

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.2908 of 2011
and
M.P.No.1 of 2011**

P.K.Karuppan

.. Petitioner

Vs.

1.Subbarayan by General
Power Agent N.Raju

2.Subbarayan

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 02.07.2010 passed in I.A.No.780 of 2008 in O.S.No.109 of 2007, on the file of the learned Subordinate Judge, Namakkal.

For Petitioner : Mr.S.Victor Prasath

For Respondents : Mr.C.Jagadish (for R2)

No Appearance (for R1)

ORDER

The petitioner has filed this Civil Revision Petition to set aside the fair and decreetal order dated 02.07.2010 passed in I.A.No.780 of 2008 in O.S.No.109 of 2007 by Learned Subordinate Judge, Namakkal.

2.The case of the revision petitioner is that he as plaintiff has filed the suit in O.S.No.109 of 2007 for specific performance as against the 2nd defendant on the basis of a sale agreement dated 04.09.2006 entered upon by the revision petitioner and the defendant in respect of suit schedule property. Having received the advance amount, the respondent refused to accept the balance sale consideration offered by the revision petitioner and failed to execute the sale deed in favour of the revision petitioner. Therefore the revision petitioner has filed the above suit in O.S.No.109 of 2007 for specific performance. In the mean time the revision petitioner found that in the sale agreement dated 04.09.2006, the properties mentioned in schedule "A" and "B" remained added erroneously by the document writer, who scribed the sale agreement. Originally the agreement was entered upon only in respect of "B" and "C" scheduled property mentioned in the plaint.

Whereas the "A" and "B" schedule properties were mistakenly included in the sale agreement document, as well in the plaint also. Therefore the petitioner has filed an application under Oder 6, Rule 17 CPC to carry out the correction by removing the items 1 and 2 from the suit schedule. However, the learned trial Judge on misconception of facts and law has dismissed the revision petitioner's application in I.A.No.780 of 2008 sought for amendment. The said order is impugned herein.

3.I heard Mr.S.Victor Prasath, learned counsel appearing for the petitioner and Mr.C.Jagadish, learned counsel appearing for the 2nd respondent and no representation on behalf of the 1st respondent and perused the entire records.

4.The learned counsel for the petitioner would submit that revision petitioner having found that in the sale agreement dated 04.09.2006, the properties mentioned in schedule "A" and "B" in respect of which there was no agreement executed but stood added erroneously by the document writer, who scribed the sale agreement. The agreement was entered upon only in respect of "B" and "C" scheduled properties mentioned in the plaint, whereas the "A" and "B"

scheduled properties were mistakenly included in the sale agreement document and in the plaint. Therefore petitioner has filed an application under Order 6, Rule 17 CPC to carry out the correction by deleting the items 1 and 2 from the suit schedule. However, the trial Court by adopting a mechanical approach that the petition is not maintainable, the petition came to be dismissed. The learned trial judge failed to see that the amendment sought by the revision petitioner would not alter the nature and character of the suit. Furthermore amendment sought by the revision petitioner ought to have been permitted for the purpose of complete adjudication of controversies and disputes involved in the suit.

5. Per contra, the learned counsel for the 2nd respondent would submit that the petition filed by the revision petitioner is not maintainable, since the amendment has been sought for removal of 1st and 2nd item of properties from the suit schedule, since the same stand incorporated in the sale agreement itself. Therefore the relief sought for by the revision petitioner was rightly negated by the Trial Court.

6.A perusal of the order of the trial Court discloses that the learned trial judge has dismissed the revision petitioner's application on the sole ground that the amendment sought for by the revision petitioner is impermissible, unless otherwise the sale agreement dated 04.09.2006 itself is amended by removing the 1st and 2nd item of suit schedule properties, the proposed amendment in the suit cannot be made by the revision petitioner. Further it was held that in a suit for specific performance the enforcement of an agreement cannot be made in part.

7.Now the question arise before this Court is that whether the amendment of pleading or amendment of rectification of the instrument itself is permissible under Specific Relief Act 1963.

8.In this context it would be relevant to look into Section 26 of the Specific Relief Act which runs as follows:

Section 26 - When instrument may be rectified:- (1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles 628

of association of a company to which the Companies Act, 1956 (1 of 1956), applies) does not express their real intention, then,-

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the Court finds that the instrument, through fraud or mistake, does not

express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim."

9. Thus it is precise that both rectification of instrument as well as the amendment of pleading could be made by a party, if the same is claimed to be out of a mistake or fraud. Further it is needless to say that the amendment sought herein is a Pre-Trial amendment and the same is to be considered liberally. Furthermore the amendment sought for by the revision petitioner, if granted, would not alter the nature and character of the suit.

10. In the light of the above said legal proposition and the facts involved in the case, the fair and decreetal order of the learned Subordinate Judge, Namakkal, dated 02.07.2010 passed in I.A.No.780 of 2008 in O.S.No.109 of 2007 is liable to be set aside.

11. In the result:

(a) this Civil Revision Petition is allowed by setting aside the order passed in I.A.No.780 of 2008 in O.S.No.109 of 2007, dated 02.07.2010, on the file of the learned Subordinate Judge, Namakkal;

(b) the defendant is permitted to file additional

written statement, if any, within a period of 30 days from the date of filing the amended plaint;

(c) on filing the additional written statement, the trial Court is directed to dispose the suit within a period of three months thereafter. No costs. Consequently, connected miscellaneous petition is closed.

27.01.2017

Note: Issue order copy on 16.08.2017

Internet: Yes

Index: Yes

vs

To

The Subordinate Judge,
Namakkal.



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M.V.MURALIDARAN, J.

VS



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