



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDER RESERVED DATE : 09.04.2018

DATED : 14.06.2018

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THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) Nos.1144 of 2016 & 466 of 2018 and

CMP (MD) Nos.5674 of 2016 & 2084 of 2018

1.S.Swaminathan

2.S.Murugan

... Petitioners in both CRPs

-vs-

K.Esakkidoss

... Respondent in both CRPs

PRAYER in CRP(MD) (PD) No.1144 of 2016: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order passed in I.A.No.679 of 2015 in O.S.No.282 of 2011 dated 15.02.2016 on the file of the Additional Sub-Court, Tirunelveli.

PRAYER in CRP(MD) (PD) No.466 of 2018: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order passed in I.A.No.713(a) of 2016 in O.S.No.282 of 2011 dated 31.01.2018 on the file of the Additional Sub-Court, Tirunelveli.

For Petitioners : Mr.H.Arumugam (In both CRPs)

For Respondent : Mr.T.Selvan (In both CRPs)

O R D E R

The Revision Petitioners are defendants in the suit in O.S.No.282 of 2011 on the file of the learned Additional Sub-Court, Tirunelveli filed by the respondent herein for the relief of partition and separate portion of his 1/3rd share in the suit property. The 1st Petitioner is the purchaser of the property from the father and brother of the respondent herein. The Respondent claims that the suit property is an ancestral property and as such the sale executed by his father and brother will not bind on him



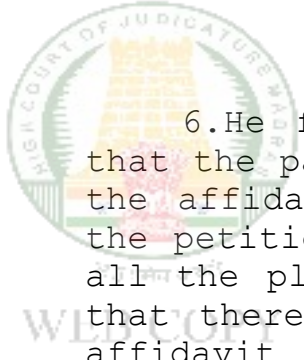
and prayed for partition.

2.The Petitioners have filed written statement denying right and title of the respondent and also pleaded that the suit is not maintainable. Later on the petitioners came to know that the pleading regarding non-joinder of father and brother of the respondent and other co-owners are not added as parties and also all the properties of the family not included in the suit, hence the petitioner filed an additional written statement with an application seeking leave in I.A.No.679 of 2015 and the same was opposed by the respondent herein. The Trial Court dismissed the petition on giving a finding that the affidavit filed along with the petition does not say about the important points omitted in the written statement and not even a prayer available to read the additional written statement filed along with petition as part and parcel of the affidavit and no reason also assigned why the above plea was omitted in the written statement and thereby refused to receive the additional written statement. As against the same the C.R.P.No.1144 of 2016 is filed. Though the petitioner prayed for stay this court ordered notice on 15.06.2016 without granting any stay.

3.The suit was at the stage of examining the defendants' side witness and the defendant did not produce any witness but represented that the C.R.P.No.1144 of 2016 is pending and sought adjournment. As the petitioners did not adduce any evidence and there was no representation on 19.09.2016 and the trial court passed an order setting the defendant as ex-parte and posted the case for arguments of plaintiff. Thus the petitioners have filed petition to set aside the ex-parte order on 29.09.2016 in I.A.No.713(a) of 2016. The said petition was opposed by the respondent and the Trial Court dismissed the same on 31.01.2018 stating that the petitioners are not willing to proceed with the suit and prolonged the same citing the pendency of C.R.P.No.1144 of 2016. As against the dismissal of set aside the ex-parte order the C.R.P.No.466 of 2018 is filed.

4.I heard Mr.H.Arumugam, learned counsel for the petitioners and Mr.T.Selvan, learned counsel for the respondent in both the revisions and perused the entire records.

5.The learned counsel for the petitioners submitted that the non-mentioning of pleading about the non-joinder of necessary parties namely the father and brother of the respondent, who are the vendors of the petitioners and other co-owners and also not including the all the family properties is not a wilful one. Further, the plea regarding non-joinder of necessary parties and partial partition are purely legal one in a suit for partition and thus the additional written statement ought to have been accepted.



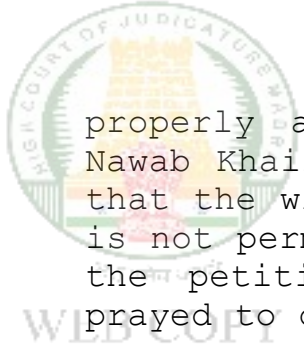
6.He further emphasised that the finding of the Trial Court that the particulars of the proposed pleadings is not mentioned in the affidavit and the reason for same also not averred and thus the petition is liable to be dismissed is totally erroneous, when all the pleadings are available in the statement and the finding that there is no prayer to read the additional mentioned in the affidavit and therefore the court cannot consider the same is hyper technical one and it is not a ground to dismiss the petition. He further submitted that the additional written statement is not contrary to the original written statement but the same is very essential to decide the real issue involved in the suit.

7.He further submitted that there is no intention to drag on the matter as the defendants filed revision and the reason for non-appearance that the counsel was in other court was not considered by the court below. As it is only an ex-parte order it ought to have set-aside the same. Thus prayed to allow the both the revision petitions.

8.The learned counsel for the petitioners relied upon the judgment of this Hon'ble Court in Subramanian and three others -vs- Jayaraman reported in 1999 (3) CTC 52 and argued that the legal pleas can be raised in the additional written statement and the same cannot be seriously objected. As in the case on hand also the plea of partial partition and non-joinder of necessary parties are legal one, the same can be raised at any point of time. He further submitted that the co-owners in the partition suit can be impleaded at any point of time and the properties left out also included until passing of final decree, as such allowing the defendants to raise the above defence will not affect anyone but it will have disposal of the suit on merits.

9.The learned counsel for the petitioners relied upon the judgment of this Hon'ble Court in V.R.Sundararajan -vs- D.Neelaveni reported in 2017 (1) MWN (Civil) 694 and argued that the delay in filling additional written statement cannot be a reason for dismissing the application. The learned counsel for the petitioner further submitted that when the revision was filed challenging the dismissal of petition to receive the additional written statement and the same is pending, the Trial Court erroneously dismissed the petition to set aside the ex-parte order, without even considering that ex-parte order alone passed and the petition was filed within 10 days, as such prayed to allow the revision.

10.The learned counsel for the respondent has not raised any serious objection with regard to setting aside the ex-parte order, however, strenuously contended that the additional written statement filed after closing of evidence of plaintiff cannot be allowed and the delay in filling the same is also not explained



properly and he relied upon the judgment in R.Periyasamy -vs- Nawab Khairunnissa reported in 2016 (1) MWN (Civil) 32 and argued that the written statement filed contrary to the original pleading is not permissible and thus the Trial Court is right in dismissing the petition to receive the additional written statement and prayed to dismiss the revision filed against the same.

11.The judgment relied upon by the learned counsel for the respondent in R.Periyasamy -vs- Nawab Khairunnissa reported in 2016 (1) MWN (Civil) 32 is not applicable to the present fact of the case, as the proposed pleading is contrary to the original pleading but the case is raising the legal plea of non-joinder of necessary parties and partial partition.

12.It is an admitted fact that the petitioners are the purchaser of property from the father and brother of the respondent. According to the respondent the property is ancestral one and as such the sale executed by his father and brother will not bind on his share, hence he filed suit for partition and separate possession of his 1/3rd share in the suit property. It is also admitted that the father, brother and other co-owner of the respondent was not added as party in the suit for partition. As argued by the learned counsel for the petitioner that the plea regarding non-joinder of necessary parties is purely a legal one and the same can be raised in the additional written statement.

13.It is settled law that the suit for partition need not be dismissed for non-joinder of necessary parties but the same can be decided after impleading all the parties. While necessary parties can be impleaded at any stage of the suit and even during the pendency of appeal nothing wrong in allowing the defendant to raise the plea in the additional written statement, as held by this Hon'ble Court in Subramanian and three others -vs- Jayaraman reported in 1999 (3) CTC 52, the legal plea can be raised in the additional written statement. This Hon'ble Court has held the above judgment in Para No.9 to 12 read as follows:-

"9. It is not the intention of the legislature that no pleading subsequent to the written statement should be allowed other than for reasons given therein. But the intention is that without the leave of the Court, no pleading subsequent to the written statement shall be presented. Hence, it goes without saying that the subsequent statement or additional statement could be filed only with the leave of the Court on such terms, as the Court thinks fit. The approach of Law in permitting the Court to grant leave in such cases is positive. But, the Court while granting the leave could direct the petitioner to comply with certain terms that the Court thinks fit and hence absolutely there is no impediment or hurdle or legal barrier put forth by the Rule in allowing any additional statement subsequent to the written statement and the only



shot provided in the arms of the Court for granting leave is that it could allow the application on such terms as it thinks fit. The same power could also be suo motu exercised by the Court as per the concluding part of the Rule. The Rule has been liberally construed so far as the Court granting the leave to present such additional statements and discretion is given to the Court either to allow or to reject and while allowing it could do the same on such terms as the Court thinks fit. Therefore, it could be safely concluded that in all such cases, wherein the defendant approaches the Court with an application under Order 8 Rule 9 of the Civil Procedure Code praying to grant leave, Courts are expected to be liberal in granting the leave but of course on terms as the Court thinks fit in the circumstances of the individual case.

10. The lower Court itself has shown as to when the Court could reject the plea of the defendant in its order, citing the judgment reported in A.I.R. 1977 S.C.680 wherein it is held that

'... by means of amendment the defendants wanted to introduce an entirely different case and if such amendments were permitted, it would prejudice the other side.'

What is to be decided, in the light of the above proposition of the Apex Court, by the Court dealing with the subject is to find out whether the defendant wants to introduce an entirely different case so as to prejudice the other side, provided he is permitted to carry out the amendments.

11. So far as the order of the lower Court is concerned, it is remarked that the additional written statement sought to be filed is quite contradictory to the earlier statement filed by the petitioners/defendants and further since the petitioners have not filed any objection to the Commissioner's Report, they are not entitled to be granted with the leave to present the additional statement as sought for in the petition and thus dismissed the petition filed by the petitioners/defendants. However, the requirements of the Rule and the proposition of Law held in the case cited supra are that the Court should take a lenient view in granting leave and if need be the leave could be granted on terms and that if the defendants introduce an entirely different case in the additional statement, so as to prejudice the other side, their application for leave is liable for rejection.

12. In answering these two points, the lower Court does not seem to have taken a liberal view with a positive approach as warranted by the Rule nor has the lower Court established as to how the petitioners wanting to introduce an entirely different case so as to cause prejudice to the other side. The



'Order 8, Rule 9: Subsequent pleadings.-No pleading subsequent to the Written Statement of a Defendant other than by way of defence to 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 of not more than thirty days for presenting the same.



Section 151 of CPC: Saving of inherent powers of Court.-Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.'

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14. Therefore, it is made clear the Additional Written Statement can be filed and hence, in the interest of justice, this Civil Revision Petition ought to be allowed by setting aside the Order passed in I.A. No.420 of 2010 and accordingly the Order passed in I.A. No.420 of 2010 in O.S. No.558 of 2008, dated 17.8.2010, is set aside.

15.The main ground on which the petition filed to receive the additional written statement was rejected is that the legal pleas are not mentioned in affidavit. Though the additional written statement contains the pleadings, there is no request to read the same as part and parcel of affidavit and the trial court has dismissed the same in view of the non-mention of such a request in the affidavit. The said finding of the court is not proper and the same is a hyper technical one. When the pleadings are available in the additional written statement the mere non-mentioning of the sentence that the additional written statement may be as read as part and parcel of the affidavit cannot be a reason to decline the perusal of the proposed plea. It is the duty of the court to see the additional written statement, whenever the application is filed to receive the additional written statement and also see the original written statement to decide whether any plea mutually contrary to the original plea is taken and the court cannot disown, its duty to read the records, which are form part of the case. The court must see that substantial justice is rendered to the parties on the basis of material available on records, after all the procedure are all handmaid of justice, which shall not affect the substantial rights of the parties. Hence, this court of the view that the additional written statement is to be received and the suit shall be decided on merits.

16.It is seen from the records that there is no malafide intention on the side of the petitioners in filling the memo about the pendency of revision in C.R.P.No.1144 of 2016 and making request for adjournment, when the case is at the stage of adducing his evidence. In view of allowing the petitioners to file additional written statement, this court finds that, if the petitioners proceeded with the examination of evidence without the plea of non-joinder of necessary parties and partial partition it may affect their case on merits also. In view of the settled law, no amount of evidence can be let in to without pleadings. The Trial Court has proceeded to dismiss the petition to set aside the ex-parte order without even considering the reason adduced in the affidavit that the counsel was engaged in some other court. When it is only ex-parte order and the petition was filed immediately,



the Trial Court has committed wrong in dismissing the same ignoring the settled principles of law that there is no limitation provided to set aside the ex-parte order. Thus to render substantial justice the ex-parte order shall liable to be set aside.

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17. In view of the above, both the revisions are allowed:-

[a] The order passed in I.A.No.679 of 2015 in O.S.No.282 of 2011 dated 15.02.2016 on the file of the learned Additional Sub-Court, Tirunelveli, is set-aside and the petition is allowed;

[b] The order passed in I.A.No.713(a) of 2016 in O.S.No.282 of 2011 dated 31.01.2018 on the file of the learned Additional Sub-Court, Tirunelveli, is set-aside and the petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/

Assistant Registrar(T&P)

/True copy/

Sub Assistant Registrar

To
The Additional Subordinate Judge,
Tirunelveli.

Copy to:
The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. **(2 COPIES)**

+1cc to Mr.T.SELVAN, Advocate, SR.No.68445
+2cc to Mr.H.Arumugam, Advocate, SR.No. 68497, 68498

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