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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 04.09.2018

DELIVERED ON : 04.10.2018

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (PD) (MD) No.1211 of 2015

and

M.P. (MD) No.1 of 2015

1.M.Shanmugammal

2.Babu @ Muthusebagavalli

.. Petitioners /Petitioners/
Plaintiffs

Vs.

1.Muthiah

2.Poongodi

.. Respondents/Respondents

Prayer : This Civil revision petition is filed under Article 227 of Constitution of India, to modify the order made by the Court of the District Munsif Cum Judicial Magistrate, Aundipatty in I.A.No.112 of 2015 in O.S.No.62 of 2009 dated 23.04.2015.

For Petitioners: Mr.M.S.Balasubramania

For Respondents: Mr.R.Subramanian

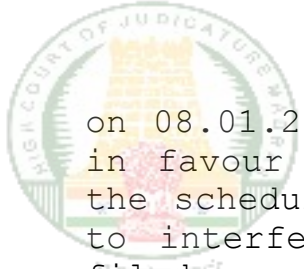
ORDER

Heard Mr.M.S.Balasubramania, learned counsel appearing for the petitioners and Mr.R.Subramanian, learned counsel appearing for the respondents.

2.This petition has been filed to modify the order dated 23.04.2015 made in I.A.No.112 of 2015 in O.S.No.62 of 2009 on the file of the District Munsif Cum Judicial Magistrate, Aundipatty.

3.The petitioners are the plaintiffs in O.S.No.62 of 2009 and they filed the case for permanent injunction against the respondents/defendants. As the respondents denied the redemption of mortgage and the suit has to be amended with an alternative prayer entitling the petitioner to redeem the property. The petition was dismissed by the lower Court and against the order, the petitioner has filed this revision petition.

4.On the side of the petitioners, it is stated that the suit property belonged to the first petitioner. The first petitioner purchased the property on 26.10.1965 and he mortgaged the property with the first respondent on 18.11.1978 for a sum of Rs.6,000/- (Rupees Six Thousand only) and he redeemed the mortgage



on 08.01.2003 and the first petitioner executed a settlement deed in favour of the second petitioner on 11.06.1982 with regard to the schedule items 2 to 7 properties. Since the respondents tried to interfere the possession of the petitioners, the petitioners filed a suit and the respondents who are the defendants in the suit filed a written statement admitting the ownership of the petitioners but denied the redemption of mortgage claimed that the respondents are entitled in enjoyment of the property. It is further stated that the respondents claimed that the redemption receipt is with the petitioners and the petition filed by the petitioners was dismissed. The respondents filed a petition before this Court and the same was also dismissed. In this circumstances, the suit should be amended with the alternative prayer of redemption and for possession.

5. On the side of the respondents, it is stated that the petition is time barred. The trial has already commenced and two witnesses on the side of the petitioners are examined and Exs.A1 to A12 and Exs.B1 to B3 documents were also marked. After the trial, the petitioners are not entitled to amend the plaint. The original suit was filed for prayer of injunction and the contention of the petitioners is that they are in possession of the property and the petitioners filed a petition for permission to prepare a fresh suit on the same cause of action and the copy of the petition was also served to the learned counsel for the respondents. Subsequently instead of filing that petition, this amendment petition is filed by the petitioners. The original case is for injunction. Now the petitioners wanted the alternative prayer for possession. The amendment will create a fresh cause of action and that will entirely change the character of the case. In the above circumstances, this petition could not be entertained. The present petition is filed only with a motive to drag on the case and prayed the petition is to be dismissed.

6. On the side of the petitioners, it is stated that there is a difference between Section 153 of CPC and the provision under Order VI Rule 17 of CPC and the lower Court failed to note that the proviso introduced by the amendment to the Order 6 Rule 17 of CPC is not introduced by that amendment to Section 153 of CPC. The respondents were attempting to drag on the proceedings and thereby, attempt to squat on the property and enjoy the income of the properties and the amendment will not introduce any new cause of action. The suit for injunction can always be amended for the recovery of possession and such an amendment is always permissible. The claim of the petitioners is that there was mortgage and the same was redeemed. The claim of the respondents is that the mortgage is not redeemed. Allowing the element would not change the character of the case and the amendment will affect the proceedings between the same parties. The relief of redemption of mortgage is not barred by limitation and prayed that the petition to be allowed.



7. The learned counsel appearing for the petitioners relied on the Judgment passed by the Hon'ble Supreme Court in the case of **Abdul Rehman and another v. Mohd. Ruldu** reported in **2012(5) CTC 803**, which reads as follows:

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"Held, change in nature of relief ought not to be considered as change in nature of suit and power of amendment to be exercised in larger interests of doing full and complete justice between the parties-Order of trial Court and high Court dismissing Application for amendment, set aside

.. This Court, in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice. The main purpose of allowing the amendment is to minimize the litigation

.. The relief of cancellation of Sale Deeds as sought by amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit."

8. The learned counsel appearing for the petitioners relied on the Judgment passed by this Court in the case of **K. Ganapathy v. Sakthi Sugar Limited** reported in **(2012) 6 MLJ 345**, which reads as follows:

"17. An amendment in pleading can be allowed at any stage a Court of law has discretion to allow the amendment in the interest of justice. The words 'at any stage' means at any stage before the judgment is pronounced, as opined by this Court."

9. The learned counsel appearing for the petitioners relied on the Judgment passed by this Court in the case of **Ramachandran v. Baskar Sethupathi, rep. By Power of Attorney Agent, Seenuvasan** reported in **(2012) 8 MLJ 805**, which reads as follows:

"Amendment of pleadings-Application filed to add relief of recovery of possession, allowed-prayer of injunction deleted and substituted with relief of recovery of possession- Civil Revision Petition-Held, on getting leave of Court, relief which are available to plaintiff at time of filing of suit, and not prayed for, can be prayed later-Filing of application under Order 6, Rule 17 amounts to obtaining leave from Court to include



relief, which are omitted."

10. The learned counsel appearing for the petitioners relied on the Judgment passed by this Court in the case of **S.Arumugam v. Sathy** reported in (2013) 3 MLJ 797, which reads as follows:

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"Held, bar to allow amendment after commencement of trial is not absolute, and it is only conditional-If Court is convinced that in spite of due diligence, party could not have raised matter before commencement of trial, it is open to trial Court to allow amendment."

11. The learned counsel appearing for the petitioners relied on the Judgment passed by this Court in the case of **K.R.Rajeesh Kumar v. K.Nalini Raghavan and others** reported in 2013 (1) CTC 297, which reads as follows:

"As said property is available for partition and contesting parties had no objection to same, application ought not to be denied only on ground that inclusion would delay trial of suit"

12. The learned counsel appearing for the petitioners relied on the Judgment passed by this Court in the case of **S.Kanthimathiammal and Others v. Nagammal nad others** reported in (2015) 5 MLJ 800, which reads as follows:

"The proviso shall always be interpreted narrowly and the very purpose of the main provision cannot be defeated by the proviso. Therefore, the application of proviso will be interpreted narrowly. At this juncture, it is also relevant to refer the main provision, Order 6 Rule 17 which provides for amendment of the pleadings at any stage of the proceedings. Therefore, if it requires any amendment of proceedings, the same can be permitted at any stage of the proceedings in the interest of justice."

13. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **V.Jayalakshmi and others v. Kasirajan and Others** reported in 2016 5 LW 810, which reads as follows:

"Suit for declaration and injunction dismissed-Appeal -Amendment of plaint, application to include alternative relief of portio at appellate stage-whether can be allowed.



necessary."

14. The learned counsel appearing for the petitioner relied on the Judgment passed by the Hon'ble Supreme Court in the case of **Firm Srinivas Ram Kumar v. Mahabir Prasad and others** reported in **Civil Appeal No.82 of 1949**, which reads as follows:

"But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence."

15. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Chitra v. Kannan** reported in **(2015) 3 MLJ 668**, which reads as follows:

"Prayer for amendment within period of limitation since filed within three years-when already suit for injunction involving question of title, filed within time, no question of bar of limitation being attracted for seeking relief for declaration, more so during pendency of suit for injunction."

16. On the side of the respondents, it is stated that the suit is filed in the year 2009 and only in the year 2015, the petitioners want to amend the suit for redemption and recovery. It is stated that on 18.11.1978, the petitioners mortgaged the property for a period of five years and the period was expired on 17.11.1983. As per Section 63 of Limitation Act, the petitioner is having right for redemption for a period of 30 years which ends on 17.11.2013. 2015 amendment is barred by Section 61 of the Limitation Act. The amendment can be allowed subject to the limitation for the amendment relief sought for and the limitation to be calculated as per the date of amendment not from the date of the suit.

17. The learned counsel appearing for the respondents relied on the Judgment passed by the Hon'ble Supreme Court in the case of **L.C.Hanumanthappa v. H.B.Shivakumar** reported in **2015 (6) CTC 562**, which reads as follows:

"It is clear that the Doctrine of relation Back would not apply to the facts of this case for the reason that the Court which allowed the amendment expressly allowed it subject to the plea of limitation, indicating thereby that there are not special or extraordinary circumstances in the present case to warrant the Doctrine of Relation Back applying



so that a legal right that had accrued in favour of the Defendant should be taken away."

18. The learned counsel appearing for the respondents relied on the Judgment passed by this Court in the case of **T.N. Alloy Foundry Co. Ltd. v. T.N. Electricity Board and Others** reported in (2004) 3 Supreme Court Cases 392, which reads as follows:

"Limitation-Held, the Court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of application-However, this is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it"

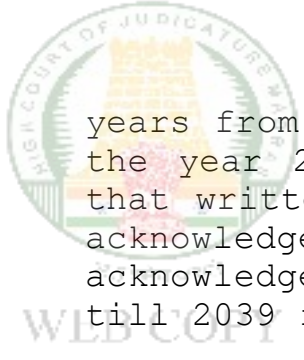
19. The learned counsel appearing for the respondents relied on the Judgment passed by the Division Bench of this Court in the case of **Tamil Nadu Electricity Board v. The Tamil Nadu Alloy Foundry Co. Ltd.**, reported in 2001 (4) CTC 174, which reads as follows:

"Application for amendment seeking higher amount of damages should be made within period of limitation."

20. On the side of the petitioners, it is stated that original case of the petitioners is that they redeemed the mortgage and they are in possession. But the respondents are disturbing the possession. The case of the respondents is that the possessionary mortgage is not redeemed and on the advice of the Advocate, the petitioners wanted to amend the suit with the alternative prayer for redemption of the mortgage. As per Order 6 Rule 17 of CPC at any stage of the case, amendment can be allowed for the purpose of determining the real questioning in controversy between the parties. There is a provision that the amendment cannot be allowed after the trial has commenced. On the side of the petitioners, it is stated that such proviso cannot curtail the main provision under Section 153 of CPC. This proviso is not an absolute bar as per Section 153 of CPC. Considering both the Sections, the Court has the power to permit amendment.

21. On the side of the petitioners, it is further stated that mortgage is admitted by the respondents and the point to be decided is whether the mortgage is redeemed or not and who is in possession of the property. To avoid multiplicity of the suit, amendment is to be allowed.

22. On the side of the petitioners, it is stated that the mortgage is in the year 1978. The period of redemption is five



years from the date of redemption till 2013. The suit was filed in the year 2009 and the written statement filed on 25.11.2009. In that written statement, the mortgage is admitted which amounts to acknowledgement of the mortgage on 2009. From the date of acknowledgement of the mortgage, the petitioner is having the time till 2039 for the prayer for redemption.

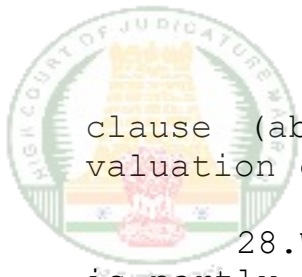
23. On the side of the respondents, it is stated that limitation period is to be calculated on the date of the petition and not from the date of plaint.

24. On the side of the petitioners, it is stated that as per Section 18 of the limitation Act, limitation start from the date of acknowledgement and in this case, in the written statement in the year 2009, the petitioners have acknowledged the mortgage and the period of limitation starts from the year 2009.

25. In support of his contention, the Judgment passed by this Court in the case of **R.A. Karunambal and another v. Loganathan and others** reported in **2016 (3) CTC 149** is cited.

26. Records perused. A perusal of the records reveals that the respondents admitted the title of the petitioners and the respondents have admitted the mortgage also. The contention of the respondents is that the mortgage is not redeemed and the respondents are in enjoyment of the property. The trial Court dismissed the petition on the basis of the proviso of Order 6 Rule 17 of CPC. No application for amendment was allowed after the trial has commenced and it is the duty of the petitioners to be clear in their prayer and the trial Court considered the amendment for possession is in contrary to the main prayer in the injunction. If the petitioners are able to prove that they are in possession, the petitioners may succeed. But the alternative prayer sought for by the petitioners is that altering the prayer permitting the petitioners to redeem the mortgage and for recovery of possession. The clear case of the petitioners is that they are in possession of the property altering the prayer for recovery of possession will amount to a change in the character of the case itself. Two things are that the petitioners want to amend the suit for the damages and for a compensation of 30,000/- per annum. This prayer for money clearly is barred by limitation and in the prayer it is not clearly stated that from which date onwards the petitioners are claiming compensation.

27. In the above circumstances, this amendment cannot be allowed and the prayer for alternative relief of redemption alone is to be considered to avoid multiplicity of the case and in the interest of the justice. Hence, this Civil Revision Petition is partly allowed. In particulars of the amendment, item 1, 2, 3, 4, 5 are allowed. In paragraph No.6, clause (aa) is permitted and



clause (ab) and (ac) are not permitted and in paragraph No.7, valuation column (b) is allowed and (c) and (d) are dismissed.

28. With the above observation, this Civil Revision Petition is partly allowed. No Costs. Consequently, M.P.(MD)NO.1 of 2015 is closed.

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Sd/-

Joint Registrar (Judl)

// True Copy //

Sub Assistant Registrar(CS-III)

To

The District Munsif Cum Judicial Magistrate, Aundipatty.

+ 1 CC TO MR.R.SUBRAMANIAN, ADVOCATE IN SR NO.88743

MRN

BU/NM/RP/SAR-III :15.11.2018 : 8P/3C

C.R.P. (PD) (MD) No.1211 of 2015
04.10.2018