

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	10.09.2018
Pronounced on	26.09.2018

Coram

The Honourable Ms.Justice P.T.ASHA

C.R.P (NPD) No.1133 of 2005

and

C.M.P.No.8025 of 2005

Nallendran

...Petitioner

Versus

1.Indirani

2.A.Loganathan

...Respondents

This Civil Revision Petition is filed under Section 115 of C.P.C praying to set aside the fair and decreetal order dated 02.02.2005 made in I.A.No.4 of 2005 in A.S.No.84 of 2004 on the file of the Additional Sub-Court, Salem by allowing this Civil Revision Petition.

For Petitioner : Mr.N.Manoharan
For Respondent - 1 : Mr.M.Udhayakumar
Respondent - 2: No Appearance

O R D E R

This Civil Revision Petition is filed challenging the order passed by the learned Additional Subordinate Judge, Salem in I.A.No.4 of 2005 in A.S.No.84 of 2004, in and by which the learned Additional Subordinate Judge had allowed the Application filed by the first respondent herein seeking to transpose herself as one of the appellant in the above First Appeal.

2. The brief facts necessary for the disposal of this Civil Revision Petition are as follows:

The revision petitioner herein had filed a Suit in O.S.No.419 of 1999 on the file of the learned Principal District Munsif Court, Salem for the following reliefs:

"restraining the defendant by way of permanent injunction from selling any portion of the suit pathway also annexing the same to his land in S.No.46/2B lying South of it; directing the first defendant by way of mandatory injunction to restore the suit pathway to its original width of 12 feet throughout its length of about 50 feet by removing the boundary stones put up by him in the pathway; failing which the same may be removed through court process and restraining the second defendant from by way of permanent injunction from in any manner causing interference to the plaintiff's user of the suit pathway to go to his lands and house lying on the west through the suit pathway from the Yercaud Main Road."

3. The suit in O.S.No.419 of 1999 was decreed on 10.08.2004, in and by which the learned District Munsif, Salem had granted a permanent injunction restraining the respondents herein from interfering with the plaintiff's use of the pathway and also directing the second respondent herein to restore the pathway to its original width. The first respondent herein was impleaded as a party to the proceedings since she had purchased the property of the second respondent pending the suit. However, she was set ex-parte in the above suit. Aggrieved by the judgment and decree passed by the learned Principal District Munsif, Salem in O.S.No.419 of 1999 dated 10.08.2004, the second respondent herein had filed a First Appeal in A.S.No.84 of 2004.

4. Pending the Appeal, the first respondent herein had taken out the impugned Interlocutory Application seeking to transpose herself as an appellant in the above First Appeal. In the affidavit filed in support of the petition, the first respondent had come forward with a statement that she had no occasion to know about the proceedings in O.S.No.419 of 1999 and on account of the judgment and decree passed by the learned Principal District Munsif, Salem in O.S.No.419 of 1999, her interest, right and enjoyment of the property was in a jeopardy. She would further contend that she was under the impression that her interest would be safeguarded by the second respondent herein. Since that did not take place, she sought to get herself transposed as an appellant.

5. The revision petitioner filed a counter affidavit stating that the first respondent having remained ex-parte without even filing a written statement cannot be permitted to be transposed as an appellant when she has not even contested the suit. He would further contend that there is no procedure under Code of Civil Procedure (hereinafter referred to as C.P.C) to transpose the defendant who has remained ex-parte and figured

as a respondent in the above suit as an appellant in the First Appeal. The invocation of Section 151 of C.P.C by the first respondent to have herself transposed was criticized by the revision petitioner. He would contend that the only remedy that was available was to set aside the ex-parte decree or to file a fresh Appeal against the ex-parte decree.

6. After hearing both parties, the learned Additional Subordinate Judge, Salem by his order dated 02.02.2005, allowed the Application in I.A.No.4 of 2005 on the ground that the same would not cause prejudice to any one. Aggrieved by this order, the revision petitioner has filed the present petition.

7. Mr.N.Manoharan, learned counsel appearing on behalf of the petitioner would contend that the first respondent has come forward with a false affidavit. The statement that she came to know about the suit only recently was totally false since she had been impleaded in the suit, engaged counsel and thereafter, set ex-parte for non filing of the written statement. He would also contend that the first respondent is not a bonafide purchaser for value and therefore, she cannot be allowed to participate in the proceedings. Further, despite receipt of summons, she has remained ex-parte and has not cared to even file a written statement.

8. Mr.M.Udhayakumar, learned counsel appearing on behalf of the first respondent would submit that on the purchase of the property, the first respondent had stepped into the shoes of the second respondent and they have a common interest in the lis. He would further argue that the right of the first respondent is coextensive with that of the second respondent and therefore, she has a genuine interest in the outcome of the Appeal and hence, the order of the learned Additional Subordinate Judge, Salem transposing the first respondent as the second appellant in the First Appeal is correct and should not be interfered with. In support of his argument, he had relied on the following judgments:

- Vasanth Ammal Vs. V.P.Dhanaraj reported in 1990 - 1 - L.W. - 53
- M.Sultan Beevi @ Chinna Pillai and Ors. Vs. Uthumanummal reported in (1976) 1 MLJ 325
- R.Dhanasundari @ R.Rajeswari Vs. A.N.Umakanth and Ors. reported in 2006 (5) CTC 440
- Selvaraj S/o. Muniyandi @ Subbiah and Ors. Vs. Sundararajan S/o. Chinnaasamy and Ors. reported in MANU/TN/2418/2005
- Madhavan Pillai Vs. Vasu Pillai reported in CDJ 1988 Ker HC 474
- Bhagwati Prasad Bhagat Vs. Pahil Sundari reported in CDJ 1968 Bihar HC 075

9. Heard both sides, perused the documents and the judgments cited by the counsels on either side.

10. It is seen that the impugned Interlocutory Application has been filed invoking the inherent powers of the Court under Section 151 of C.P.C. It is also seen that the revision petitioner had impleaded the first respondent as a defendant in the suit pursuant to the purchase of the property by her. It is also seen that the second respondent has engaged a counsel but however had not filed a written statement. The suit was contested by her vendor/second respondent herein. It is also seen that the second respondent has preferred an appeal and the same is pending disposal. This clearly shows that the second respondent is adequately trying to protect his interest as well as that of his purchaser, the first respondent. At this juncture, the Application has been to be moved on the ground that the first respondent apprehended that her interest would not be amply taken care of by the second respondent/her vendor. It is no doubt true that the first respondent has not filed a written statement, however, her vendor/second respondent had filed a written statement and was contested the suit.

11.1. The present application seeking transposition has been filed immediately upon receipt of summons in the first Appeal. This Court in its judgment in the case of M.Sultan Beevi @ Chinna Pillai and Ors. Vs. Uthumanummal reported in (1976) 1 MLJ 325 has observed that when there is a joint decree, one or more of the plaintiffs or defendants who contested the decree can prefer an appeal and the results would enure to all without them filing an Appeal. This Court has also held that the provisions of Order 1 Rule 10 Sub-Rule 5 of C.P.C was wide enough to give discretion to this Court to transpose a necessary party if it were to come to the conclusion that the person so being transposed can effectively, along with the appellants put forth their contentions in respect of a joint decree which has been obtained against the appellants and the persons seeking to transpose themselves. A Division Bench of this Court in the case of Vasanth Ammal Vs. V.P.Dhanaraj reported in 1990 - 1 - L.W. - 53 has held as follows:

"3. On the question of transposition of parties, the powers of Court, are wide enough to confer a discretion on it to transpose the necessary and proper party, if that is required for an effective and a

comprehensive adjudication of the controversy in the lis. The use of the discretion will depend upon the facts and circumstances of the case. This discretion is not an unbridled one, but is circumscribed by two broad limitations. One is, where rights valuable have accrued to the other side. The other is, where there is a lack of bonafides on the part of the party seeking transposition, in that he has no plausible case to agitate, having a genuine interest in the lis. In these circumstances, the Court will fetter its hands and will not exercise its discretion. But, the question, as already noted, has to be decided depending on the facts of each case and by bare recapitulation of the principles, the Court should not abdicate its discretionary power for ordering transposition, when, in fact, that application needs to be countenanced in the interests of justice and on the facts of the case."

11.2. Applying the principles to the instant case, it is seen that the first respondent has purchased the second respondent's interest and therefore, the decree would have a direct bearing on the first respondent and she therefore has to protect her interest. It also appears that the appellants have substantial defense inasmuch as they have questioned the very existence of the pathway and the first respondent is only seeking to step in as an appellant at the stage of the Appeal. The judgment of the Kerala High Court in Madhavan Pillai Vs. Vasu Pillai reported in CDJ 1988 Ker HC 474 relates to a situation where the person seeking to transpose himself as a plaintiff in the lower Court and thereafter, on an Appeal, the judgment of the trial Court was confirmed and at the stage of Appeal, the Application for transposition was filed. One of the arguments advanced was that by not filing the written statement the fourth appellant was admitting the correctness of the allegations made in the plaint and therefore, it is to be presumed that his case is that of the plaintiff.

12. The learned Judge ultimately held that where the defendants are jointly made liable, the claim should not be defeated on a technical objection and the same should be remedied by impleading the defendants as co-plaintiffs.

13. Considering all the above factors, this Court is of the view that the order of the learned Additional Subordinate Judge, Salem does not suffer from any infirmity.

14. In the result, this Civil Revision Petition is dismissed and the order passed by the learned Subordinate Judge, Salem in I.A.No.4 of 2005 in A.S.No.84 of 2004 dated 02.02.2005 is confirmed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

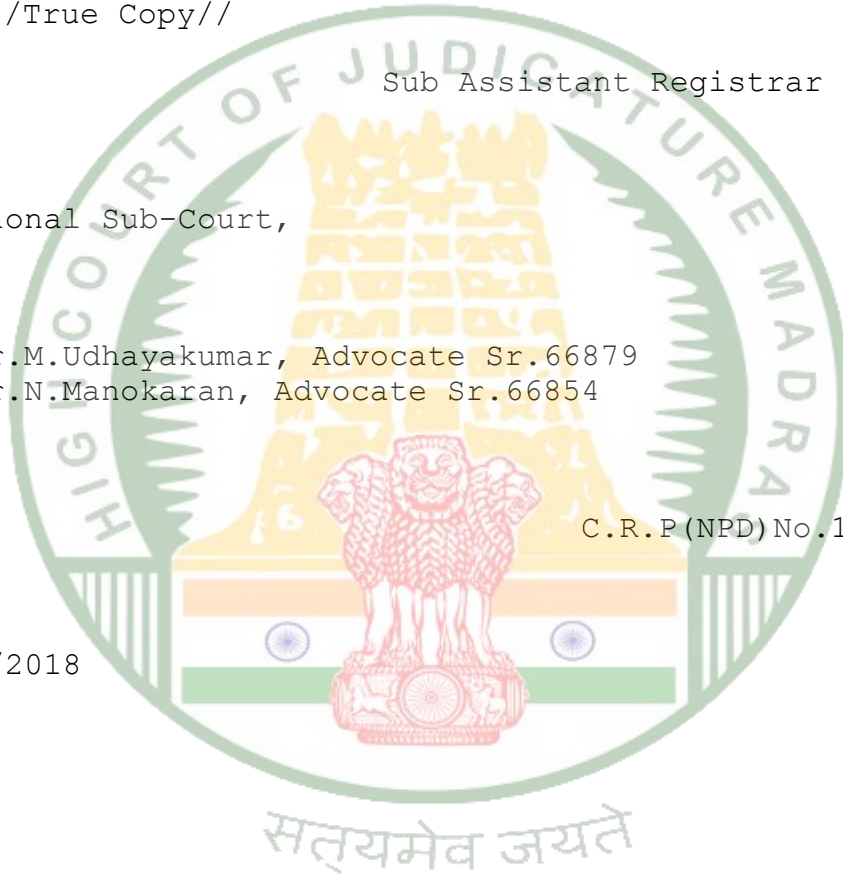
To

The Additional Sub-Court,
Salem.

+2cc to Mr.M.Udhayakumar, Advocate Sr.66879
+1cc to Mr.N.Manokaran, Advocate Sr.66854

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