

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2018

CORAM :

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.3440 of 2012
and M.P.No.1 of 2012

Umapathy Odayar

...

Petitioner

Vs.

- 1.Lakshmiammal (Deceased)
- Appu Padayatchi @ Iyyavou Padayatchi @ Kuttiandi (died)
- (Rep. By his Lrs. R6 to R10)
- 2.Nehru
- 3.Gopalasamy Counder
- 4.Padmavathy @ Kanniammal
- 5.Sadagopan
- 6.Jayalakshmi
- 7.Veerappan
- 8.Muniammal
- 9.Rani
- 10.Valliamma (minor)
- (Rep. By her mother, 7th respondent as her guardian)
- 11.Zealatchoumy
- 12.Morugane
- 13.Mohan

...

Respondents

(R11 to R13 are brought on record
as L.R of the deceased R1 vide order
of Court dated 04.12.2014 made in
M.P.Nos.1 to 3/2014 in C.R.P.No.3440/2012)

PRAYER: Civil Revision Petition filed under Article 227 of the

Constitution of India to set aside the fair and decretal order dated 25.04.2012 made in I.A.No.442 of 2010 in O.S.No.59 of 2006 on the file of the Court of the III Additional District Judge, Puducherry.

For Petitioner : Mr.T.P.Manoharan
Senior Counsel for
Mr.K.P.Jotheeswaran

For Respondents : R1 – Died
Not ready in notice
Reg. R2, R3 & R5

No appearance for
R4, R6 to R10

Mr.T.Sathiamoorthy for
M/s.G.M.Mani Associates
for R11 to R13

ORDER

This Civil Revision Petition is filed to set aside the fair and decretal order dated 25.04.2012 made in I.A.No.442 of 2010 in O.S.No.59 of 2006 on the file of the Court of the III Additional District Judge, Puducherry.

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2.The petitioner is second defendant, deceased first respondent is the plaintiff, respondents 2 to 10 are the defendants 3 to 11 and respondents 11 to 13 are the legal heirs of the deceased

plaintiff in O.S.No.59 of 2006 on the file of the Court of the III Additional District Judge, Puducherry. The first respondent filed the said suit for declaration of title and various other reliefs. The petitioner filed written statement on 28.10.2004 and 4th respondent filed written statement on 23.04.2004 and are contesting the suit. Trial commenced. The first respondent and petitioner let in evidence and closed their side. When the 4th respondent gave evidence as D.W.3, the petitioner has come out with the present application, I.A.No.442 of 2010 for permission to file additional written statement. According to the petitioner, the first respondent is claiming title to the suit property based on the Donation Deed dated 10.02.1972. The property mentioned in the Donation Deed and suit property are entirely different. In view of the same, there is no cause of action for the first respondent to institute the present suit. The petitioner came to know about the discrepancy only when the 4th respondent gave evidence.

3.The deceased first respondent filed counter affidavit and contended that the petitioner did not raise this issue in the written statement filed by him and he has not disputed the schedule of the

property when he cross examined the respondents and when he let in evidence. The property in the Donation Deed as well as schedule of the property, suit property are correlated as per the Revenue records and Resurvey.

4.The learned Judge considering all the materials available on record and deposition relied on by both the parties, dismissed the application.

5.Against the said order of dismissal dated 25.04.2012 made in I.A.No.442 of 2010 in O.S.No.59 of 2006, the present Civil Revision Petition is filed by the petitioner.

6. The learned Senior Counsel for the petitioner contended that permission to file additional written statement can be granted even if the defendant is taking inconsistent plea in additional written statement but not mutually destructive plea. Additional written statement can be allowed to be filed if no prejudice is caused to the plaintiff and even if any prejudice is caused the plaintiff, if the same can be compensated by awarding costs, additional written

statement can be permitted to be filed. In the written statement, the petitioner had not specifically stated that the property mentioned in the schedule to the plaint is not that of the property mentioned in the donation deed. The properties mentioned in the donation deed and the schedule to the plaint are entirely different. The property has to be co-related with the revenue records. The revenue records can be produced only when the defendant has disputed the description of the property. The properties mentioned in the donation deed as well as the schedule to the plaint are shown to be situated in two different villages and further contended that the Civil Revision Petition may be allowed on terms.

6(a) In support of his contention, the learned Senior Counsel for the petitioner relied on the following judgments -

(i) 2010 (5) CTC 198 (S.Sathish and another Vs. Dr.Sumathi and others)

15. In the written statement, originally filed by the revision petitioners, they admitted the execution of the power in favour of the 4th respondent. In the additional written statement, they have taken the plea that the 4th respondent played fraud on them and after the death of their father, the 4th respondent was taking care of them and they trusted the 4th respondent and executed a power in his favour and the 4th respondent took advantage of the

power sold the 3rd item in favour of the 5th respondent for a lesser consideration, though the property is worth more than 17 lakhs and the sale is not valid under law and they are not bound by the same. It is further admitted that while plaintiffs witnesses were examined, no such plea was taken as claimed in the additional written statement. Even, while filing the proof affidavit, the first defendant did not take such stand and only after the case was posted for the cross examination of the first defendant, the 1st defendant has come forward with the application for receipt of the additional written statement and has taken a different stand in respect of the 3rd item of the property and in the additional written statement, he also questioned the competency of the 4th respondent to execute the sale deed and also made allegations against the 4th defendant. In such circumstances, we will have to see whether such application for filing additional written statement can be permitted. It is settled principles of law that in the written statement, the defendant is entitled to take mutually inconsistent plea and he is not permitted to take mutually destructive plea. Further, in the additional written statement though the defendant is entitled to take inconsistent plea, he is prohibited from introducing a new case or taking a mutually destructive plea. Further, the Courts have held that the Courts must be liberal in receiving the additional written statement and the principles, which govern the amendment of written statement should not be imported in the case of receipt of the additional written statement. In the case of amendment of written statement, if the defendant wants to erase or delete admission or statement made in the original statement and introduce a new set of facts by which the benefits accrued to the parties by reason of the admission made by the defendants in the original written statement is taken away and therefore, in such circumstances, the Courts have held that when by reason of the amendment of the written statement, the admission made by the defendants are sought to

be erased and a new case is put forward that should not be allowed.

18. Further in the judgement reported in 2009(6)MLJ 933 in the case of *E.O.Mohammed Ali vs. Dessi Ammal Alias Jessima Deevi and others*, this Court has held that when no inconsistent stand has been taken in the written statement it can be allowed.

19. Further this Court has held in the judgment reported in 2007(4) MLJ 1098 in the case of *S.Suresh vs. Sivabalakannan* that leave to file additional written statement is to be granted liberally, except when the defendant raises mutually destructive pleas or tries to introduce a new case altogether by way of filing an additional written statement.

20. It has been held in the judgment reported in 2007(5) CTC 722, in the case of *Muthuraman vs. Muthukumar* that object of filing of additional written statement is to supply what might have been omitted in written statement filed earlier and such additional written statement can be allowed if it is not likely to cause prejudice to plaintiff.

21. The Honourable Supreme Court in the judgment reported in 2009(7)MLJ 1081 [SC], in the case of *Olympic Industries vs. Mulla Hussainy Bhai Mulla Akerally and others* held that introducing new ground of defence in additional counter statement is not ground for dismissing application so long as same does not result in causing grave injustice and irretrievable prejudice to plaintiff.

22. In the judgment reported in 1999(3) CTC 52, in the case of *Subramanian and three others vs. Jayaraman*, it has been held that subsequent pleadings by defendant even though contradictory to the original written statement, could be taken in the form of additional written as plea of res-judicata and estoppel are legal pleas and cannot be seriously objected and to give a fair trial by affording adequate opportunities to both parties it is required

that the grant of leave for filing additional written statement is just and necessary.

23. Further the Honourable Supreme Court held in the judgment reported in 2006(6) SCC 498, in the case *Baldev Singh and others vs. Manohar Singh and another* that adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action.

(ii) 2014 (3) MWN (Civil) 285 (Mutturamu and another Vs. A.Muthulakshmi and another)

8. From the above Judgments, it is clear that the Courts must be liberally in considering the application for permission to file additional written statement and should not be dismissed on the ground of delay or commencement of the trial. The Court must consider whether the additional written statement is contrary to original written statement and whether injustice would be done to the other party. If there is no contradiction and injustice is caused to the other party, the Courts have wide discretion to give a chance to the parties to agitate their rights and the Court should not be rigid and exercise their discretion liberally.

(iii) 2004 - 4- L.W 699 (Shanmugam Vs. Vijayarangam and another)

“10. Order 8 Rule 9 of C.P.C provides for subsequent pleadings, which states as follows:-

"No pleading subsequent to the written statement of a defendant, either by way of defence to a set-off or counter-claim shall be presented except by the leave of the court and upon such terms as the court thinks fit, but the court may at any time require a written statement or additional

written statement from any of the parties and fix a time for presenting the same".

This provision enables the defendant to filing of additional written statement; that in the present case the defendant is seeking permission for filing additional written statement on the ground that the relevant documents were filed in some other suit and only in the said circumstances, he could not set forth all his defence in the suit. To avoid further delay and also to prove the bona fides the defendant also filed the additional written statement. The trial court is expected only to consider the bona fide in filing the petition. But in this case the trial court has gone to the extent of discussing the merit of the additional written statement filed by the defendant at the stage itself, which is not proper....."

"11. The trial court also had observed that the defendant has filed the petition belatedly. The revision petitioner-defendant has explained the delay in filing the petition and the said delay is only bona fide and I do not find any malafide on the part of the defendant. That apart, mere delay in filing the additional written statement will not take away the right of the party. That in order to meet the ends of justice, the parties must be given fair and reasonable opportunity to complete the pleadings as the trial court is the court of first instance where the parties are expected to exhaust their pleadings and in the said context also, I am of the view that the dismissal of the application filed by the defendant is not proper and the same is liable to be set aside."

(iv) 2007 - 2- L.W. 938 (A.Perumal Raj Vs. B.Rajendran)

7. As rightly pointed out, the lower Court has dismissed the I.A solely on the ground that it has been filed belatedly and further holding that the said move is only with a view to drag on the proceedings unnecessarily. Of course, it is correct that there is unnecessary delay on the part of the petitioner to file

the additional written statement and also nothing prevented the petitioner from filing the additional written statement atleast before recording of the oral evidence. But on that score alone, the prayer of the petitioner to file additional written statement cannot be denied in view of the judgment of this Court reported in 2006(5) C.T.C. Page 580 (Supra cited) wherein the learned Judge has relied on the judgments of the apex Court reported in 2006(2) C.T.C. Page 55 (Ahmed Meera V. S. Kumaraswamy), AIR 2006 SC 2832 (**Baldev Singh V. Manohar Singh**) and also a judgment reported in AIR 1922 PC 249 (**Ma Shwe Mya V. Maung MO Hnaung.**) In Paragraph 13 of the judgment, the learned Judge has held as follows:

Para 13. As already stated, the rustic people, who depend upon the advise of the counsel appearing for them, cannot be faulted and that did not take due diligence while filing their earlier written statement. Furthermore the amendment, if allowed, that would avoid multiplicity of proceedings by filing another Suit, which also avoid the conflicting judgments rendered by the Court in a Suit filed by the respondents for declaration and the Suit to be filed by the petitioner seeking same prayer in a subsequent Suit. Having regard to the above said facts, this Court is of the considered view that the interest of justice would be met if the petitioner is allowed to raise the pleas by paying necessary fee. The necessary corollary would be the order of the Trial Court non-suiting the petitioner on pedantic technicalities has to be set aside and the same is set aside and the Revision is allowed. It is needless to say that all the defence the respondents are having legally and factually can be agitated before the Trial Court.

Similar are the facts in the case on hand also.

8. Applying the principles enumerated in the said judgment this Court has to have a liberal approach while dealing with the prayer for permission to file additional written statement. The

learned counsel for respondent relies on Paragraph 12 of the judgment, reported in 2005(4) L.W. Page 482 wherein this Court has held as follows:

Para 12. The object of the law of pleadings is that the Court and the respective parties, should fully know of the case before the parties go in for trial, so that, the trial may proceed in that well defined channel. Now, by putting forth new set of facts, after the plaintiff's evidence is closed, the Defendants are only attempting to divert the process of trial. If the application is allowed, there would be no remedy to the plaintiff to adduce proper evidence, thereby, meeting the defence plea set forth.

9. But in the case on hand facts are not similar. In the reported case, a new set of facts were sought to be put forth after the plaintiffs evidence was closed to divert the process of trial. But in the case on hand, no new plea is taken and what is sought to be done is only to supplement the earlier written statement by furnishing more details. Therefore it is not the case that the respondent would be put to any prejudice if the petition is allowed. Even during arguments, learned counsel for the respondent has not raised any question of prejudice to the respondent if the additional written statement is allowed to be filed. For all the above said reasons, by having liberal approach, the learned District Munsif ought to have allowed the I.A. Thus the impugned order deserves to be set aside and accordingly set aside. I.A.No.954 of 2004 stands allowed.

7. Per contra, the learned counsel for the respondents contended that the petitioner has not raised any objection with regard to schedule of the property. Having failed to specifically object to the description of the property in the plaint, the petitioner

cannot now object to the same by filing additional written statement. The petitioner had impliedly admitted the correctness of the property described in the schedule by not raising any objection in the written statement. When the petitioner cross examined the respondent, no question was put with regard to discrepancy in the property. When the petitioner was examined, he did not depose about any discrepancy in the properties mentioned therein. By filing additional written statement, the petitioner is introducing a new case for which he is not entitled after commencement of trial.

7(a) In support of his contention, the learned counsel for the respondents relied on the following judgment -

(2009) 14 SCC 525 (P.A. Jayalakshmi Vs. H. Saradha and others)

4. Appellant filed her written statement on 7.4.2006, inter alia, contending that after the death of Anantha Subramania Iyer, the properties in suit devolved upon each of his children equally as a result whereof she inherited 1/7th share therein. Allegedly, she discovered on or about 5.2.2007 that Anantha Subramania Iyer had executed a Will in favour of his wife. On or about 1.3.2007, she filed an application for leave to file additional written statement.

5. By an order dated 27.3.2007, the learned

Trial Judge dismissed the said application, opining :

"10. The petitioner/4th defendant has filed this petition after the start of the enquiry proceedings in this suit and after examination of the PW1 in full stating that one Anantha Subramania Iyer had executed a WILL on 18.3.93, that a copy of the same traced out only now and hence it is to be considered that mentioning of the same in the additional written statement itself would be a belated one and further failure to mention this in the written statement filed on 7.11.2006 and after the start of trial filing a petition seeking permission to file additional written statement with regard to a WILL which has not been mentioned in the written statement seems not acceptable and the petition is a belated one."

12. Ordinarily at such a belated stage, leave for filing additional written statement is usually not granted. We may notice that one of the plaintiffs was examined on 1.3.2007. It is accepted at the bar that despite the fact that the appellant is said to have discovered the existence of the Will on or about 5.2.2007, no question was put to the said witness with regard to the said Will or otherwise. It is only at a later stage that the aforementioned application for grant of leave to file additional written statement was moved.

8. Heard the learned Senior Counsel for the petitioner as well as respondents 11 to 13 and perused the materials available on record.

9. From the materials available on record, it is seen that the first respondent in the written statement did not raise any dispute with regard to the property mentioned in the schedule to the plaint.

He has not taken any stand that property mentioned in the Donation Deed is not the property mentioned in the schedule to the plaint. The petitioner, in the written statement filed has taken a plea that donation deed appears to him not a genuine one and valid in law and suit is not maintainable on the alleged unlawful document. Now, the petitioner is seeking to take a stand that the description of property in the donation deed is different from description of property described in the schedule to the plaint. This plea is not in consistent to the earlier plea or it is a mutual destructive plea. The contention of the learned Senior Counsel that only when objection to the description of the property is taken, revenue records can be verified and compared has considerable force.

10. After filing written statement, the defendant can file additional written statement with the leave of the Court. The defendant cannot introduce any new cause of action or new case. In the additional written statement, defendant can take inconsistent stand than the stand taken in the written statement. But defendant cannot take mutually destructive stand or withdraw the admission made in the written statement. The application for leave to file

additional written statement must be considered liberally. At the same time, the Court has to consider whether by permitting the defendant to file additional written statement, the plaintiff will be prejudiced. Even if plaintiff is prejudiced, the Court can permit the defendant to file additional written statement by compensating the plaintiff by awarding cost. The delay in filing application is not a ground for dismissing the application.

10(a). In the present case, the petitioner had taken a stand that donation deed based on which the first respondent/plaintiff is claiming title is not genuine. In view of such stand taken in the written statement, the plea that description of property in the suit is different from the description of property in donation deed is additional plea which cannot be termed as inconsistent plea or mutually destructive plea.

10(b). The Courts have held that the consideration for allowing or rejecting an application for amendment of pleading under Order VII Rule 17 of C.P.C is different than the consideration for allowing or rejecting an application for filing written statement under Order

VIII Rule 9 of C.P.C. There is no restriction in Order VIII Rule 9 of C.P.C as imposed in Order VII Rule 17 of C.P.C. The judgments relied on by the learned Senior Counsel for the petitioner are applicable to the facts of the present case, while the judgment relied on by the learned counsel for the respondents does not advance their case.

11. For the above reason, the impugned order of the learned Judge is liable to be set aside and it is hereby set aside. Based on the plea taken in the written statement, issues have been framed and parties have let in evidence on such basis. By this additional written statement, additional issues are to be framed and further evidence has to be let in and respondents are entitled to file reply statement.

12. In the result, this Civil Revision Petition is allowed setting aside the fair and decretal order dated 25.04.2012 made in I.A.No.442 of 2010 in O.S.No.59 of 2006. The petitioner has come out with the present application at belated stage. For the above reason as well considering the contention of the learned Senior

Counsel for the petitioner, the impugned order is set aside on condition that the petitioner pays a sum of Rs.5,000/- to the respondents 11 to 13/legal heirs of the deceased plaintiff and also to be paid to **St. Louis Institute for Deaf & Blind, No.25, Canal Bank Road, Gandhi Nagar, Adyar, Chennai – 600 020 [Near Old Cancer Hospital & Kotturpuram Railway Station, Mob.No.9003152064, Ph.No.24910886/24421315]**, within a period of two weeks from the date of receipt of a copy of this order failing which this Civil Revision Petition shall stand dismissed automatically without further reference to this Court. No costs. Consequently, connected Miscellaneous Petition is closed.

14.02.2018

Index: Yes
Internet: Yes/No
gsa/rg

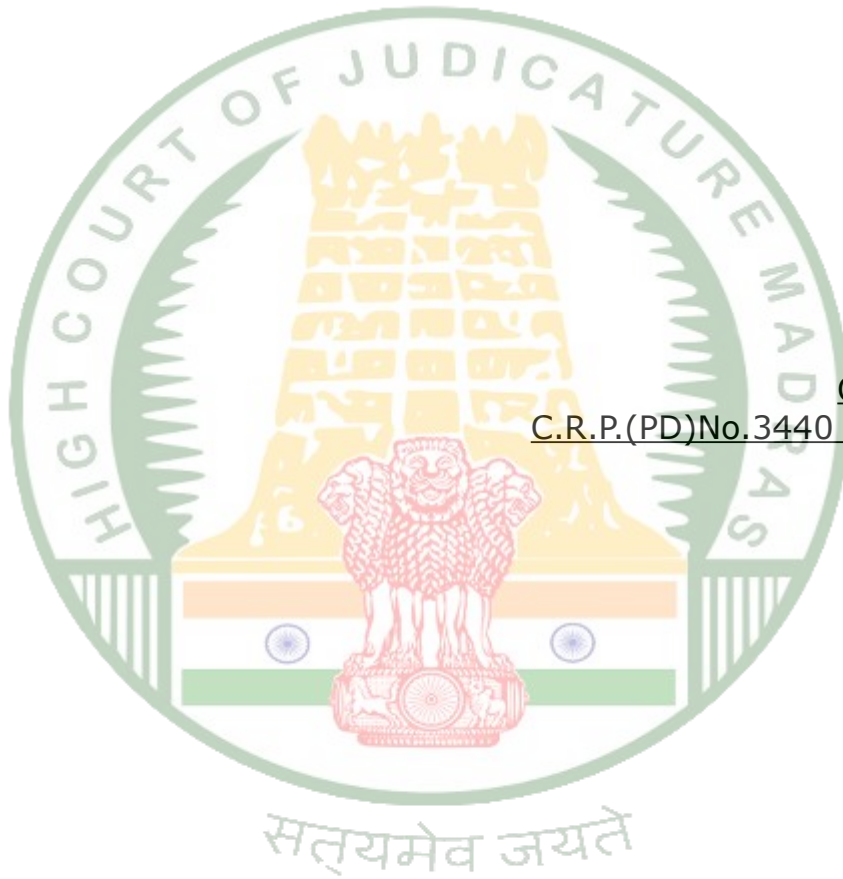
To

The III Additional District Judge,
Puducherry.

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V.M.VELUMANI, J.

gsa/rgr



Order in
C.R.P.(PD)No.3440 of 2012

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