

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.04.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.615 of 2017
and C.M.P.Nos.6608 and 3151 of 2017

1.Durai Ramaswamy Gounder
2.R.Visalakshi
3.Ushadevi
4.R.VenkatesaSunderesan
5.V.Visweswaran

.. Petitioners

Vs.

1.Uma @ Umamaheshwari
2.V.Siventhiran

.. Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 22.10.2016 made in I.A.No.385 of 2016 in O.S.No.61 of 2013 on the file of the learned III Additional District and Sessions Judge, Coimbatore.

For Petitioners	: Mr.V.Raghavachari
For R1	: Mr.Venkatachallapathy senior counsel for Mr.D.Balaraman
For R2	: No appearance

ORDER

This Civil Revision Petition is filed against the fair and decreetal order dated 22.10.2016 made in I.A.No.385 of 2016 in O.S.No.61 of 2013 on the file of the learned III Additional District and Sessions Judge, Coimbatore.

2. The petitioners are defendants 1 to 5, first respondent is the plaintiff and second respondent is the 6th defendant in O.S.No.61 of 2013. The suit is one for partition and other consequential reliefs. The petitioners 1 to 3 filed written statement on 30.07.2013 and are contesting the suit. In the written statement, they have stated that the first petitioner entered into partition with his only son namely, fourth petitioner and it was registered on 10.04.1970. Fourth petitioner, subsequently, entered into another partition with his sons viz., fifth petitioner and second respondent vide partition deed dated 20.12.1999. First respondent filed I.A.No.385 of 2016 seeking permission to amend the plaint by including the additional reliefs, which are morefully mentioned in the schedule to petition.

3. According to the first respondent/plaintiff, the partition deeds dated 10.04.1970 and 20.12.1999 are only sham and nominal, they are not acted upon and not binding on the first respondent. The first respondent came to know about the partition deeds, though it is dated 10.04.1970 and 20.12.1999, only when the petitioners 1 to 3 filed the written statement. In the earlier suit O.S.No.194 of 2012 filed by the first respondent against the petitioners challenging the cancellation of the settlement, written statement was filed by the first petitioner, in which, he has not mentioned about the earlier partition deeds dated 10.04.1970 and 20.12.1999. Therefore, the amendment sought for is pre-trial amendment and request for permission to include the additional reliefs, as cited supra.

4. The petitioners 1 to 3 remained exparte. The fourth petitioner has filed counter affidavit and the same was adopted by the fifth petitioner. Second respondent has made an endorsement that no counter has been filed.

5. According to the petitioners 4 and 5, the first respondent knew about the partition deed dated 20.12.1999 even before filing

of the suit and the relief sought for is barred by limitation. First respondent has no locus-standi to challenge the said partition deed in the year 2016.

6.The learned Judge considering the averments made in the affidavit, counter affidavit and materials available on record allowed the application holding that whether the first respondent is aware of the partition deed at the time of filing of the suit and whether the said partition deed is sham and nominal can be decided only after completion of trial by appreciating the oral and documentary evidence let in by the parties.

7. Against the fair and decreetal order dated 22.10.2016 made in I.A.No.385 of 2016, the present civil revision petition is filed.

8. Learned counsel for the petitioners submitted that the first respondent is not entitled to challenge the two partition deeds dated 10.04.1970 and 20.12.1999. The present relief sought for is barred by limitation. Any registered document must be challenged within three years and first respondent cannot challenge the same after 40

years. The benefit under the Hindu Succession Amendment Act, 2005 is not available to the first respondent. He further submitted that the learned Judge in a mechanical manner allowed the application after amendment to Civil Procedure Code in a casual manner and amendment ordered is contrary to the facts. By amendment, the first respondent has introduced new cause of action. Hence, he has prayed for allowing this revision. In support of his contention, he has relied upon the following judgments:

(i) ***(2011) 9 SCC 126 in (Khatri Hotels Private Limited and another v. Union of India and another)***, wherein para-27 and 30, it is held as follows:

"27. The differences which are discernible from the language of the above reproduced two articles are:

(i) The period of limitation prescribed under Article 120 of the 1908 Act was six years whereas the period of limitation prescribed under the 1963 Act is three years and,

(ii) Under Article 120 of the 1908 Act, the period of limitation commenced when the right to sue accrues. As against this, the period prescribed under Article 58 begins to run when the right to sue first accrues.

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30. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued. "

(ii) **(2016) 1 SCC 332 (L.C.Hanumanthappa (since dead) represented by his legal representatives Vs. H.B.Shivakumar)**, relevant portions are extracted hereunder:

"13. We have heard the learned counsel for the parties. It is not disputed that Article 58 of the Limitation Act would apply to the amended plaint inasmuch as it sought to add the relief of declaration of title to the already existing relief for grant of permanent injunction.

28. Article 120 of the 1908 Act was interpreted by the Judicial Committee in *Bolo v. Koklan* [(1929-30) 57 IA 325 : AIR 1930 PC 270] and it was held: (IA p. 331)

'There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.'

The same view was reiterated in *Annamalai Chettiar v. Muthukaruppan Chettiar* [ILR (1930) 8 Rang 645] and *Gobinda Narayan Singh v. Sham Lal Singh* [(1930-31) 58 IA 125]. "

9. Learned senior counsel appearing for the first respondent submitted that the first respondent filed a vacate stay petition and she came to know about the partition deed only when written statement was filed by the petitioners on 30.07.2013. In the said written statement only, partition deeds were mentioned and the said deeds were not mentioned in the written statement filed in the earlier suit O.S.No.194 of 2012, which was filed by the first respondent for injunction against the petitioners. The learned Judge

rightly allowed the application by holding that whether the first respondent had knowledge of partition deeds before filing of suit and whether the documents are sham and nominal can be decided only after completion of the trial by appreciating oral and documentary evidence let in by the parties. In support of his contention, he has relied on the judgment reported in **(2009) 10 SCC 84 (Revajeetu builders and developers Vs. Narayanaswamy and sons and others)**, in para-63, it is held as follows:

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bona fide or mala fide;

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to

injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive. "

10. Heard both sides and perused the materials available on record.

11. First respondent filed the suit for partition and above stated reliefs. The petitioners and second respondent are contesting the suit. Before commencement of trial, the first respondent has filed an application to permit her to amend the plaint by including include the additional reliefs, which are morefully mentioned in the schedule of amendment viz., for declaration that the partition deeds dated 10.04.1970 and 20.12.1999 in respect of the suit property

are sham and nominal, not acted upon and also not binding on the plaintiff/first respondent.

12. According to the first respondent, she came to know about the partition deeds only from the written statement filed in the suit.

13. According to the petitioners, first respondent knew about the partition deeds earlier before filing of the suit and claim of the first respondent is barred by limitation. The above rival contentions can be decided only after oral and documentary evidence let in by the parties. The judgment relied upon by the learned senior counsel for the first respondent is squarely applicable to the facts of the present case. The judgments relied on by the learned counsel for petitioners are not applicable to the facts of present case.

14. The learned Judge has given cogent and valid reasons while allowing the application. The learned Judge has exercised his power properly. Therefore, I do not find any illegality or irregularity in the order passed by the trial Court warranting interference by this Court.

15. In the result, the civil revision petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

19.04.2017

Index : Yes
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To

III Additional District and Sessions Judge, Coimbatore.

V.M.VELUMANI, J.

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