

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2017

CORAM :

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

Civil Revision Petition (NPD) No.1061 of 2012
and
M.P.No.1 of 2012

1.Sananulla
2.Sadhulla (died)
3.Rahimunnisa
4.Narulla
5.Samiyulla
6.Nazreema
7.Asraj Ali
8.Jasmine .. Petitioners
(Petitioners 6 to 8 brought on record as legal heirs
of 2nd petitioner as per the order dated 12.08.2016
in M.P.No.1 of 2014)

1.Salma
2.Mohammed Basha
3.Hayath Basha
4.John Basha
5.Jaheer
6.Mumtaj
7.Sadigi
8.Indirani Ammal
9.M.K.Settu
10.Kamrudheen

.. Respondents

Revision filed under Article 227 of Constitution of India against
the fair and decretal order in I.A.No.115 of 2010 in A.S.No.83 of 2008

on the file of the Principal Sub Court, Thiruvannamalai dated 22.12.2012.

For Petitioners : Mr.V.Raghavachari

For Respondents : Mr.D.Govind Reddy
(for R3, R4, R7, R9 & R10)

No Appearance (for R1, R2, R5, R6 & R8)

ORDER

This Civil Revision Petition has been filed by the petitioners seeking to set aside the order dated 22.12.2012 passed by the Principal Sub-Court, Thiruvannamalai in I.A.No.115 of 2010 in A.S.No.83 of 2008.

2. The petitioners, who are plaintiffs in the suit, have preferred an appeal being A.S.No.83 of 2008 seeking to set aside the judgment and decree dated 31.10.2006 made in O.S.No.474 of 1996 on the file of the Principal District Munsif Court, Chengam.

3. The plaintiffs have filed the suit O.S.No.474 of 1996 to declare that the suit properties belong to them and for permanent injunction restraining the defendants, their men and agents from interfering with

the peaceful possession and enjoyment of the suit properties by the plaintiffs. After full contest, the suit was dismissed by the trial Court. Aggrieved by the same, the plaintiffs have filed the aforesaid appeal.

4. Pending appeal, the plaintiffs have filed application being I.A.No.115 of 2010 under Order 6, Rule 17 of Code of Civil Procedure, 1908 to amend the plaint seeking an alternative prayer for partition and separate possession of the suit properties alleging that the suit properties are the absolute properties of the petitioners. It is stated in the affidavit that based on the rights over the suit properties, they have filed the suit for declaration and permanent injunction. It is alleged that the suit properties were allotted to the share of the petitioners' father. In the written statement, the deceased first defendant pleaded that he is the joint owner of the suit schedule item 2 and as per the partition deed dated 19.03.1945, the suit schedule item 1 fell into the share of Abdul Wahab Sahib. It is further alleged that in its judgment, the trial Court held the partition deed dated 19.03.1945 is not a partition deed and based on Ex.B26, they cannot claim partition and therefore, the plaintiffs are not entitled to the declaration and permanent injunction as sought for. When such is the finding arrived at by the trial Court, in the interest of justice, it is

necessary to amend the prayer for partition and separate possession. No prejudice would be caused, if the amendment is allowed. Therefore, in order to avoid multiple proceedings, it is necessary to amend the plaint.

5. The respondents have filed the counter stating that the suit properties and other properties originally belong to one Puttu Sahib @ Sabji Sahib. During 1940, by oral partition, the legal heirs of Puttu Sahib divided some of the properties and the remaining properties were divided by the three sons of Puttu Sahib vide partition deed dated 19.03.1945. The trial Court held that the partition deed dated 19.03.1945 and the Koorchit dated 19.09.1951 are not valid. Likewise, the trial Court discarded the plea of the plaintiffs that they had purchased the properties during 1955 by oral sale. The suit properties were already divided by metes and bounds and the respective sharers were enjoying their respective shares. It is stated in the counter that some of the properties were sold by the petitioners to the respondents. The entire properties were not shown in the appeal. The properties mentioned in the appeal are the properties of the respondents and they are in possession of the same. Hence, prayed for dismissal of the application.

6. Upon consideration of the rival submissions, the learned Subordinate Judge dismissed the application holding that the trial Court dismissed the suit and based on the opinions given by the trial Court in the judgment, the plaintiffs cannot change the prayer. The learned Subordinate Judge further held that the proposed amendment, if allowed, would change the entire cause of action and the basic structure of the suit itself.

7. Challenging the order of the learned Subordinate Judge, the plaintiffs have filed the present Civil Revision Petition.

8. I heard Mr.V.Raghavachari, learned counsel for the petitioners and Mr.D.Govind Reddy, learned counsel for the respondents 3, 4, 7, 9 and 10. I have also perused the materials available on record. There is no representation on behalf of the respondents 1, 2, 5, 6 and 8.

9. The learned counsel for the appellants submitted that the petitioners have filed the amendment petition mainly to decide the real controversy between the parties and division of the properties. However, the appellate Court dismissed the application. He would

submit that the proposed amendment would neither introduce any new cause of action nor alter the nature and character of the suit. The findings of the appellate Court that the amendment sought would alter the nature of the suit is against the dictum laid down by this Court as well as the Hon'ble Supreme Court. He would further submit that the plaintiffs have every right to seek amendment of the plaint at any stage. In support of his submissions, the learned counsel cited the decisions reported in (2009) 10 SCC 626 [Surender Kumar Sharma v. Makhan Singh] and (2009) 11 SCC 308 [Peethani Suryanarayana and another v. Repaka Venkata Ramana Kishore and others].

10. Per contra, the learned counsel for the respondents submitted that the appellate Court has rightly dismissed the application by holding that if the proposed amendment is allowed, the entire character of the suit would be altered. He would further submit that if the amendment is allowed at the appeal stage, the respondents would be put to irreparable loss and damage. The appellate Court has rightly dismissed the application and no interference is warranted.

11. As stated above, the suit in O.S.No.474 of 1996 filed by the plaintiffs for declaration and for permanent injunction was dismissed

by the trial Court after full contest. In its judgment, the trial Court held that the plaintiffs are not entitled to the declaration as sought for in the suit, which shows that the plaintiffs have failed to establish their case that they are having rights over the suit properties. The said findings of the learned trial Court has now been challenged by the plaintiffs by way of appeal in A.S.No.83 of 2008. While so, as rightly pointed out by the learned counsel for the respondents and as rightly observed by the learned trial Court, how the plaintiffs can change their mind and file an application to amend the plaint for partition and separate possession of the suit properties. As also rightly held by the appellate Court, if the proposed amendment is allowed, it would alter the entire character of the suit and moreover, the same cannot be permitted at the appellate stage.

12. In *Peethani Suryanarayana, supra*, the Hon'ble Court held that Court can allow the amendment provided (i) application is bona fide; (ii) does not cause injustice to other side; and (iii) does not affect the right already accrued to the other side.

13. On overall analysis of the materials available on record, I find that there is no bona fide in the application. If the proposed

amendment is allowed, definitely, it would cause injustice to the other side. Moreover, both sides have claimed certain rights over the suit properties and the trial Court, upon consideration of the documents and evidences produced before it, held that the plaintiffs are not entitled for the relief sought for in the suit. When findings are now under challenge in the appeal, at this stage, if the proposed amendment is allowed, the rights, if any, accrued to the defendants would be affected.

14. In *Surender Kumar Sharma*, supra, the Hon'ble Supreme Court held that while considering the belated amendment, the Court must bear in favour of doing full and complete justice in the case where the party against whom the amendment is to be allowed, can be compensated by costs. It was further held that only because there was some delay in filing the application for amendment of the plaint, such prayer for amendment cannot be allowed.

15. In the said case, pending suit, the plaintiff therein had filed amendment application, whereas in the case on hand, the suit was decreed and at the appellate stage that too after the two years from the date of filing of the appeal, the plaintiffs have filed the application

to amend the plaint. In such view of the matter, the decisions cited by the plaintiffs are of no use to them.

16. The appellate Court was right in holding that if the proposed amendment is allowed, the character and nature of the suit would be altered. The cause of action for the proposed amendment would also be changed. If the plaintiffs want to file a suit for partition, they can very well file the same, as per law, if so advised. On the other hand, they cannot seek to amend the prayer for partition at the appellate stage. Furthermore, there are no valid grounds for interference of this Court.

17. In the result:

(a) The Civil Revision Petition is dismissed by confirming the order passed in I.A.No.115 of 2010 in A.S.No.83 of 2008, dated 22.12.2012, on the file of the Principal Sub Court, Thiruvannamalai;

(b) The first Appellate Court, namely, the Principal Sub-Court, Thiruvannamalai is directed to dispose of the appeal in A.S.No.83 of 2008 within a period of one month from the date of receipt of a copy of this order;

(c) Liberty is given to the petitioners/appellants/
plaintiffs to file separate suit for partition, if so advised. No
costs. Consequently, M.P.No.1 of 2012 is closed.

24.08.2017

Note: Issue order copy on 09.04.2018
vs

Index : Yes
Internet : Yes

To

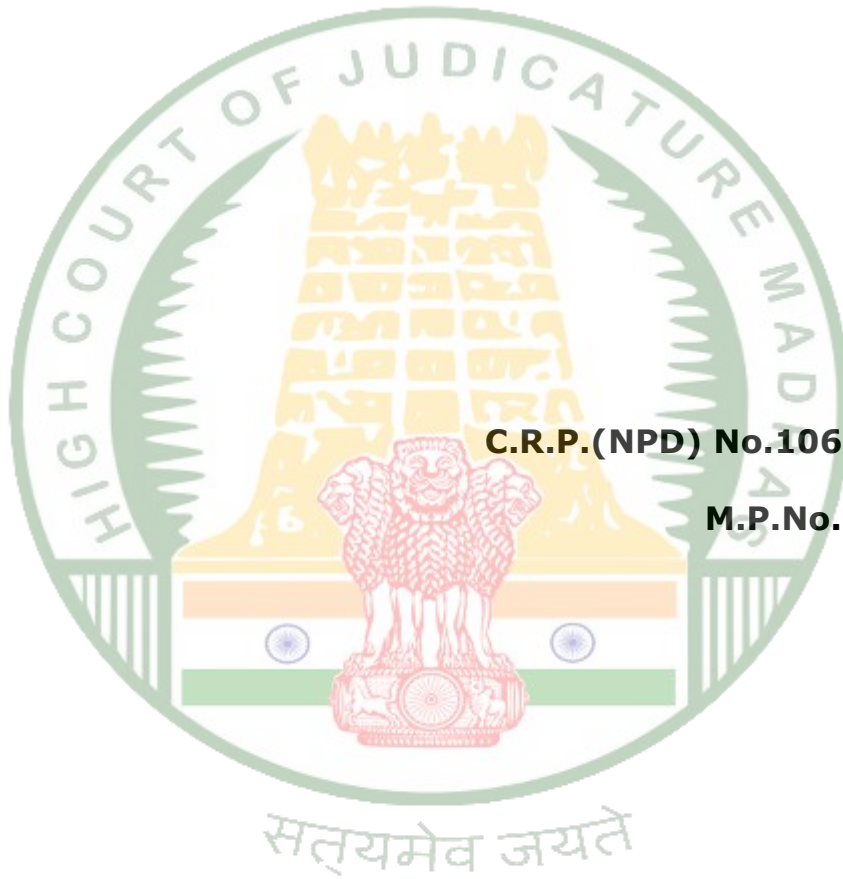
The Principal Sub Court,
Thiruvannamalai.



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M.V.MURALIDARAN,J.

VS



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