



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P. (PD) (MD) No.2219 of 2017

and

C.M.P. (MD) No.10860 of 2017

1. Rohia Beevi

2. Jahafar

... Respondents/Appellants/Petitioners

-vs-

Mariamamma (Died)

1. Vargheese Samuel

2. Mamman Samuel

3. Cheriyan Samuel

... Petitioners/Respondents/Respondents

Prayer: Civil Revision Petition filed under Section 115 of CPC praying to set aside the Fair and Decreetal Order dated 21.09.2017 made in I.A.No.5 of 2016 in A.S.No.78 of 2009 on the file of the learned Subordinate Judge, Padmanabhapuram and allow the revision.

For Petitioners : Mr.V.M.Balamohan Thambi

For Respondents : Mr.C.Godwin

O R D E R

The revision petitioners are the appellants in A.S.No.78 of 2009 on the file of the learned Subordinate Judge, Padmanabhapuram and in the suit, the plaintiffs/respondents herein sought for declaration among various other reliefs. The suit was decreed in favour of the plaintiffs, against which, the defendants/revision petitioners herein have preferred an appeal. Subsequently, the plaintiffs / respondents herein have filed an application in I.A.No.5 of 2016 seeking certain modification with regard to extent of Item No.2 of the plaint schedule properties and the said application was allowed by the Trial Court, stating *inter alia* that the correction sought was only a formal one. Challenging the said order, the petitioners/appellants are before this Court.

2. It is the case of the revision petitioners that the amendment sought for cannot be granted in the midway and though there was a complaint of encroachment of one cent, the plaintiffs have been seeking for recovery of the entire Item No.2, but however, the Civil Court had granted the relief only to the limited extent. It is the further case of the revision petitioners that the suit was valued only for 42sq.ft and the Court Fee was also paid only for that area and as such, the decree passed was in consonance with the plaint filed by the plaintiffs and therefore, correction in the judgment cannot be amended at all. Contending

that the petition is not maintainable in the absence of amendment in the plaint, it is prayed that the order of the Trial Court is liable to be set aside.

3. Per contra, learned counsel for the plaintiffs/respondents herein has contended that in the plaint, the extent of Item No.2 of the plaint schedule properties was wrongly mentioned as one cent instead of 42½ sq.ft. and further, in the rough sketch, the encroachment portion of one cent is to be marked as BEFG instead of BEF. It is the further case of the petitioners that since the said mistake came to light only during execution proceedings, immediately necessary amendment was sought in the plaint, which was on account of encroachment made by defendants.

4. Learned counsel for the respondents states that while drafting the plaint, there was a mistake crept in Item No.2 of the plaint schedule properties to the extent indicated above, which necessitated the plaintiffs to file a petition for amending the same. Learned counsel for the plaintiffs, in support of his submission that the amendment sought is permissible under law, has relied upon the following judgments of the Hon'ble Supreme Court:

i) **Sampath Kumar vs. Ayyakannu and another**, reported in **(2002) 7 SCC 559;**

"10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observation in Siddalingamma and Anr. v. Mamtha Shenoy, [2001] % SCC 561.

11. In the present case the amendment is being sought for almost 11 Years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be



added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in culcating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

12. On the averments made in the application, the same ought to have been allowed. If the facts alleged by plaintiff are not correct it is open for the defendant to take such plea in the written statement and if the plaintiff fails in substantiating the factual averments and/ or the defendant succeeds in substantiating the plea which he would obviously be permitted to raise in his pleading by way of consequential amendment then the suit shall be liable to be dismissed. The defendant is not prejudiced, more so when the amendment was sought for commencement of the trial.

13. For the foregoing reasons, the appeal is allowed. The impugned orders of the High Court and the Trial Court are set aside. The plaintiff is permitted to incorporate the pleas sought to be raised by way of amendment in the original plaint foregoing the plea to the extent given up by him before the Trial Court, However, in view of the delay in making the application for amendment, it is directed that the plaintiff shall pay a cost of Rs. 2,000 (Rupees Two Thousand only) as a condition precedent to incorporating the amendment in the plaint. The prayer for declaration of title and recovery of possession shall be deemed to have been made on the date on which the application for amendment was filed."

ii) **Usha Devi vs. Rijwan Ahamd and Others**, reported in **(2008)**

3 MLJ 287 (SC);

"I. Though there was lack of due diligence on the part of the plaintiff inasmuch as the wrong description of the suit property was pointedly brought up by the defendants not only in the written statement but also in course of the proceedings of the Case, the prayer for



amendment related to correction of description of suit property in plaint deserves to be allowed, in view of the decision in Sajjan Kumar v. Ram Kishan (2005) 13 SCC 89 which is closer on facts wherein it was held that when the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit amendment would create needless complications at the stage of execution, the amendment should be allowed."

5. Heard the learned counsel on either side and also perused the material documents available on record.

6. It is not in dispute that the plaintiffs had sought for declaration, which was granted in their favour and after judgment in the appeal, filed by the defendants, confirming the judgment and decree of the Trial Court, the plaintiffs sought to amend the plaint so as to incorporate the right extent of suit schedule property, which was omitted to be mentioned in the plaint due to oversight and encroachment made by the defendants. It is contended by the plaintiffs/respondents herein that due to oversight, such mistake has occurred and therefore, the Court below, finding that the amendment sought will not alter the character of the plaint at any cost, had rightly granted the relief to them

7. It is pertinent to mention here that the appeal was filed in the year 2009 and the contention of the respondents, that there will not be any alteration of the character of the main suit owing to the proposed amendment, is the secondary concern and the primary concern for this Court is to give quietus to the whole issue itself and in the event of allowing this petition, it will further dillydally the matter, instead of giving quietus to the issue, which, in the considered opinion of this Court, is an abuse of process of law. The plaintiffs/respondents herein, having kept mum all these years, i.e. till passing of an order in the appeal, now suddenly woke up from their sleep and sought for such amendment. There is force in the contention raised by the petitioners that the amendment should not be allowed to travel beyond the judgment and decree.

8. Of course, it is true that as per Order 6 Rule 17 CPC, the pleadings can be allowed to be either altered or amended at any stage of the proceedings, in case such amendments determine the real questions in controversy between the parties. But, in the present case on hand, allowing the amendment will only prolong the issue and therefore, this Court is of the view that the order of the Trial Court is un-sustainable and needs interference by this Court.



9. In view of the foregoing discussions and observations and finding merit in the contention made by the petitioners/appellants, this Court is of the view that the order of the Trial Court is liable to be set aside.

10. In the result,

a) this civil revision petition is allowed and the order dated 21.09.2017 made in I.A.No.5 of 2016 in A.S.No.78 of 2009 by the learned Subordinate Judge, Padmanabhapuram, is hereby set aside.

No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(W)

/True Copy/

Sub Assistant Registrar(CS-II)

To:

The Subordinate Judge,
Padmanabhapuram.

Copy to

The Record Keeper, VR Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.V.M.Balamohan Thambi, Advocate Sr.No.70970
+1cc to Mr.C.Godwin, Advocate Sr.No.71011

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VB/SV/SAR2/17.09.2018/5P/6C

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