



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 05.06.2018

Pronounced on : 14.06.2018

WEB COPY

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THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No. 795 of 2018 and
CMP (MD) No. 3510 of 2018

Subramanian

... Petitioner

-vs-

1. Mariammal

2. Chelliah

3. Sundararajan

... Respondents

PRAYER: Civil Revision Petition filed under Section Article 227 of the Constitution of India, against the Order and Decree made in I.A.No.1002 of 2015 in O.S.No.114 of 2013 dated 08.03.2018 on the file of the Sub-Court, Srivilliputtur.

For Petitioner : Mr.M.Thirunavukkarasu
For Respondents : No Appearance (for R1 & R2)

O R D E R

That the instant Civil Revision Petition is filed to permit the Petitioner to amend the prayer of the suit by adding the relief of mandatory injunction and to amend the pleadings which was dismissed by the trial Court.

2. According to the learned counsel for the Petitioner, the Revision Petitioner filed the suit against the respondents herein in O.S.No.114 of 2013 for Declaration and Permanent Injunction before the learned Sub-Court, Srivilliputhur. Since the 2nd Respondent herein constructed a house by encroaching upon the pathway in which the Revision Petitioner is having access, he filed a Petition in I.A.No.286 of 2013 to appoint an advocate commissioner. The Learned Advocate Commissioner filed report noting down the physical features with measurements and the encroachment. Hence the Petitioner herein filed an application in I.A.No.1002 of 2015 to amend the pleadings and prayer of the suit. The Respondents herein resisted the said application to allow the same. After enquiry the learned trial Judge dismissed the amendment application by order at 08.03.2018 which is impugned in this Civil Revision Petition.



3. The Learned counsel for the Revision Petitioner would submit that since the 2nd Respondent constructed his house by encroaching upon the pathway to an extent of 2.6 feet during the pendency of the suit, which necessitated him to file the above amendment application. However, it was dismissed by the trial Court on an erroneous appreciation of facts and law by holding that even if the Respondents herein encroached upon the public pathway during the pendency of the suit, he ought to have filed separate suit. The Learned counsel contented that the said finding of the lower Court is perverse and the Court below ought to have allowed the amendment application to avoid multiplication of proceedings. The Learned trial Judge failed to consider the fact that the 2nd Respondent made construction pending suit which could be found from the report of the Advocate Commissioner.

4. I heard Mr. M. Thirunavukkarasu, learned counsel appearing for the petitioner and there is no representation for the respondents 1 and 2. Though they received notice, failed to appear either by engaging counsel or in person. The 3rd respondent died, but no steps are taken to bring the legal heirs of the 3rd respondent.

5. The learned Counsel for the petitioner made an endorsement to effect that since they have not claimed any relief against the 3rd respondent and therefore, no steps are required to be taken. Hence this civil revision petition is abated as against the 3rd respondent.

6. It is seen from the records that the revision petitioner filed a suit for declaration, to declare the suit property absolutely belongs to him and consequential permanent injunction. At the incidence of the revision petitioner the Commissioner was appointed to inspect the suit property and the learned advocate commissioner filed the report. The perusal of the Advocate Commissioner report and plan disclosed that the 2nd respondent while construction of house on the eastern side of the revision petitioner's house, had put up his house in the public pathway to an extent of 2.6 feet breadth and 23 feet height in the alleged pathway. Whether the said construction of the 2nd respondent herein had encroached upon the common pathway or not could be decided only after conducting full fledged trial.

7. The procedure for amendment of pleadings is as per Order 6, Rule 17 of the Code of Civil Procedure. It reads thus:

"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."



8. Coming to the facts and circumstances of this case, this Court finds that as rightly pointed out by the learned counsel appearing for the petitioner that the fact remains that immediately after the construction, the revision petitioner was specifically brought to the notice that the construction was put up in the common pathway. Therefore the petitioner filed amendment petition to introduce a prayer for mandatory injunction to demolish the superstructure put up by the respondents.

9. The learned trial judge failed to see that first of all the proposed amendment is pre-trial amendment and the same could be considered liberally. Further, the amendment necessitated the revision petitioner only because of the fact that pending suit the 2nd respondent herein had constructed his house by encroaching upon the common pathway. Therefore, the learned trial judge is not justified in rejecting the amendment on the ground that the revision petitioner should have filed a separate suit for the relief of mandatory injunction. The said finding in the consider opinion of this court, is not proper since it will lead to multiplicity of proceedings.

10. In view of the foregoing decision, I am of the view that the proposed amendment is liable to be allowed in the interest of justice and to avoid multiplicity of proceedings.

11. In the result, this Civil Revision Petition is allowed and the Order and Decree made in I.A.No.1002 of 2015 dated 08.03.2018 on the file of the learned Sub-Court, Srivilliputtur, is hereby set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (WRITS)

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge,
Sub-Court,
Srivilliputtur.

+ 2 CC TO Mr.M.THIRUNAVUKKARASU, ADVOCATE IN SR No.67946 & 68184

VSV

RJ/RSK/SAR-1 : 12/07/2018 : 3P/4C