

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

Dated: 15.11.2017

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU**C.R.P. (PD) (MD) .No.1692 of 2017****and****C.M.P. (MD) .No.9782 of 2017**

1. M.Pandi
2. Inbam
3. Shenbagam
4. Moorthy
5. Muthupetchi

... Petitioners

Vs.

M.Raju

... Respondent

PRAYER: The Civil Revision Petition is filed against the fair and decreetal order in I.A.No.955 of 2016 in O.S.No.433 of 2013 on the file of the Principal District Munsif Court, Thirumangalam, dated 23.03.2017.

For Petitioners : Mr.D.P.Sundara Raj

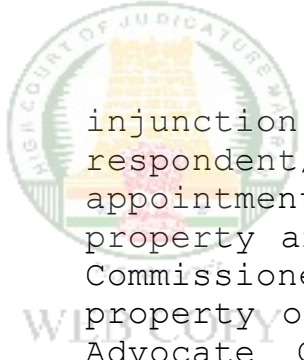
For Respondent : Mr.R.Suria Narayanan

O R D E R

The Civil Revision Petition has been filed against the fair and decreetal order dated 23.03.2017 in I.A.No.955 of 2016 in O.S.No.433 of 2013 on the file of the Principal District Munsif Court, Thirumangalam.

2. The brief facts of the case are as follows:

The respondent herein is the plaintiff in O.S.No.433 of 2013 and the petitioners are the defendants. The respondent/plaintiff purchased the suit property by a registered sale deed dated 29.10.2012 and was in possession and enjoyment of the same without any disturbance. The petitioners/defendants property is on the West and East of the suit property and it is alleged by the respondent that with a view to grab the suit property, all the petitioners/defendants are attempting to interfere with the peaceful possession and enjoyment of the same. Hence, the respondent/plaintiff filed the above suit for permanent



injunction. During the pendency of the suit, the respondent/plaintiff filed an application in I.A.No.38 of 2014 for appointment of an Advocate Commissioner to measure the suit property and the physical features of the property. The Advocate Commissioner along with the qualified Surveyor inspected the suit property on 12.07.2014 and measured the same. The report of the Advocate Commissioner revealed that the petitioners/defendants have encroached the suit property in Survey No.58/8A5 by constructing a backyard including their bathroom. Originally the suit was filed for permanent injunction. But after the report of the Advocate Commissioner, it is alleged that the respondent came to know that the petitioners/defendants have encroached the suit property. Therefore, the respondent/plaintiff filed an application in I.A.No.955 of 2016 seeking for amendment of the prayer by including the prayer of mandatory injunction to remove the encroachment.

3. The petitioners/defendants through their counter affidavit in I.A.No.955 of 2016 contended that the cause of action was arisen on 29.10.2012 and the respondent/plaintiff cannot introduce a fresh suit in the guise of amending the plaint at the trial level as the suit is abated by the limitation of time. It is also the contention of the petitioners/respondents that the Advocate Commissioner has inspected the suit property on 12.07.2014 and amending the plaint at the distance of time based on the Commissioner's report is not permissible in law. The alleged encroachment lies within the survey of first respondent / first defendant's property in Survey No.58/8A2, against whom only the respondent/plaintiff has to sue. But the respondent/plaintiff is trying to introduce some fresh cause of action by impleading the respondents 2 to 5 / defendants 2 to 5 and hence, prayed for dismissal of the application on the ground of mis-joinder of unnecessary parties. The petitioners/defendants further contended that as per old sub division, which has been accepted by the Commissioner that the building raised in the north side of the suit property exists since 100 years ago, the claim of ownership by the respondent/plaintiff is raised only after he purchased the property in S.No.58/8C which comes no alteration in Sub Division 58/8A5 and the amendment petition is filed only to mislead the Court against the issues framed fairly by the Court and if the petition is allowed, great injustice would be caused. But the trial Court has allowed the petition for amendment in I.A.No.955 of 2016 on 23.03.2016. Against which, the present Civil Revision Petition has been filed.

4. The learned counsel for the revision petitioners relied on a judgments reported in (i) **2017 (6) CTC 19 (K.Suresh Napoleon v. D.Mohan)** (ii) **2009 (14) SCC 525 (P.A.Jayalakshmi v. H.Saradha and others)**.



5. He also relied on another judgment in **Civil Appeal No.6921 of 2009**, wherein, in paragraph Nos.61 and 64, the Hon'ble Supreme Court has held that

"61. The first condition which must be satisfied before the amendment can be allowed by the Court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court."

6. The learned counsel for the respondent would submit that the learned Judge after elaborate discussion has allowed the application for amendment and to remove the encroachment and the order is a well considered order and prayed for dismissal of the Civil Revision Petition. In support of his contention, he relied on the judgment reported in **(2010) 2 LW 917**. The judgment reported in **(2010) 2 LW 917**, at paragraph Nos.57, 60, 61 and 64, relied on various judgments, which state as follows:

"57. In *Haridas Aildas Thadani and Others Vs. Godrej Rustom Kermani*, this Court said that "It is well settled that the Court should be extremely liberal in granting prayer for amendment of pleading unless serious injustice or irreparable loss is caused to the other side. It is also clear that a revisional court ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances.

60. In *Suraj Prakash Bhasin Vs. Smt. Raj Rani Bhasin and others*, this Court held that liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under pretence of amendment, that one distinct cause of action should not be substituted for another and that the subject matter of the suit should not be changed



61. The first condition which must be satisfied before the amendment can be allowed by the Court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the Courts' discretion in grant or refusal of the amendment.

64. In Ganga Bai's case (supra), this Court has rightly observed:

The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court."

7. Heard the learned counsel for the petitioners as well as the learned counsel for the respondent.

8. The respondent/plaintiff has filed the above suit for permanent injunction and during the pendency of the suit, he has filed the application for appointment of Advocate Commissioner. The Advocate Commissioner inspected the suit property along with the Surveyor and measured it and the report of the advocate commissioner reveals the physical features of the property and it does not say that the respondent has encroached the property. Only after the inspection of the Commissioner the respondent/plaintiff came to know that the petitioners/defendants have encroached the property and therefore, he filed the application to amend the plaint for mandatory injunction of removal of encroachment which will pass the first test and as far as the limitation is concerned, the amendment petition can be allowed and the parties to agitate their rights during the trial whether the petitioner is entitled for any claim as per the amendment. The above said judgments relied on by the learned counsel for the petitioners support the case of the respondent. The trial Court has rightly found and allowed the application for amendment and there is no infirmity in the order passed by the learned District Munsif, Thirumangalam in I.A.No.955 of 2016 in O.S.No.433 of 2013. Accordingly, the Civil Revision Petition is dismissed. The trial Court is directed to dispose of the suit without being influenced by the observations made in this order. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(Crl side)



To

1. The Principal District Munsif Court,
Thirumangalam.

2. The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 cc TO Mr.D.P.Sundara Raj , Advocate in SR No. 87389

Akv

AE/JC/SAR2/11.01.2018/5P/5C

C.R.P. (PD) (MD) .No.1692 of 2017
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