

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. PD No.3746 of 2012
& M.P.No.1 of 2012 and
CMP No.14312 of 2016**

1.Pelakshin Nirmala
2.Ethiraj

...

Petitioners

Vs

1.U.Jayanthi
2.Umapathy

...

Respondents

Civil Revision Petition is filed under Section 83 (9) of Wakf Act 1995 against the fair and decreetal order dated 27.06.2012 passed in I.A.No.251 of 2012 in O.S.No.67 of 2004 on the file of the District Munsif Court at Thiruvotriyur.

For Petitioners : Mr.Ravikumar Paul,
Senior Counsel for
M/s.Paul & Paul

For respondentss : Mr.R.Natarajan

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ORDER

This Civil Revision Petition is filed against the fair and decreetal order dated 27.06.2012 passed in I.A.No.251 of 2012 in O.S.No.67 of 2004 on the file of the District Munsif Court at Thiruvotriyur.

2. The petitioners are the defendants and the respondents are the plaintiffs in the suit in O.S.No.67 of 2004 on the file of District Munsif Court, Tiruvotriyur. The respondents filed the suit for declaration and consequential relief of permanent injunction restraining the petitioners from interfering with the respondents' possession and enjoyment of the suit property. The petitioners filed written statement on 07.09.2004 denying the claim of the respondents and are contesting the suit. The respondents filed I.A.No.251 of 2012 for amendment of the plaint to include the prayer of recovery of possession.

3. According to the respondents, they filed I.A.No.372 of 2004 for interim injunction. They could not produce the sale deed dated 23.12.1912 and the original patta and they produced only the xerox copy of the sale deed at the time of hearing. The said interlocutory application was dismissed. Against the said order of dismissal, the respondents filed CMA No.9 of 2007 before Sub Court, Ponneri and the same was also dismissed. Thereafter, the respondents filed CRP (PD) No.2210 of 2011 before this Court against the order passed in CMA No.9 of 2007. This court, while disposing of the CRP, permitted the respondents to file necessary application for marking of documents.

Taking advantage of the dismissal of I.A.No.372 of 2004, the petitioners, trespassed into the suit property. By way of abundant action and to avoid multiplicity of proceedings, the respondents have filed application for amendment to include the prayer of recovery of possession.

4. The petitioners filed counter affidavit and denied all the averments made in the affidavit. According to the petitioners, even in the written statement filed on 07.09.2004, they have stated that they are in possession of the suit property and respondents are not in possession of the same. Inspite of such averments, respondents persisted on their plea that they are in possession of the suit property in I.A.No.372 of 2004, CMA No.9 of 2007 and CRP (PD) No.2210 of 2011. This court did not give any direction to the respondents to file application for amendment. This court, only gave liberty to the respondents to file application seeking permission to mark the certified copy of the sale deed. The stand of the respondents before the revenue officials for patta on the ground that they are in possession was rejected by the revenue officials. The respondents were never in possession of the suit property and at the time of filing of the suit, they did not seek relief of possession. In the present application, the respondents have not stated as to when the petitioners trespassed

into the suit property except stating that after dismissal of I.A.No.372 of 2004, the petitioners trespassed into the suit property.

5. The petitioners have stated in the counter that respondents have made vague allegations. By present amendment, respondents are seeking to include the relief of recovery of possession which is contrary to the relief already sought for. The respondents have taken a stand in I.A.No.372 of 2004, CMA No.9 of 2007 and CRP (PD) No.2210 of 2011 upto this Court and they are in possession of the suit property and contrary to such stand, respondents has filed the present application alleging that petitioners have trespassed into the suit property after dismissal of I.A.No.372 of 2004 filed by the petitioners for injunction for the purpose of filing the petition for amendment and to include a new case and new cause of action. The respondents have not stated the alleged date of tress pass by the petitioners. The contentions of the respondents that petitioners trespassed into the suit property after dismissal of the interlocutory application is not correct. It is not correct to state that without the knowledge of the respondents, the sub-division was effected. On the other hand, the respondents have challenged the sub-division before the revenue officials and the same was rejected.

6. The learned Judge, considering the averments in the affidavit and counter affidavit and other materials on record, allowed the application holding that, in the interest of justice, to avoid multiplicity of proceedings and to grant proper relief to the parties.

7. Against the said order dated 27.06.2012 passed in I.A.No.251 of 2012 in O.S.No.67 of 2004, the present Civil Revision Petition is filed.

8. The learned Senior Counsel appearing for the petitioners submitted that the learned Judge failed to see that respondents have filed application at a belated stage, after commencement of trial, when the suit was posted for cross examination of PW1 and has not given any valid reason as contemplated in Order VI Rule 17 CPC and after commencement of trial, applications for amendment is not maintainable. By amendment, the respondents are taking a contradictory stand, than the stand in I.A.No.372 of 2004, CMA No.9 of 2007 and CRP (PD) No.2210 of 2011 and before the revenue officials. The respondents have not stated as to when the petitioners trespassed into the land. The reason given by the learned Judge for allowing the application for amendment to include the prayer of

recovery of possession is arbitrary and is unjust. The amendment sought for by the respondents is barred by limitation. It takes away the accrued right of petitioners and causes great prejudice. The learned Senior Counsel relied on the judgment reported in **CDJ 2006 SC 1134 [Ajendrapradadji N.Pande & anr. v. Swami Keshaprakeshdasji.N. & others]**

10. Placing reliance on *Kailash vs. Nanhku and Others*, (2005) 4 SCC 480, 495 para 28, Mr. Vakil submitted that all the rules and procedures are hand maids of justice and the language employed by the draftsmen of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. Arguing further, learned counsel submitted unless compelled by express and specific language of the statute, the provisions of C.P.C. or any other procedural enactment ought not to be construed in a manner which would make the court helpless to meet extraordinary situations in the ends of justice. If the proviso is interpreted as providing an absolute bar or embargo, ends and interests of justice are likely to suffer. O.6.R.17 would apply not only to suit, but also to all proceedings in any court of civil jurisdiction by virtue of section 141 of the C.P.C. The question of amendment of pleadings can arise in a representative suit, admiralty suit, matrimonial proceedings, proceedings involving fundamental rights under the constitution of India and proceedings involving high

Public Interest. If the embargo or bar against amendment were to be absolute with sole qualification specified in the proviso, considerable injustice would occur, based solely on the conduct of the party seeking amendment, even to other persons. It would also lead to a strange result that a party who could not have raised the matter with due diligence before the commencement of trial is not hit by the embargo, but a party which in fact raised the matter in the suit or proceeding, albeit not by way of written statement, would be hit by the bar. Therefore, the proviso is required to be interpreted not mechanically or literally, but purposively. Keeping the purposes of O.6.R.17 in tact, the proviso intends to serve the purpose of keeping out matters from pleadings which could have with due diligence been pleaded, but in fact not pleaded. However, the purpose could not have been hyper-technical to bar amendment when matter sought to be raised was in fact raised, though not in form of written statement. Therefore for purposive interpretation, the proviso can be read as follows :

"Provided that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that the party has raised or in spite of due diligence could not have raised the matter in the suit or proceeding before the commencement of trial".

9. Per contra, the learned counsel appearing for the respondents submitted that the respondents were in possession of the suit property at the time of filing of the suit till the dismissal of I.A.No.372 of 2004 filed by the respondents for interim injunction. After dismissal of the said application only, the petitioners have trespassed into the suit property. The learned counsel for the respondents further submitted that amendment can be ordered at any stage of the suit in order to decide the issue in the suit in its entirety. The respondents are not introducing a new cause of action and a new case. In support of his contention, the learned counsel relied on the following judgments -

1. 2012 (11) SCC 341 [Abdul Rehman and anr. v. Mohd. Ruldu and ors.]

13) Next, we have to see whether the proposed amendments would alter the claim/cause of action of the plaintiffs. In view of the same, we verified the averments in the un-amended plaint. As rightly pointed out by Ms. Manmeet Arora, learned counsel for the appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the un-amended plaint. We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the un-amended plaint and, therefore, the relief of cancellation of sale deeds as sought by amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view of the same, the

contrary view expressed by the trial Court and High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for amendment of the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should have been caused to respondent Nos. 1-3 (defendant Nos. 1-3 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation.

2. 2000 (III) CTC 389 [Sanjeevi Ammal vs. Narasimha Naicker]

15. When orders are passed on the interlocutory application that defendants are in possession, to resolve the dispute between parties, relief of recovery is necessary. As was held in *Natesan and another v. Govindasami and another*, 1988 (2) LW 397, which was also a case where amendment was sought after trial court entered finding that defendant is in possession. In that case relief sought for was alternate relief. I do not think that makes any difference. In that case learned Judge held thus, ".... This prayer becomes important because of the fact that possession is claimed by the defendants did in case the trial court finds that they are in possession, then the plaintiffs will be without any effective remedy. It is only to avoid such a contingency and to avoid multiplicity of proceedings, the provisions in Order 6, Rule 7, C.P.C, are intended."(Italics supplied)

3. 100 L.W. 489 [Subashini, G v. P.Lakshmi Bai]

14. Learned Counsel for the appellants lost no time in urging that the prayer as found in the plaint after the representation would imply an admission on the part of the plaintiff that the document was

executed by Sundaramma properly and validly though it was intended to be acted upon. I am unable to accept this argument. Though I have my own doubts as to whether the plaintiff had knowledge of the change made by the counsel in the prayer in the plaint, it is unnecessary for me to consider the question. The case of a plaintiff has to be gathered from the averments made in the body of the plaint and not from the prayer paragraph. The prayer only relates to the relief which the plaintiff seeks from the Court on the basis of the averments made in the earlier paragraphs. The appropriate relief that has to be prayed for by a plaintiff is very often decided by the counsel and not by the client. The client instructs the counsel on the facts. After setting out the facts, the counsel frames the relief that has to be obtained from the Court. It is always for the Court to decide whether on the averments made in the plaint and the evidence let in by the plaintiff, the relief prayed for by the plaintiff could be granted or not. The power of the Court to mould the relief according to the facts established by evidence cannot be disputed. The dictum of Natesan, J. in *Lakshmi Ammal v. Sivakamu Natesan* (1969) 82 L.W. 589, may be referred with advantage in this connection. The learned Judge observed as follows:

It seems to me that neither of the parties, when they adduced evidence in this case, nor the courts below have kept before themselves the principles above set out from the decided cases in coming to their conclusion as to the true relationship between the plaintiff and the defendant in the matter of latter's occupation of the plaintiff's land. Also neither the plaintiff nor the defendant should be penalised for overstating their case and putting exaggerated versions. If the Court can find the true and real relationship between the parties, notwithstanding some ornamentation and some trappings in the cases of the parties, the Court should give relief according to the rights found.

In my opinion, the change in the prayer in the plaint even assuming that it was made with the knowledge and consent of the plaintiff; shall not prevent the Court from granting the appropriate relief to the plaintiff, if she has made out a case there for. The prayer in the plaint has always to follow the averments in the body of the plaint and the reverse cannot be true.

10. Heard the learned counsel for the petitioners as well as respondents, perused the materials available on record and the judgments relied on by the learned counsel for the parties.

11. The respondents have filed the suit for declaration of title and injunction. In the written statement, the petitioners have stated that the respondents are not in possession of the suit property and only they are in possession of the suit property. The respondents, till the disposal of CRP (PD) No.2210 of 2011 were taking a stand that they are in possession of the suit property and they are entitled to an order of interim injunction, pending suit. Subsequently, they have filed I.A.No.251 of 2012 for amendment of the plaint to substitute the relief of possession in the place of injunction. In the said application, the

respondents have stated that after dismissal of I.A.No.372 of 2004, the petitioners have trespassed into the suit property.

12. It is pertinent to note that the respondents have not given any details as to when the petitioners have trespassed into the suit property. From the documents filed in the typedset of papers, it is seen that the respondents were aware of the fact that the petitioners are in possession of the suit property as they have filed petition before the revenue officials for cancellation of patta issued in favour of the petitioners and order for sub-dividing the property. The petitioners have also stated that in the written statement filed on 07.09.2004 that they are in possession of the suit property. In spite of these facts, the respondents gave not filed any application for amendment at the earliest. They have filed application for amendment after commencement of trial when PW1 was examined in chief and the suit was posted for cross examination of PW1.

13. As per proviso to Order VI Rule 17 CPC, the respondents must allege and prove that in spite of due diligence, they could not file application for amendment before commencement of trial. The respondents have not given any reason for not filing the application for

amendment before commencement of trial. If the amendment now sought for is allowed, it will be introducing a new cause of action and new case. An amendment can be ordered at any stage of the suit. But the court must consider whether the amendment is necessary to decide the issue in the suit and should not cause prejudice to opposite party. The learned Judge failed to consider the order of this Court made in CRP (PD) No.2210 of 2011 and averments in the written statement, counter affidavit filed by the petitioners in proper perspective and erroneously allowed the application for amendment. The learned Judge has not properly exercised his power conferred on him. In view of the above facts, the judgments relied on by the learned counsel for the respondents are not applicable to the facts of the present case. Hence, the order dated 27.06.2012 passed in I.A.No.251 of 2012 in O.S.No.67 of 2004 is liable to be set aside and it is accordingly set aside.

14. In the result, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petitions are closed. Already there is a direction by this Court in CRP (PD) No.2210 of 2011 to dispose of the suit in O.S.No.67 of 2004 within a time frame which was not complied with by the Trial Court. Considering the fact that the suit

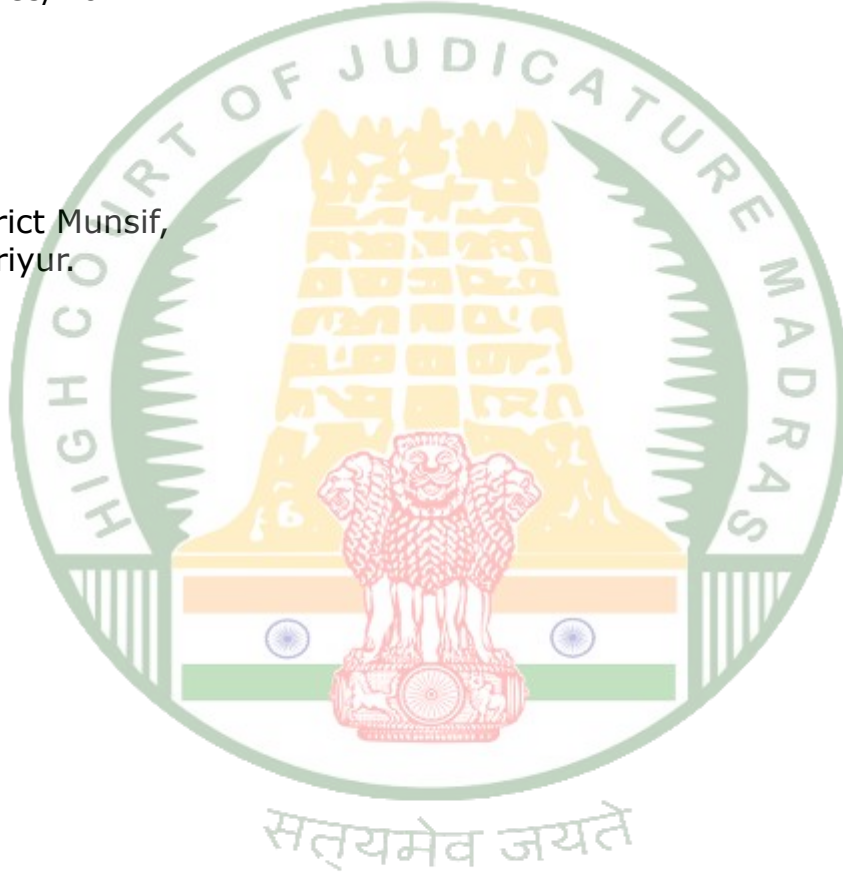
is of the year 2004, the District Munsif, Thiruvottriur is directed to dispose of the suit within a period of three months from the date of receipt of a copy of this order.

09.08.2017

Index : Yes/No
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To

The District Munsif,
Thiruvottriur.

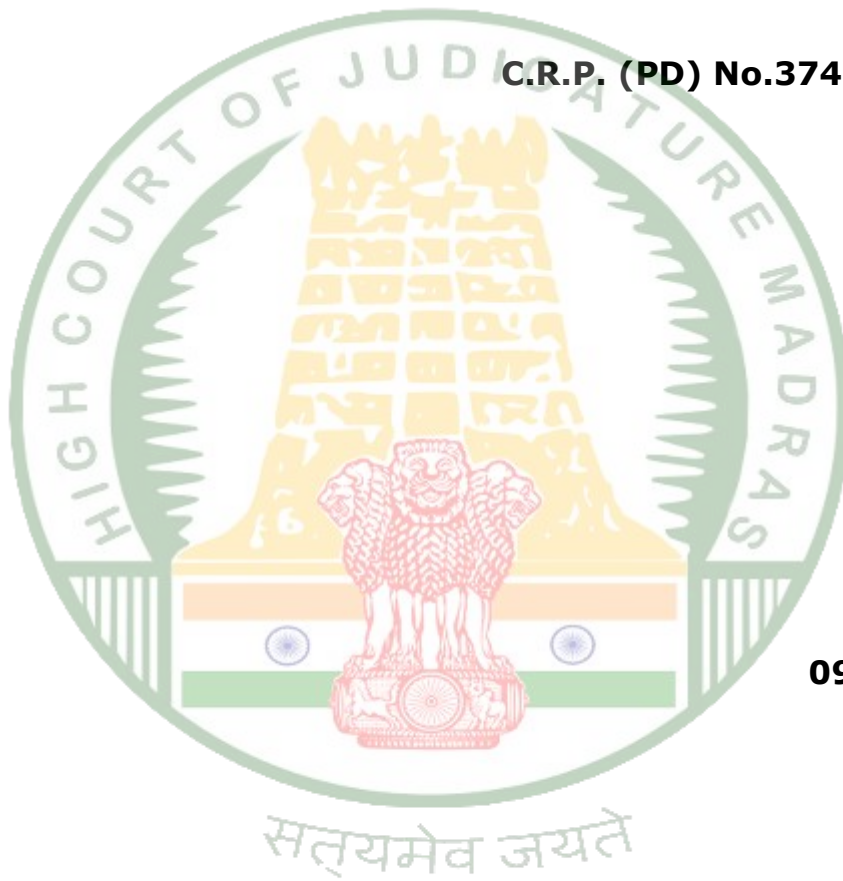


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V.M.VELUMANI, J.

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