

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE. N.SATHISH KUMAR

**CRP PD No.2759 of 2013 and
M.P.No.1 of 2013**

Vishnupathi

... Petitioner

Vs.

1. K.Balasubramaniam

2. K.B.Kavitha

3. The Chairman, CMDA,
Chennai-8.

4. The Commissioner,
Ambattur Municipality,
Ambattur, Chennai.

.... Respondents

PRAYER Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 08.07.2013 passed in I.A.No.1969 of 2011 in O.S.No.214 of 2004 by the District Munsif, Ambattur.

For Revision Petitioner : Mr.B.Vijay

For Respondents No.1 and 2 : M/s R.V.Gayatri
for Mr.P.B.Balaji
for M/s R.Nalliyappan

For respondent No.3 and 4 : No appearance.

ORDER

This revision petition has been filed as against the orders passed by the trial court allowing the application to amend the plaint by incorporating a relief of mandatory injunction.

2. The revision petitioner is the first defendant in the original suit and the plaintiffs have filed a suit for permanent injunctions against the first defendant and also against the 2nd and 3rd respondents. Pending suit, the plaintiffs have filed an application before the trial court seeking permission to amend the plaint by incorporating a relief of mandatory injunction on the ground that, during pendency of the suit, the first defendant had encroached into the suit property and also made certain constructions in the property. The trial court allowed the application by its order dated 08.07.2013, against which the first respondent came up with the present revision petition.

3. The plaintiffs have filed the said suit in O.S.No.214 of 2004 for permanent injunction restraining the first defendant from interfering with his peaceful possession of the property and putting up any construction or compound wall in the suit property and also restraining the 2nd and 3rd respondents from sanctioning any planning permission to the first defendant to put up construction or compound wall in the suit property. The first

respondent has also filed his written statement denying the title and possession of the plaintiffs. It is the specific stand taken by the first defendant in his written statement that he is in possession of the suit property for a very long period and also put up pucca compound wall with gate. His further contention is that in pursuance of his long possession, patta has also been issued in his favour by the concerned authorities. It is to be noted that the written statement was filed in the year 2004 and the application for amendment was filed only in the year 2011. It is also relevant to note that in the affidavit filed for seeking such amendment, the plaintiffs made allegation that the first defendant during the pendency of the suit, trespassed into the property and erected unauthorised construction and therefore, prayer of mandatory injunction has to be included in the plaint. The trial court allowed the application mainly on the ground that to avoid multiplicity of proceedings.

4. The learned counsel appearing for the revision petitioner vehemently contended that the first defendant in his written statement has taken plausible stand that he had put up construction of compound wall along with gate long back, even before the filing of the suit. When such observation has been made in the written statement in the year 2004 itself, the amendment application has been filed only in the year 2011, that is

after 7 years contending that the defendant has attempted to encroach upon the property and hence the application has been filed. There is no detail whatsoever mentioned in the amendment petition about the nature of such construction etc, extent of construction etc. In order to get over the limitation aspect, such relief has been sought. According to the learned counsel for the revision petitioner, when the defendant has asserted in his written statement that compound wall has already been put up by him before filing the suit, the mandatory injunction should have been sought within a period of three years. But the plaintiff has not done so, whereas filed petition after 8 years. Hence, it is the contention of the counsel for the revision petitioner that such amendment is certainly prejudice the first defendant and when the relief itself is barred by limitation, the same cannot be allowed. In support of his contention, he relied on a judgment in ***L.C.Hanumanthappa (since dead) represented by his legal representatives Vs. H.B.Shivakumar reported 2016(1) S.C.C. 332*** and prayed to allow the revision petition.

5. The learned counsel appearing for the respondents 1 and 2/ plaintiffs contended that whether the plaintiffs have put up construction or the first defendant has put up a compound wall is a matter of evidence, which can be decided only at the stage of trial and it is the specific

assertion of the plaintiff that the defendant had trespassed into the suit property and put up construction. Hence, the plaintiff is entitled to seek a relief of mandatory injunction and no prejudice will cause to the first defendant and hence, the trial court has rightly allowed the amendment petition and the same does not warrant any interference by this court. In support of her argument, she relied on a judgment in (i) ***Sampathkumar Vs. Ayyakkannu and another reported in CDJ 2002 SC 547*** (ii) ***Agnel B.Pereira and another Vs. K.A.V.Bhanu Prakash and another reported in CDJ 2016 KAR HC 336*** and prayed for dismissal of the revision petition.

6. I have perused the materials on record. The suit has been filed for permanent injunctions in the year 2004 alleging that the first defendant tried to encroach upon the suit property. But, the specific contention of the first defendant is that even before filing of the suit, he has been in possession of the suit property and his possession is long, continuous and uninterrupted one and he was also given patta by the concerned authority and he had constructed a compound wall with gate in the suit property. The written statement of the first defendant was filed in the year 2004 itself. When such assertion has been made with regard to the existence of compound wall by the defendant, and if such alleged

construction is unauthorized one , the action should have been taken within a period of three years.

7. Admittedly, the application for amendment had been filed only in the year 2011, after more than 7 years delay. It is to be noted that even in the application to amend the plaint, it is not even pleaded what is the nature of construction, which is sought to be removed by way of mandatory injunction. It is to be noted that when a relief of mandatory injunction is sought to be included in the prayer, there must be a specific and clear details about the area, what is the nature of the construction and boundaries of such construction. Without making any such details in the affidavit, one cannot say that he is entitled to amend the plaint after much delay, especially when the defendant has taken a stand that he is in possession of the property and he has constructed the compound wall.

8. In the judgment relied upon by he learned counsel appearing for the respondents 1 and in ***Sampathkumar Vs. Ayyakkannu and another reported in CDJ 2002 SC 547*** in para 11 it has been held thus.

" 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 to 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 lapse of time, by excluding a period of about 11 years in calculating 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.

9. It is curious to note that the above judgment would also be considered by the Larger Bench of the Honourable Supreme Court in the later judgment in ***L.C.Hanumanthappa (since dead) represented by his legal representatives Vs. H.B.Shivakumar reported 2016(1) S.C.C. 332***, in which, in paragraph 14, it has been held thus.

14. Given this statement of the law, it is clear that

the present amendment of the plaint is indeed time-barred in that the right to sue for declaration of title first arose on 16.5.1990 when in the very first written statement the defendant had pleaded, in para 13 in particular, that the suit for injunction simpliciter is not maintainable in that the plaintiff had failed to establish title with possession over the suit property. The only question that remains to be answered is in relation to the doctrine of relation back insofar as it applies to amendments made under Order 6 Rule 17 of the Code of Civil Procedure.

Similarly, in paragraph No.29 of the said judgment, after considering the various judgment, pertaining to the doctrine of relation back, the Honourable Supreme Court finally concluded as follows.

29. Applying the law thus laid down by this court to the facts of this case, two things become clear. First, in the original written statement itself dated 16.05.1990, the defendant had clearly put the

plaintiff on notice that it had denied the plaintiff's title to the suit property. A reading of an isolated paragraph in the written statement, namely, para 2 by the trial court on the facts of this case has been correctly commented upon adversely by the High Court in the judgment under appeal, The original written statement read as a whole unmistakably indicates that the defendant had not accepted the plaintiff's title. Secondly, while allowing the amendment, the High Court in its earlier judgment dated 28.03.2002 had expressly remanded the matter to the trial court, allowing the defendant to raise the plea of limitation. There can be no doubt that on an application of Khatri Hotels (P) Ltd. the right to sue for declaration of title first arose on the facts of the present case on 16.05.1990 when the original written statement clearly denied the plaintiff's title. By 16.05.1993 therefore a suit based on declaration of title would have become time-barred. 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 no special or extraordinary circumstances in the present case to warrant the doctrine of relation back applying so that a legal right that we find no infirmity in the impugned judgment of the High Court. The present appeal is accordingly dismissed.

10. Having regard to the above judgment, particularly in the absence of any details as to the nature of unauthorized construction allegedly made by the first defendant, the filing of amendment petition after 7 years is certainly barred by limitation, particularly when the defendant has taken defence in his written statement as early as in the year 2004 asserting that he had put up construction and he has been enjoying and in possession of the suit property. Even assuming that the defendant had put up construction, during the pendency of the suit, the limitation to remove such construction is only for three years from the date of such construction. Therefore, the application filed in the year 2011 to incorporate the prayer of mandatory injunction by way of amendment is certainly barred by limitation and cannot be allowed to be included in the suit.

11. In the result,

(ii) The civil revision petition is allowed. No costs. The connected civil miscellaneous petition is closed. The order passed by the trial court is set aside.

(iii) The trial court is directed to dispose the suit within 6 months from the date of receipt of a copy of this order, without influencing any of the observations made by this court in this revision petition.

04.03.2019

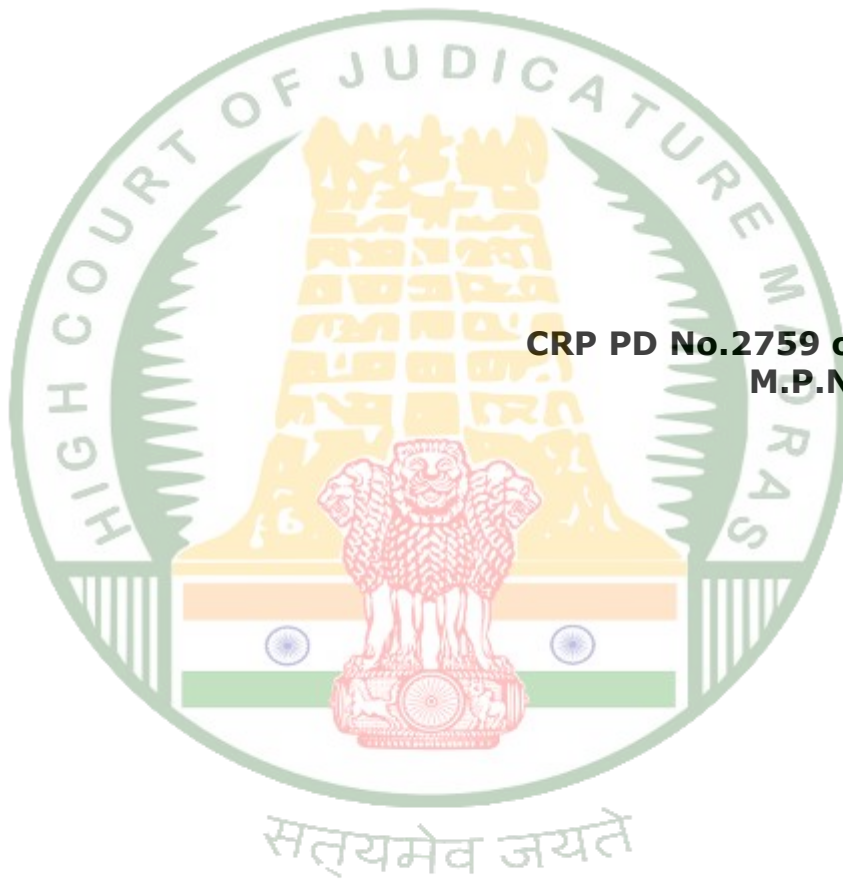
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To

The District Munsif, Ambattur,

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N.SATHISH KUMAR, J.,



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