in a separate proceedings and the different stand taken by the revision petitioners in the additional written statement will not prejudice their right in proving their case that the sale in favour of the 5th respondent was a valid sale and that cannot be decided in the suit. The reason being even assuming that the sale in favour of the 5th respondent by the 4th respondent as power agent of the revision petitioners is nor valid, that will not affect the rights of the plaintiffs when they are able to establish that they are also the legal-heirs of Dr.Selvaraj along with the defendants 1 and 2. Hence, by allowing the additional written statement, the right of the plaintiffs is not going to be affected and this aspect was not taken into consideration by the trial Court, while rejecting the application.

15. Heard the learned counsel for the petitioner and the learned Senior Counsel appearing for the respondents.

16. The issue to be decided in the two CRPs is whether the reasoning given by the learned Judge for allowing the application for permission to 3rd defendant to file additional written statement to the counter claim filed by the 4th defendant is valid or not. The 4th defendant, after being impleaded as LR of the deceased 2nd defendant, filed his written statement on 24.06.2014 with counter claim against the plaintiffs and 3rd defendant. From the records, it is seen that the 3rd defendant has filed written statement on 16.07.2007 when the suit was pending in this Court, i.e. the 3rd defendant has filed his written statement earlier to that of written statement and counter claim filed by the 4th defendant. According to the learned Judge, when the 4th defendant filed written statement with counter claim, no opportunity was given to the 3rd defendant to file reply statement and issues were framed and suit was posted to 12.11.2014 for trial.

17. The learned counsel for the plaintiff /petitioner herein filed a memo for filing reply statement before the learned Judge to the

counter claim of 4th defendant and filed reply statement on 18.11.2014. Admittedly, the 3rd defendant did not take any steps for filing additional written statement with regard to the counter claim made by the 4th defendant. Trial commenced and evidence on behalf of the plaintiff and 3rd defendant was let in and closed. The Power of Attorney of 4th defendant was examined in chief and was cross examined by the learned counsel for the plaintiff/petitioner and posted for cross examination by the learned counsel for the 3rd defendant/respondent. At that stage only, the 3rd defendant has come up with the application for permission to file additional written statement to the counter claim of the 4th defendant.

18. The only reason given by the 3rd defendant is that he was under the impression that only the plaintiffs can file reply statement and hence he did not file any additional written statement. On subsequent advise by his learned counsel, he has filed the application for permission to file additional written statement to the counter claim of the 4th defendant. In this regard, the relevant provisions are Order VIII Rule 8 & 9 which reads as follows -

8. New ground of defence - Any ground of defence which has arisen after the institution of the

suit or the presentation of a written statement claiming a set-off [or counter-claim] may be raised by the defendant or plaintiff, as the case may be, in his written statement.

9. Subsequent pleadings – 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.

19. From the reading of the above two Rules, it is clear that a party has to take steps to file pleadings either reply statement or additional written statement by obtaining leave of the Court. There is no provision for the court to give opportunity to the party to file reply statement or additional written statement to the counter claim filed by one of the defendants. The learned Judge, erred in holding that no opportunity was given to the 3rd defendant to file additional written statement to counter claim of 4th defendant.

20. As already stated, it is for the plaintiffs or defendants to take steps for filing reply statement or additional written statement to

the counter claim. It is pertinent to note that after written statement of 4th defendant with counter claim, issues were framed and suit was posted for trial. At that stage, plaintiff filed memo for permission to file reply statement and permission was granted to plaintiff and he filed reply statement. On such filing, additional issues were framed on 17.1.2014. Even after that, the 3rd defendants has not taken any steps for filing additional written statement to the counter claim of the 4th defendant. The reason given by the 3rd defendant that he was under the impression that only the plaintiffs can file reply statement and therefore, he did not file any additional written statement to the counter claim of 4th defendant, is not a valid reason for permitting the 3rd defendant to file additional written statement to the counter claim of the 4th defendant, at the belated stage.

21. Ignorance of law is not an excuse. As per Order VIII Rule 9, Court has discretion to permit a party to file additional pleading at any stage of the suit. This discretionary power has to be exercised judicially, considering the facts and circumstances of the case. In the present case, the learned Judge has considered the facts on merits elaborately but failed to consider that the trial has commenced and plaintiffs and 3rd defendant have completed their evidence and the

same was closed. The witness of the 4th defendant was examined in chief and cross examined by the learned counsel for the plaintiffs. The learned Judge failed to see that by allowing the application permitting the 3rd defendant to file counter statement, additional issues are to be framed, plaintiff and 4th defendant are to be given opportunity to file their reply statement or additional written statement as the case may be and additional issues are to be framed. Trial has to be re-opened and fresh trial has to be held which will cause prejudice to the plaintiffs and 4th defendants and will delay the conclusion of the trial.

22. A subsequent pleading as per Order VIII Rule 9 can be allowed only if such subsequent pleading will not prolong the trial, complicate further proceedings or cause delay in the progress of the suit by going back to the beginning of commencement of trial. In the present case, by permitting the third defendant to file additional written statements, the learned Judge has set aside entire trial already conducted and a smooth flow of trial / proceedings had been stalled.

23. The learned Judge, by allowing the application permitting the 3rd defendant to file additional written statement has committed irregularity and failed to exercise his power properly. In view of the above circumstances, the order dated 24.01.2017 made in I.A. No.16844 of 2016 in O.S.No.12065 of 2010 on the file of VI Additional Judge, City Civil Court, Chennai is hereby set aside.

24. In the result, both the Civil Revision Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed. The learned Judge is directed to return the additional written statement filed by the 3rd defendant and proceed with the trial from the stage of cross examination of DW2 and dispose of the suit, as expeditiously as possible, not later than three (3) months from the date of receipt of a copy of this order.

30.06.2017

Index : Yes/No
rgr

To

The VI Additional Judge,
City Civil Court,
Chennai.

V.M.VELUMANI, J.

rgr

**Pre-delivery common order in
C.R.P. PD Nos.537 & 600 of 2017**

30.06.2017