



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.03.2018
(Reserved on 12.02.2018)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP(NPD) (MD)No.1830 of 2017
and
CMP(MD)No.9693 of 2017

M.G.Kannan ... Petitioner/Respondent/Appellant

vs.

V.Palaniammal ... Respondent/Petitioner/Respondent

Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order dated 08.08.2017 passed in I.A.No.34 of 2017 in A.S.No.2 of 2017 on the file of the Subordinate Judge, Virudhunagar.

For Petitioner : Mr.N.Subramanian

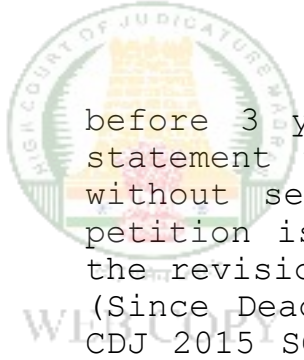
For Respondent : M/s.G.Dhanalakshmi

ORDER

This Civil Revision Petition has been filed against the fair and decreetal order dated 08.08.2017 passed in I.A.No.34 of 2017 in A.S.No.2 of 2017 on the file of the Subordinate Judge, Virudhunagar.

2.The respondent has filed a suit for mandatory injunction against the revision petitioner for removal of walls on the northern and southern sides of ABCD lane shown as 2nd item in the plaint schedule property. The suit was decreed on 02.07.2016 and the revision petitioner filed appeal against the decree passed in the suit contending that without seeking the relief of declaration in respect of the suit lane, the respondent cannot seek the relief of mandatory injunction. Therefore, the respondent has filed the present amendment petition to include the relief of declaration in respect of ABCD lane shown as 2nd item in the plaint schedule property.

3.Opposing the above petition, the revision petitioner has contended that the respondent has filed the petition belatedly at the appeal stage for amendment regarding the prayer for declaration in the plaint which would change the nature and character of the suit and further, the petition is barred by limitation and that even



before 3 years, the petitioner has clearly stated in his written statement that the respondent has sought for mandatory injunction without seeking relief of declaration. Therefore, the amendment petition is liable to be dismissed. In support of his contention, the revision petitioner relied on the decisions in L.C.Hanumanthappa (Since Dead) represented by his LRs vs. H.B.Shivakumar reported in CDJ 2015 SC 668 and N.Jothi vs. S.Radha and others reported in CDJ 2017 MHC 2600, taking the plea of limitation.

4.However, the appellate Court rejecting the objection raised by the petitioner held that the defendant filed written statement on 03.07.2014 in the trial court and the plaintiff has filed the amendment petition on 27.06.2017 within a period of three years and therefore, the objection on the ground of limitation is not sustainable. The appellate Court also held that the decision in CDJ 2017 MHC 2600 is not applicable since the defendant in that case who has lost the case in the trial court has filed appeal and in the appeal, he filed amendment petition belatedly. Ultimately, the appellate Court observing that trial Court has given its finding that the suit lane is the common lane, held that only the plaintiff who has been benefitted by the judgment and decree has come forward with the petition for amendment to include the relief of declaration to avoid further complications and therefore, the said amendment is necessary for the proper disposal of the suit as well as the appeal and accordingly allowed the amendment application by the impugned order dated 08.08.2017. Aggrieved against the said order, the revision petitioner/appellant/defendant has filed this revision petition.

5.Learned counsel for the revision petitioner contended that the appellate Court ought to have dismissed the amendment application as the amendment was not sought for in the Trial Court. It is further contended that the appellate Court ought to have held that the amendment petition is barred by limitation as the petitioner filed counter in I.A.No.110 of 2014 filed by the respondent for temporary injunction before 26.06.2014, as such, three years period had already expired. It is also contended that after the pronouncement of the judgment by the Trial Court, amendment application at the appellate stage is prohibited as per the proviso to Order IV Rule 17 CPC, however, without taking into account the said provision, the appellate court allowed the amendment petition. Further, no explanation has been offered by the respondent why application for amendment was not taken before the Trial Court. Therefore, the impugned order is liable to be set aside. In support of his contention, learned counsel relied on a decision of the Supreme Court in J.Samuel and others vs. Gattu Mahesh and others reported in (2012) 2 SCC 300.

6.Heard the learned counsel for the petitioner as well as the respondent and perused the materials available on record.



7. The respondent has filed the suit for mandatory injunction against the revision petitioner for removal of walls on the northern and southern sides of ABCD lane shown as 2nd item in the plaint schedule property and the suit was decreed on 02.07.2016, against which, the revision petitioner filed appeal against the decree passed in the suit contending that without seeking the relief of declaration in respect of the suit lane, the respondent cannot seek the relief of mandatory injunction. Therefore, the respondent has filed the present amendment petition to include the relief of declaration in respect of ABCD lane shown as 2nd item in the plaint schedule property which was allowed by the Court below, against which, the present revision petition has been filed.

8. The only issue to be decided before this Court is whether the amendment application can be allowed at the appellate stage without seeking the relief of declaration. In this regard, it is relevant to extract below Order 6 Rule 17 CPC:-

'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.'

9. Proviso to Order 6 Rule 17 CPC would clearly state 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 per the above proviso, the petitioner cannot seek amendment during the appeal. There is no pleading as to the due diligence shown by the petitioner and despite of which he was not able to claim the relief of declaration. By including the prayer of declaration, the nature and character of the suit will change. Also, the petitioner has clearly stated in his written statement that the respondent sought for mandatory injunction without seeking the relief of declaration. But, in spite of that, the respondent has not amended the plaint and now after passing of the decree, the respondent/plaintiff is not entitled to seek for amendment at the appellate stage. Even as per the proviso to Order 6 Rule 17 CPC, as the respondent had knowledge about the written statement filed by the petitioner, learned counsel for the respondent cannot plead due diligence for filing amendment application and therefore, in my considered opinion, the impugned order passed by the learned Judge warrants interference.



10. Accordingly, the impugned order dated 08.08.2017 passed in I.A.No.34 of 2017 in A.S.No.2 of 2017 on the file of the Subordinate Judge, Virudhunagar, is set aside and this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge,
Virudhunagar.

CRP (NPD) (MD) No.1830 of 2017
28.03.2018

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JM/KK/SAR 1/10.04.2018/4P/2C