



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.02.2017

CORAM:

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THE HONOURABLE MS.JUSTICE V.M. VELUMANI

CRP(MD) No. 357 of 2017 (PD)

1. M. Kulasekaran.
2. K. Muthu Jeyakumar.

....Petitioners

Vs.

1.M. Dhanapathy.
2.M. Asupathy.
3.G. Kalavathy.
4.S. Kavihta.
5.B.Murugan.
6.A. Palaniraj.
7.G.Vetriselvi.
8.R. Tilakavathy.
9.Sethpathy Ramasamy
10.The Panchayat President,
Mallingapuram@ Anaimalayanpatti,
Uthamapalayam Taluk,
Theni District.
11.Jeganathan.
12.Rukmani.
13.Arumugam.
14.R.Sugumaran.
15.V.Veeranan.
16.K.Karuppiah.
17.K.Thangam.
18.K.Sundararaj.
19.S.Sahayasumitha.
20.P. Kalamani.
21.C.Venkatesh.
22.The District Revenue Officer,
Theni District.

....Respondents

Prayer: This Civil Revision Petition is filed under Section 115 of CPC to set a side the Ex-order and Fair order, dated 16.11.2016, made in I.A.No.763/2016 in O.S.No.103/2009 on the file of the District Munsif Uthamapalayam.

For Petitioners

:Mr. R. Suriya Narayanan.



O R D E R

This Civil Revision Petition is filed to set aside the Ex parte order dated 16.11.2016, made in I.A.No.763/2016 in O.S.No.103/2009 on the file of the District Munsif Uthamapalayam.

2. The petitioners are defendants 1 and 23. The first respondent / plaintiff filed suit in O.S. No. 103 of 2009, on the file of the District Munsif Court, Uthamapalayam for partition and claiming one-third share each. The petitioners and other defendants filed written statement and are contesting the suit. Trial commenced. The first respondent let in evidence. At that time, the first respondent filed I.A.No.763 of 2016, for amendment of the schedule in the plaint, with regard to extent and boundaries. According to the first respondent, he came to know about the discrepancy only from the report of the Advocate Commissioner. The petitioners filed counter affidavit and opposed the said application.

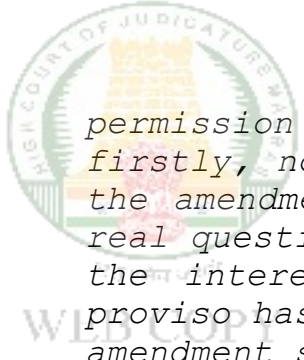
3. According to the petitioners, they filed application for an appointment of Advocate Commissioner. The first respondent filed his counter and submitted that Advocate Commissioner must be directed to measure the property as existed prior to 2007. Now, the first respondent is seeking amendment, based on the sub Division effected on 02.01.2007. The amendment sought for in the present petition will introduce a new cause of action and change entire character of the suit.

4. The learned Judge considering all the materials on record and the averments in the affidavit and counter affidavit and the report of the Advocate Commissioner and arguments of the counsel for the parties allowed the application holding that amendment sought for will not introduce new cause of action and change the character of the suit. The learned Judge has also held that in the suit for partition the extent and boundaries should be given clearly. The learned Judge also awarded cost of Rs.2,000/- to be paid.

5. Against the above said order, present Civil Revision Petition has been filed.

6. The learned counsel appearing for the petitioners reiterated the averments and relied upon the Judgment reported in **2012(2)CTC 94 (J.Samuel and others Vs. Gattu Mahesh and others)**, wherein para nos. 12 to 14, it has been held as follows:-

12) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant



permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

13) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

7. The learned counsel appearing for the first respondent submitted that respondents 2 to 22 are given up, since they remained ex parte before the lower Court.

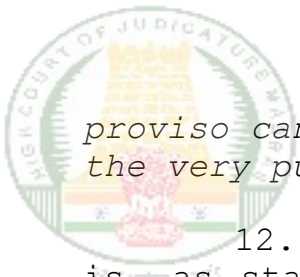
8. The learned counsel appearing for the first respondent in support of his contention relied on the following Judgments :

(i) 2015(5) LW 783 (Kandasamy and another Vs. Thiagarajan and others), wherein para no.11, it has been held as follows:-

11. In the case on hand, though the trial has commenced, taking into account the nature of amendment sought for, the Trial Court ought not to have rejected the application seeking amendment. It is well settled that Order 6 Rule 17 CPC provides for amendment at any stage of the proceedings. Hence, the same cannot be whittled down by the Proviso, particularly, if a case is made out by the parties and more particularly, if the amendment is with regard to correcting survey number etc.

(ii) 2015(5) LW 761 (Kaleeswaran Vs. Uma), wherein para nos.11 and 12, it has been held as follows:-

11. As per Order 6 Rule 17 C.P.C., amendment application could be made at any stage of the proceeding. However, the proviso restricts the Trial Court to make amendment if trial has commenced. After the trial has commenced, as per the said proviso, if the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial, the Trial Court can allow the amendment. It is well settled that the



proviso cannot be narrowly interpreted and the same cannot take away the very purpose of the provisions of the main section.

12. In this case, particularly when the amendment sought for is, as stated supra, for changing the date of the Will, the Trial Court ought to have allowed the application instead of rejecting it on the ground that no due diligence was shown by the revision petitioner as alleged by the respondent / plaintiff. Hence, I have no hesitation to set aside the order of the Trial Court.

(iii) 2008(5) CTC 253 (Rajkumar Gurawara (dead) through LRs Vs. S.K.Sarwagi & Co Pvt. Limited and another), wherein para no.5, it has been held as follows:-

5. To put it clear, Order VI Rule 17 C.P.C. confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso.

9. I have heard the learned counsels appearing on either side and perused the materials available on record.

10. The first respondent has sought for amendment of extent mentioning as per the sub division and the names of the present owner with regard to boundaries. The above amendment is only to correct the Survey Numbers and boundaries. By this amendment, character of the suit will not be changed and first respondent is not introducing new cause of action. In a suit for partition, the properties sought to be partitioned must be clearly mentioned. If there is any discrepancy with regard to description, the same can be amended in order to avoid multiplicity of proceedings. By amendment, the Court can decide the issue with regard to partition by allotting specific portion of the properties. The Judgments relied on by the counsel for the first respondent are squarely applicable to the facts of this case.

11. The learned Judge considered all these aspects and allowed the application by compensating the petitioners by imposing cost on the first respondent. Further, the learned Judge has exercised his power conferred on him properly and there is no irregularity or illegality warranting interference by this Court.



12. In the result, the Civil Revision Petition is dismissed.
No costs. Consequently, connected Miscellaneous Petition is closed.

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SD/-
ASSISTANT REGISTRAR(CS-I)

SUB ASSISTANT REGISTRAR

To

The District Munsif Uthamapalayam.

+1 CC TO MR.R.PANDI MAHARAJA,ADVOCATE,SR NO.11986

trp

MAS/SV-MMS/SAR3:10.04.2017:5P-3C

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