

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)Nos.3034 and 3035 of 2015

1.Palaniammal
2.M.Shanmugavadivu
3.K.Kanchana
4.K.Jagadhambal
5.B.Saravanan
6.B.Anguraj
7.B.Balaji
8.Vijayalakshmi
9.Subramaniam

.. Petitioners in
both C.R.Ps.

Vs.

1.Sukumar
2.Sundaravadivel
3.Yuvaraj
4.Banumathi
5.Kalavathi
6.Selvi
7.Jamunarani

.. Respondents in
both C.R.Ps.

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COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decretal order dated 23.03.20215 made in I.A.Nos.129 and 130 of 2013 in O.S.No.533 of

1988 on the file of the I Additional Subordinate Court, Erode.

For Petitioners : Mr.B.Kumarasamy

For R1, R2,
R4, R5 & R7 : No appearance

For R3 & R6 : Mr.N.Manokaran
for Mr.D.Gopal

COMMON ORDER

These Civil Revision Petitions have been filed against the fair and decretal order dated 23.03.20215 made in I.A.Nos.129 and 130 of 2013 in O.S.No.533 of 1988 on the file of the I Additional Subordinate Court, Erode.

2.The issues and the parties involved in both the Civil Revision Petitions are one and the same and therefore, disposed of by this common order.

3.The first petitioner is one of the plaintiffs and respondents are the defendants 2 to 8 in O.S.No.533 of 1988 on the file of the I Additional Subordinate Court, Erode. The first petitioner along with her sister, Lakshmi filed the said suit against the respondents for declaration and possession. The said suit was decreed on

11.11.1993, only with regard to declaration and relief of possession was rejected. The petitioners filed A.S.No.814 of 1995 against dismissal of relief of possession before this Court and the same was allowed by the judgment and decree dated 20.04.2009. This Court granted both the reliefs of declaration and injunction. Before the Hon'ble Apex Court, the respondents filed S.L.P (Civil) No.13327 of 2011 and when the same was taken on file, an affidavit of undertaking dated May 2011, agreeing to vacate the premises on or before 14.10.2011 and surrender the vacant possession was filed. The said S.L.P was dismissed. The respondents did not surrender the vacant possession as agreed upon. The petitioners filed E.P.R.No.14 of 2010 for possession and delivery was ordered. Delivery warrant was issued on 20.10.2011 when the Court Amin went along with Village Administrative Officer. It was found that the Re-Survey number was wrongly mentioned as 329 instead of 330. The petitioners have filed two applications I.A.Nos.129 and 130 of 2012 to correct the survey number in schedule to the plaint and decree in O.S.No.533 of 1988. According to the petitioners, the Resurvey number was wrongly given due to clerical mistake. Unless the mistake is corrected, the petitioners will be put to irreparable loss and will not be in a position to realise the fruits of decree.

4.The respondents filed separate counter affidavits and took similar stand and contended that by amendment, a new case is introduced and the property in R.S.No.330 was not an issue in the suit, Appeal before this Court and S.L.P before the Hon'ble Apex Court. The respondents agreed to vacate and hand over the property to the petitioners only in R.S.No.328. The petitioners have filed the present applications to grab the property of the respondents in R.S.No.330.

5.The learned Judge by the order dated 23.03.2015, dismissed both the applications on the ground that petitioners have not filed any document to show that schedule of the property in R.S.No.329 was mentioned instead of R.S.No.330 and they have not mentioned on what basis, the R.S.No.329 was mentioned instead of R.S.No.330 and after obtaining the decree in the suit of the year 1988 and two appeals, the amendment sought for is not maintainable.

6.Against the said order of dismissal dated 23.03.20215 made in I.A.Nos.129 and 130 of 2013 in O.S.No.533 of 1988, the present

two Civil Revision Petitions are filed by the petitioners.

7.The learned counsel for the petitioners contended that the learned Judge is not correct in holding that by amendment in Re-Survey number, a new case will be introduced. The petitioners have correctly given boundaries and only one Re-Survey number has been wrongly given due to clerical mistake. The learned Judge has dismissed both the applications on technical ground based on the objection of the respondents. The respondents have not objected to survey number given in the schedule to the plaint and has not mentioned the correct survey number. The parties contested the suit, Appeal and S.L.P, knowing the correct property and at no point of time, there was any doubt about the identity of the property. The respondents have not disputed the correctness of the boundaries given in the plaint.

8.The learned counsel for the petitioners in support of his contentions, relied on the judgment reported in **1997 MLJ 481 (Swaminathan and another Vs. Duraisami and others):**

Civil Procedure Code (V of 1908), Sec.152 – Plaint and decree sought to be amended belatedly after finality

of proceedings in Supreme Court – Amendment for the purpose of correcting error in survey member in the schedule of property – held: since the mistake is bona fide the amendment can be ordered. Of course, the amendment sought for in this case can be said to be belated, but that may not be a ground to reject the amendment when the petitioner had succeeded in all the forums and got a decree for recovery of possession. If the amendment is rejected on such flimsy technical objections raised by the learned counsel for the respondents, then not only the person who obtained the decree is deprived of the benefit of the decree but also the time spent by all the court in disposing of the matter is to be considered as waste of judicial time. Since the mistake in the description of the property is bona fide, the review application can be ordered and the decree in O.S.No.67 of 1976 on the file of the Court, Chidambaram, so far as item 22 of the schedule mentioned property in the decree the survey number has to be corrected.

9.Per contra, the learned counsel for the respondents 3 and 6 contended that property in R.S.No.330 belongs to the respondents and that property was not the subject matter of the suit, Appeal before this Court and S.L.P before the Hon'ble Apex Court. The said property belongs absolutely to the respondents and only to grab

their property, the petitioners have come out with the present applications seeking amendment. The learned Judge have given valid reason for dismissing the applications and prayed for dismissal of both the Civil Revision Petitions. After judgment and decree, description of the property in the schedule to the property and in the decree cannot be amended. Only, when any clerical mistake had crept in the decree, the same can be corrected by the Court. By the amendment sought for, the petitioners are introducing new cause of action and new case. The respondents agreed to vacate and hand over possession of property in R.S.No.328 and they did not agree to vacate and hand over the property in R.S.No.330.

10. In support of his contentions, the learned counsel for the respondents 3 and 6 relied on the judgments reported in:

(i) 1998 (II) CTC 345 (Lingammal and 7 others Vs. Periappappa @ Lingammal and another):

“4. The prayer in the application is curious. The prayer is for amendment of the plaint, the final decree application and the preliminary decree passed in this case. Thus three prayers have been asked for in a single application. This application is purported to have been filed under Order 6, Rule 17 and sections 151 and 152, CPC. Let us now see

whether the prayer can be permitted at all, The District Munsif has not at all considered the application in a proper perspective. The order passed appears to be totally a perverse one. There is no explanation given at all in the affidavit for this enormous delay. It is not stated in the affidavit that a mistake was committed in setting out the survey number or boundaries and the mistake could be found out only subsequently. On the other hand, the only ground which is put forward is that there are clerical errors. How the clerical errors crept in is not sought to be explained. The plaintiffs have been granted 1/6th share in item-2, item-4, item-5, and item-6. Item-2 describes the property was comprised in survey No.496. According to the petitioner survey No.498 has to be substituted in the place of survey No.496. It is not stated in the affidavit that survey No.498 is the correct survey number and that it has been wrongly given as 496. It is simply stated in paragraph 4 that in the place of survey No.496, 498 has to be substituted. How and why is not explained in the affidavit. But the petitioners would conveniently hide under the clerk of clerical error. Then parties have gone for trial. Then the direction of the trial court was challenged in appeal. The matter has been pending in the court from the year 1981. The plaintiffs filed an application to pass final decree in the year 1992. All these years, they have kept quiet. The clerical error was not there and suddenly according to the plaintiffs it has come to light only in the year 1994. The affidavit itself is only in the year 1994. The affidavit itself is confusing. While in paragraph 4, it is stated that in respect of item-2 survey No.498 has to be substituted

in the place of 496, it is also stated that 498 has to be substituted in the place of 495 mentioned in the preliminary decree....."

(ii) CDJ 2005 MHC 1049 (Pappa & others Vs. K.R.Rangasamy

& Others):

"14. In the Trial Court as well as in this Court, reliance has been placed upon the decisions reported in 1996 (2) C.T.C. 66. In the said case, suit was for Recovery of Possession and Survey Number of the Suit Property was wrongly given in the Plaint. On Application filed under Section 152 C.P.C, the Survey Number of the Suit Property was ordered to be corrected. In the said decision, it was observed that

"...Section 152 C.P.C application is maintainable even to correct clerical or arithmetical errors in the Plaint. Decree obtained for particular Survey Number can be corrected at the time of Execution...."

In the case in hand, the Survey Number sought to be corrected is not a mere typographical error or clerical mistake; but a substitution of a new survey number. Hence, the observations in the above decision cannot be applied to the case in hand.

15. The Court may allow the Amendment only if it does not cause prejudice to the other side. No Amendment should be allowed, which amounts to defeating the legal right accrued to the opposite party by lapse of time. The

Preliminary Decree was passed even in 1988; Final Decree in 1995. Over the years, substantial right might have been accrued to the Defendants over the Suit Property – Item No.1. The same cannot be allowed to be defeated by ordering change of Survey Number.”

(iii)(2015) 8 SCC 716 (Ramesh and Harbans Nagpal and

Others):

“6.On 30.04.2007 application was preferred on behalf of Respondent 1-plaintiff for execution of the aforesaid decree. Soon thereafter he filed an application dated 07.08.2007 under Section 151 of C.P.C for amendment of the decree. It was stated therein as under:

“1.That the site plan does not show the precise location of the place surrendered or ordered to be given in possession of the plaintiff by the defendants.

2.That although the order and decree sheet clears whatever is to be given to the plaintiff and as against the defendants.

3.That it is highly improper to go beyond the decree sheet and the decree passed by the Court and therefore, it is appurtenant to describe to the bailiff as to where he has to act and what he has to do so that time of Court and the bailiff is not wasted and decree of this Hon'ble Court be obeyed and ought to be under law.”

7.The aforesaid application was dismissed by the trial court vide its order dated 15.10.2007 holding that there was

no clerical error or accidental omission in the decree and that taking on record the amended site plan at that stage would amount to going behind the decree and modifying the terms of the original decree. In the mean time the appellant-defendant 2 got the knowledge of ex parte decree dated 07.02.2007 and preferred an application under Order 9 Rule 13 of C.P.C for setting aside the same, which application is still pending consideration."

11. Heard the learned counsel for the petitioners as well as the respondents 3 and 6 and perused the materials available on record and the judgments relied on by both the parties.

12. The petitioners have sought for declaration and recovery of possession. In the schedule to the plaint, the petitioners have mentioned R.S.No.328 and 329. The petitioners have given boundaries for the property which they are seeking declaration and recovery of possession. The relief sought for by the petitioners are finally concluded in the Hon'ble Apex Court. When the petitioners filed E.P.No.14 of 2010 for possession, it was found out that one of the Survey numbers given by the petitioners as 329 is not correct and the correct Survey number is 330. In view of such mistake, the court Amin did not deliver the possession to the petitioners. The

petitioners in the circumstances, filed the present two applications for amending the schedule to the plaint and decree by substituting R.S.No.330 instead of R.S.No.329. According to the petitioners, the mistake is clerical mistake. The respondents opposed the same on the ground that by amendment, the petitioners are introducing a new case and trying to grab the property of the respondents in R.S.No.330, which was not subject matter of the suit, Appeal and S.L.P. The said contentions of the respondent are not acceptable. The petitioners are seeking to correct only one of the Survey numbers given in the schedule to the plaint and decree. The petitioners are not seeking to alter the boundaries or any other particulars. There was no dispute with regard to identity of the properties and parties contested the proceedings based on the boundaries given by the petitioners. The issue whether correction can be made in the schedule after decree was considered by the Hon'ble Apex Court in **2003 (2) SCC 330 (Pratibha Singh V. Shanti Devi Prasad)** and **AIR 2004 SC 904 (Ravinder Kaur V. Ashok Kumar)** which was followed by this Court in the order dated 30.08.2011 made in C.R.(NPD).Nos.2946 & 2947 of 2011, wherein it has been held by this Court that correction in door number / survey number can be made even after judgment and decree. Following the above

two judgments, this Court (myself) in C.R.P.No.1585 of 2015, by the order dated 22.12.2017 has ordered amendment. The relevant paragraphs are extracted hereunder:

"7(c) It is also well stated that by judicial pronouncement that a decree holder cannot be deprived off fruits of the decree by mistake in the plaint which was reflected in the decree drawn in favour of the decree holder. It is also well settled that decree holder is not left without any remedy to amend the plaint, documents or decree in any legal proceedings. In the present case, the petitioners are seeking correction of survey number and not the door number, street name and town in which the property is situated. In view of the said relief, the contention of the learned counsel for the respondents that petitioners are introducing a new case is without merits. In the said circumstances, the judgment relied on by the learned counsel for the respondents does not advance the case of the respondents to the facts of the present case.

7(d) As far as Order VII Rule 3 C.P.C is concerned, the petitioners have given door number, street name and town in which the suit property is situated. These particulars are sufficient to identify the suit property so as to effect delivery to the petitioners. The reasoning of the learned Judge for dismissing the application for amendment are not valid and the impugned order of the learned Judge is liable to be set aside for the reasons stated above. Accordingly, the impugned order of the learned Judge dated 28.01.2015

in I.A.No.860 of 2014 in O.S.No.710 of 1996 is hereby set aside."

In the present case also, the petitioners have stated boundaries which are not disputed by respondents. There is no difficulty in identifying the property.

13.As held in the judgments referred to above, Executing Court has power to amend the survey number and it will not amount to introducing new cause of action or new case. In view of the well settled judicial pronouncements and the fact that there is no difficulty in identifying the property, the impugned order of the learned Judge dismissing the applications for amendment suffers from illegality and irregularity warranting interference by this Court. For the above reason, the impugned orders of the learned Judge dated 23.03.20215 made in I.A.Nos.129 and 130 of 2013 in O.S.No.533 of 1988 are set aside and the Civil Revision Petitions are liable to be allowed.

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14.In view of the judgments of the Hon'ble Apex Court reported in **2003 (2) SCC 330 (Pratibha Singh V. Shanti Devi Prasad)** and **AIR 2004 SC 904 (Ravinder Kaur V. Ashok Kumar)** and

order dated 30.08.2011 made in C.R.P (NPD)Nos.2946 and 2947 of 2011 and the order dated 22.12.2017 made in C.R.P.No.1585 of 2015, the judgments relied on by the learned counsel for the respondents 3 and 6 are not applicable to the facts of the present case.

15. Accordingly, both the Civil Revision Petitions are allowed. No costs. The petitioners are directed to carry out the amendment within a period of three (3) weeks from the date of receipt of a copy of this order and the learned Judge is directed to proceed with the E.P.No.14 of 2010 and order delivery of possession to the petitioners.

22.02.2018

Index : Yes

Speaking Order/Non-Speaking Order

gsa

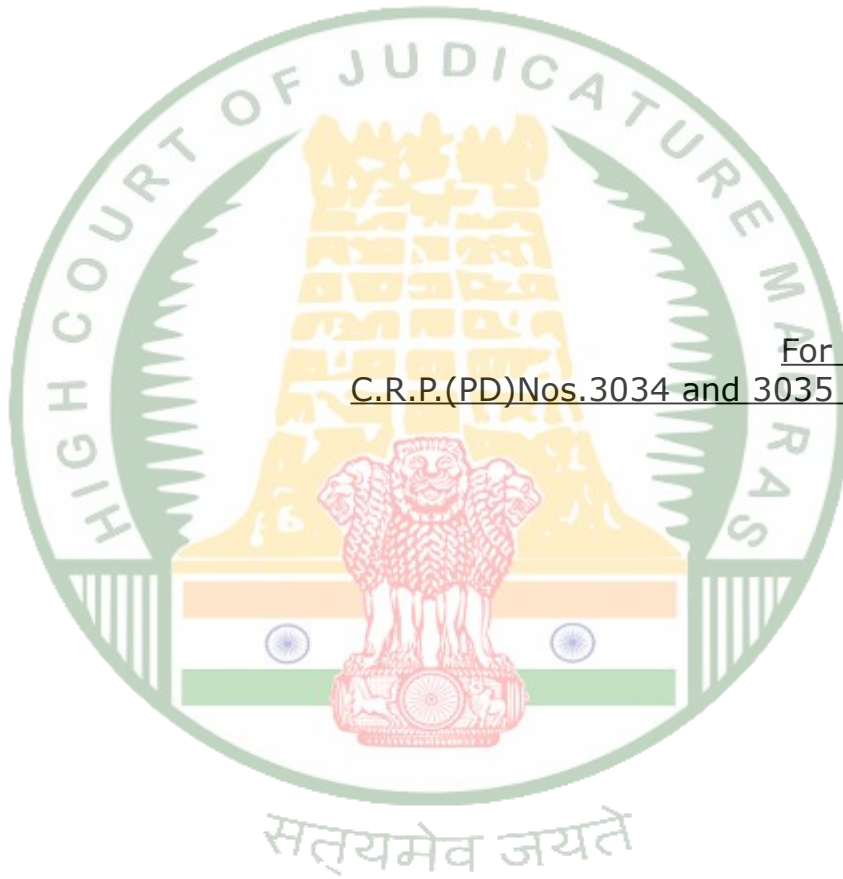
To

The I Additional Sub Judge,
Erode.

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V.M.VELUMANI, J.

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For order in
C.R.P.(PD)Nos.3034 and 3035 of 2015

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