

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.11.2018

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.R.P.(PD).No.4391 of 2013

and

M.P.No.1 of 2013

S.Kumaravadivelu
Power Agent of P.Manickam

.. Petitioner

..Vs..

1.Periyasamy
2.S.Senthilkumar
3.Puspanathan

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India praying to set aside the fair and final order dated 26.09.2013 passed by the Learned Principal District Munsif, Thiruchengode in I.A.No.354 of 2013 in O.S.No.179 of 2012.

For Petitioner : Mr.A.Ragupathy Raj

For Respondent 1 : No appearance

For Respondents 2 & 3 : Mr.N.Manokaran

ORDER

The instant revision has been filed challenging the order dated 26.09.2013 passed by the learned Principal District Munsif, Thiruchengode in I.A.No.354 of 2013 in O.S.No.179 of 2012.

Brief facts leading to the filing of the instant revision:

2. The Petitioner filed suit O.S.No.179 of 2012 seeking for bare injunction restraining the respondents from interfering with the peaceful possession and enjoyment of the suit schedule property. The Petitioner P.Manickam claims ownership of the suit schedule property by virtue of a registered Will executed by one Nachimuthu in his favour. P.Manickam is represented by his power agent S.Kumaravadivelu in the suit as well as in this revision. The respondents who are the defendants in the suit have disputed the registered Will executed in favour of P.Manickam in their written statement filed before the Trial Court on 24.09.2012. The trial commenced and the Petitioner side oral evidence was also completed before the Trial Court. Thereafter, the Petitioner filed I.A.No.354 of 2013 in O.S.No.179 of 2012 seeking amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure. In the amendment application

I.A.No.354 of 2013, the Petitioner has sought to amend the pleadings and add the relief of declaration to declare the Petitioner as the absolute owner of the suit schedule property. The respondents have also filed their counter to the amendment application before the Trial Court. The Trial Court by its order dated 26.09.2013 in I.A.No.354 of 2013 dismissed the amendment application filed by the Petitioner.

3. Aggrieved by the dismissal of I.A.No.354 of 2013, the instant civil revision petition has been filed before this Court under Article 227 of the Constitution of India.

Submissions of the learned counsels:

4. Heard, Mr.A.Ragupathy Raj, learned counsel for the Petitioner and Mr.N.Manokaran learned counsel for the second and third respondents. There is no representation on the side of the first respondent.

5. According to the learned counsel for the Petitioner, the amendment application filed by the Petitioner ought to have been

allowed by the Trial Court for the purpose of determining the real question in controversy between the parties. According to the learned counsel, since the respondents have disputed the registered Will executed in favour of the Petitioner, the amendment application was filed seeking to amend the plaint by including the relief of declaration to declare that the suit schedule property is absolutely owned by the Petitioner which is necessary for the purpose of determining the real question in controversy between the parties.

6. The learned counsel for the Petitioner further submitted that the written statement was filed by the respondents on 24.09.2012 and the amendment application was filed on 29.04.2013 and only due to inadvertence, the amendment application was filed after commencement of trial. According to the learned counsel for the Petitioner, the reasons given in the affidavit filed in support of I.A.No.354 of 2013 for not filing the amendment application before trial is satisfactory.

7. The learned counsel for the Petitioner drew the attention of this Court to the Judgment of the Hon'ble Supreme Court in the case of

ABDUL REHMAN AND ANOTHER VS. MOHD. RULDU AND OTHERS

reported in **(2012) 11 SCC 341** and referred to paragraph 10 of the said judgement and submitted that courts will have to be liberal in allowing amendment applications even if it is filed after commencement of trial.

8. Per contra learned counsel for the second and third respondents would submit that the reasons given by the Petitioner in support of I.A.No.354 of 2013 are bereft of any particulars and the reasons contained therein are unsatisfactory. According to him, the respondents have consistently disputed the execution of the alleged Will in favour of the Petitioner even prior to the institution of the suit by the Petitioner. He drew the attention of this Court to Paragraphs 9, 10 and 11 of the written statement wherein the respondents have disputed the execution of a Will in favour of the Petitioner.

9. The learned counsel for the second and third respondents also drew the attention of this Court to the following Judgments of the Hon'ble Supreme Court:

a) VIDYABAI AND OTHERS VS. PADMALATHA AND ANOTHER reported in (2009) 2 SCC 409.

b) J.SAMUEL AND OTHERS VS. GATTU MAHESH AND OTHERS reported in (2012) 2 SCC 300.

Relying upon these said Judgments, the learned counsel for the second and third respondents would submit that the Petitioner has not been diligent in filing the amendment application and the reasons contained in the affidavit filed in support of the amendment application does not satisfy the requirement of the Proviso to Order VI Rule 17 of Code of Civil Procedure.

Discussions:

10. Order VI Rule 17 of Code of Civil Procedure which deals with the amendment of pleadings reads as follows:

***“17. Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*”**

Provided 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.”

As seen from Order VI Rule 17 of Code of Civil Procedure, an amendment application can be filed before and after commencement of trial. But an amendment application filed after commencement of trial can be entertained by the Court only if the applicant despite exercise of due diligence was unable to file the same before commencement of trial. In the instant case, we need to examine whether due diligence was exercised by the Petitioner for not filing the amendment application before commencement of trial.

11. In the case on hand, suit was filed by the Petitioner seeking permanent injunction restraining the respondents from interfering with his peaceful possession and enjoyment of the suit schedule property. The first and third respondents are the brothers of the Petitioner (P.Manickam) and the second respondent is the son of the Petitioner's deceased brother Shanmugam.

12. The case of the Petitioner as seen from the plaint filed in O.S.No.179 of 2012 is that he is the owner of the suit schedule property by virtue of a registered Will dated 02.11.2011 executed by his father Nachimuthu registered as document No.69 of 2011. The plaint averments also discloses that the respondents interfered with the peaceful possession and enjoyment of the suit schedule property by the Petitioner.

13. Based on the said plaint averments, the suit O.S.No.179 of 2012 was filed by the Petitioner before the Trial Court seeking permanent injunction restraining the respondents from interfering with the peaceful possession and enjoyment of the suit schedule property. A written statement was filed by the respondents in O.S.No.179 of 2012 before the Trial Court on 24.09.2012 disputing the registered Will dated 02.11.2011 allegedly executed by Nachimuthu in favour of the Petitioner. Admittedly, as per the submissions of both the counsels, trial commenced and the Petitioners side oral evidence was also completed and only after completion of the Petitioner side evidence, the Petitioner filed I.A.No.354 of 2013 in O.S.No.179 of 2012 seeking amendment of the

pleadings under Order VI Rule 17 of Code of Civil Procedure. In the amendment application, apart from seeking other amendments to the pleadings, the Petitioner seeks an additional relief for declaration to declare that the Petitioner is the absolute owner of the suit schedule property by way of an amendment.

14. As seen from the affidavit filed by the Petitioner in support of I.A.No.354 of 2013, the Petitioner has stated that due to inadvertence, the amendment sought for in the amendment application could not be asked at the first instance. Excepting for stating inadvertence, the Petitioner has not given any specific reason as to why the said reliefs mentioned in the amendment application were not sought for in the original plaint itself or at least immediately after filing of the written statement by the respondents i.e., before commencement of Trial.

15. As seen from Proviso to Order VI Rule 17 of Code of Civil Procedure, the amendment application can be entertained by the Court after commencement of trial only under exceptional circumstances. The Petitioner will have to satisfy the Court that in spite of due diligence, he

was unable to file the amendment application before commencement of trial.

16. Paragraphs 19, 20 and 21 of the Judgment of the Hon'ble Supreme Court cited supra reported in (2012) 2 SCC 300 referred to by the learned counsel for the second and third respondents lucidly explains the term due diligence contained in the proviso to Order VI Rule 17 of Code of Civil Procedure and it reads as follows:

“19. 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.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it 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.

21. In the given facts, there is a clear lack of “due diligence” and the mistake committed certainly does not come within the perview of a typographical error. The term “typographical error” is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.”

17. In the case on hand, there were disputes between the Petitioner and the respondents in respect of the suit schedule property even prior to the filing of the suit. This necessitated the Petitioner to file the suit against the respondents.

18. In the amendment application filed by the Petitioner in I.A.No.354 of 2013, the Petitioner seeks to amend the pleadings and include the relief of declaration that he is the absolute owner of the suit schedule property. The declaratory relief could have been sought for by the Petitioner even at the time of the institution of the suit by including the said relief also in the plaint. The Petitioner in the plaint filed in O.S.No.179 of 2012 has also not filed any application under Order II Rule 2 of Code of Civil Procedure for relinquishment of part of claim and for seeking leave of the Court to sue for the relinquished claims at a later date. The necessity to file an amendment application did not arise out of any factor subsequent to the filing of the suit. The amendment of pleadings as well as insertion of a new prayer of declaratory relief could have been very well included in the original plaint itself. But for reasons best known to the Petitioner, the declaratory relief was not sought in the plaint filed at the inception.

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19. The written statement was filed by the respondents on 24.09.2012. In the written statement, the respondents have disputed the execution of the registered Will by Nachimuthu in favour of the

Petitioner. Even after filing of the written statement on 24.09.2012, the Petitioner has not immediately filed the amendment application seeking amendment of pleadings, but has filed the same only on 29.04.2013, that too, only after commencement of trial and after completion of the Petitioner's oral evidence.

20. The Petitioner, the first and third respondents and the father of the second respondent viz., Shanmugam are the children of Nachimuthu. The respondents are not strangers/third party to the Petitioner and they are the Petitioner's own blood relations. Even before filing of the suit, they were disputing the exclusive ownership of the suit schedule property by the Petitioner.

21. The only reason given in the affidavit filed by the Petitioner in support of I.A.No.354 of 2013 is that due to inadvertence, the new pleadings and the relief of declaration could not be included at the time of inception of the suit. Excepting for the said averment, the Petitioner has not given any valid reason for not filing the amendment application before commencement of trial.

22. Further, as discussed earlier, this Court is of the considered view that the declaratory relief as well as the other amendments sought for by the Petitioner in I.A.No.354 of 2013 could have been included in the plaint filed at the inception in O.S.No.179 of 2012. Furthermore, in case of relinquishment of a part of claim, the Petitioner ought to have filed an application seeking leave of this Court under Order II Rule 2 of Code of Civil Procedure for relinquishing a part of the claim. In the instant case, the Petitioner has neither filed an application under Order II Rule 2 of Code of Civil Procedure nor has given sufficient reasons in his affidavit filed in support of I.A.No.354 of 2013 for not filing the amendment application prior to commencement of trial. There is a clear lack of due diligence on the part of the Petitioner in filing the amendment application. Once due diligence has not been exercised by the Petitioner, the Court's jurisdiction to allow an application for amendment after trial is taken away.

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23. Paragraph 10 of the Judgment of the Hon'ble Supreme Court cited supra reported in (2012) 11 SCC 341 referred to by the learned counsel for the petitioner reads as follows:

“10. Before considering the factual details and the materials placed by the appellants praying for amendment of their plaint, it is useful to refer Order 6 Rule 17 which is as under:

“17. Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided 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.”

It is clear that parties to the suit are permitted to bring forward amendment of their pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them. The courts have to be liberal in accepting the same, if the

same is made prior to the commencement of the trial, If such application is made after the commencement of the trial, in that event, the court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

24. Paragraphs 10 and 11 of the Judgment of the Hon'ble Supreme Court cited supra reported in **(2009) 2 SCC 409** referred to by the learned counsel for the second and third respondents reads as follows:

“ 10.By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:

Provided 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.”

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied

viz. It must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at differed stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding".

As seen from the above said Judgment, before commencement of trial, the Courts can be liberal in accepting the application. But if the application is filed after commencement of trial, the Courts will have to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

25. In the instant case, as discussed above, this Court is of the considered view that the petitioner has not exercised due diligence as required by the proviso to Order VI Rule 17 of Code of Civil Procedure.

ABDUL QUDDHOSE, J.

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26. This Court is of the considered view that the Trial Court has rightly rejected I.A.No.354 of 2013 and this Court does not find any infirmity in the said order. In the result, there is no merit in this revision and accordingly, the Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

16.11.2018

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Index:Yes/No
Internet:Yes/No
Speaking/Non-Speaking orders

To
The Principal District Munsif,
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