

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.08.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP (PD) No.4090 of 2014
and
MP No.1 of 2014

1. Mohan
2. Anbalagan

... Petitioners

versus

1. Annadurai
2. Gopu
3. Tamilarasi
4. Usha Rani
5. Uma

.... Respondents

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the Fair and Decreetal Orders passed in I.A. No.43 of 2013 in O.S. No.94 of 2011, dated 01.09.2014 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai and allow the said I.A.

For Petitioners : Mr.A. Muthukumar
For Respondents : Mr.S.Sounthar for R1
R2 to R5 ex-parte before the
Court below

ORDER

The instant Civil Revision Petition has been filed challenging the order dated 01.09.2014 passed by the learned Additional Subordinate Judge, Mayiladuthurai in I.A. No.43 of 2013 in O.S. No.94 of 2011.

Brief facts leading to the filing of the instant Civil Revision Petition filed under Section 115 of the CPC.

2. The petitioners are the 1st and 2nd defendants in the suit O.S. No.94 of 2011 pending on the file of the Additional Subordinate Court, Mayiladuthurai. The said suit was filed by the 1st respondent / plaintiff against the petitioners as well as other defendants seeking for partition. The first respondent and the defendants in the suit are brothers and sisters. The first respondent has sought for partition in respect of six items of properties, all situated at Thirunadriyur village. The suit schedule properties are joint family properties. A written statement was also filed by the petitioners, who are defendants 1 and 2 in the suit, stating that apart from the properties mentioned in the suit schedule, there are other joint family properties left out in the partition suit. The petitioners filed I.A. No.43 of 2013 in O.S. No.94 of 2011 under Order 6 Rule 17 CPC to amend the suit schedule to include the joint family properties which were left out by the first respondent / plaintiff in the partition suit O.S. No.94 of 2011.

3.A counter affidavit was filed by the first respondent / plaintiff

in I.A. No.43 of 2013 admitting that certain properties were left out but disputing that 17 items of the properties mentioned in the amendment application filed by the petitioners are joint family properties. Therefore, according to him, only the properties admitted by him are joint family properties and can be the subject matter of the partition and the remaining 17 items cannot be included as the subject matter of the partition in the partition suit.

4.By order dated 01.09.2014, the Trial Court dismissed I.A. No.43 of 2013 in O.S. No.94 of 2011 on the ground that under Order 6 Rule 17 CPC, the petitioners, who are defendants in the suit cannot seek amendment of the plaint. Aggrieved by the dismissal of I.A. No.43 of 2013 in O.S. No.94 of 2011, the instant Civil Revision Petition has been filed under Section 115 of the Civil Procedure Code.

5.Heard Mr.A. Muthukumar, learned counsel for the petitioners and Mr.S.Sounther learned counsel for the 1st respondent and the remaining respondents 2 to 5 were set ex-parte before the court below and they have not entered appearance in this revision also despite service of notice on them.

6.The learned counsel for the petitioners drew the attention of

this Court to a Single Bench Judgment of this Court reported in the case of **A.A. Ganga and another versus A.R.Usha and others** reported in **2010 (4) CTC 331**. Relying upon the said judgment, he would submit that even a defendant in a partition suit can seek amendment of the plaint under Order 6 Rule 17 CPC.

7.He also referred to the another Single Bench judgment of this Court in the case of **Rani and another versus Chandra and others** reported in **(2012) 7 MLJ 892** and submitted that the Court should not go into the merits of the amendment when the defendant has raised a plea regarding non inclusion of certain properties in the partition suit in the written statement.

8.Per contra, the learned counsel for the first respondent relied upon the Single Bench judgment of this Court in the case of **M.Ramalingam versus Muthu Sadayan** reported in **1993 TLNJ 302**. Relying upon the said judgment, the learned counsel for the first respondent would submit that Order 6 Rule 17 CPC envisages that amendment of pleadings can be done only by the person, who is the author of the said pleadings.

9.Further the learned counsel for the first respondent referred to

a Division Bench judgment of this Court in the case of ***Solavaiammal and others versus Ezhumalai and another*** _reported ***in 2012 (1) CTC 159*** wherein the Division Bench has held that while deciding an amendment application, even in a partition suit, the Court has to prima facie satisfy itself as to whether the properties are available for partition or not. According to him, even though an application to amend the plaint under Order 6 Rule 7 CPC, can be filed even by a defendant, the Court has to satisfy itself as to whether the properties are available for partition or not.

10. In the instant case, according to him, a categorical plea has been taken by the first respondent / plaintiff in the counter affidavit that only certain properties are available for partition and the remaining properties are not joint family properties and therefore, they are not available for partition. Therefore according to him, the Trial Court has rightly rejected the amendment application filed by the petitioners.

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Discussion :

11. Admittedly in the instant case, a specific plea has been raised by the petitioners in their written statement in paragraph 6 that 26 items of properties which are also joint family properties have been left out in the partition suit. The written statement was filed in the month of February 2012. Admittedly, no reply statement was filed before the Trial Court by the 1st respondent / plaintiff. The amendment application I.A. No.43 of 2013 in O.S. No.94 of 2011 was filed under Order 6 Rule 17 CPC on 23.01.2013 after a lapse of almost a year from the date of filing of the written statement by the petitioners in the suit.

12. If really, the first respondent / plaintiff had any objection to include other properties in the partition suit, he would have filed a reply statement to the written statement filed by the petitioners in the suit, but he has chosen not to do so in the instant case. Admittedly, there cannot be a partial partition. Even in the counter affidavit filed by the first respondent / plaintiff in I.A. No.43 of 2013, it is his own case that certain properties were left out in the partition suit.

13. This Court has perused the impugned order. The Trial Court

has dismissed the application only on the ground that the petitioners, who are the defendants in the suit cannot seek an amendment of the plaint under Order 6 Rule 17 CPC. As according to the Trial Court, the first respondent / plaintiff, who is the author of the plaint can alone file an application to amend the plaint under Order 6 Rule 17 CPC and not the defendants.

14. In **A.A. Ganga and another versus A.R. Usha and others** reported in **2010 (4) CTC 331** relied upon by the learned counsel for the petitioners, it has been held that in a suit for partition of joint family properties, each parties are the plaintiffs and the defendants and the defendant can also file an application under Order 6 Rule 17 CPC to amend the plaint, the relevant paragraph of the said judgment is extracted hereunder :-

9. Admittedly, the Suit is for partition. In a Suit for partition of joint family properties, each parties are the Plaintiffs and the Defendants are also entitled to claim share by paying necessary Court-fee and therefore, in a suit for partition, it cannot be stated that the Defendants are not entitled to include some other properties, which according to them, are liable to be partitioned among the parties. In a suit for partition, if some properties are not included in the Suit and if those properties are also liable to be partitioned, it is open

to the Defendants to file an Application to include those properties in the Plaint Schedule and contend that those properties are also liable for partition and hence, the normal rule that the Plaintiff is the *dominus litus* and he has to decide, which party is to be impleaded and which properties are to be included is not applicable to the case for partition of joint family properties or joint properties owned by the parties. Therefore, with great respect to the learned Judge that it cannot be stated that in a Suit for partition, the Plaintiff is the *dominus litus* and he cannot be compelled to include other items of the property in the Plaint Schedule as laid down in the judgment reported in the case of **Ramasamy and another v. P. Marappan and others**, 2005 (3) MLJ 663.

15. In the aforesaid decision, a learned Single Judge of this Court has held that a defendant can also file an application to amend the plaint under Order 6 Rule 17 CPC. He has dissented with the view taken by another learned Single Judge of this Court in the case of **Rani and another versus Chandra and others** reported in **(2012) 7 MLJ 892** and as per the said judgment, the learned Single Judge of this Court has held that the defendants cannot seek an amendment of the plaint under Order 6 Rule 17 CPC. The learned Single Judge of this Court, while deciding the above referred reported decision in the case of **A.A. Ganga and another versus A.R. Usha and others 2010 4**

CTC 331 has considered various judgments of this Court as well as other High Courts and has also considered the judgment of the Hon'ble Supreme Court in the case of **Revajeetu Builders & Developers v. Narayanasamy & sons, 2009 (10) SCC 84**, wherein it was held that an amendment can be allowed for proper and effective adjudication of the case and refusing the amendment would lead to multiplicity of proceedings. The relevant paragraph of the decision reported in **A.A. Ganga and another versus A.R. Usha and others 2010 4 CTC 331** is as follows :

15. As stated supra, in a Suit for partition, all the properties are to be partitioned and as laid down by the Honourable Supreme Court in the judgment reported in **Revajeetu Builders & Developers v. Narayanasamy & sons, 2009 (10) SCC 84** : 2009 (13) SCALE 241, Amendment can be allowed for proper and effective adjudication of a case and refusing the amendment would lead to the multiplicity of proceedings. In this case, admittedly there were some laches on the part of the Revision Petitioners in filing the Application for Amendment earlier, but considering the interest of the parties and to avoid multiplicity of proceedings and being a Suit for partition, in my opinion, the Petition filed by the Revision Petitioners for Amendment to include some other properties in the Plaint stating that they are also liable to be partitioned can be allowed as that would put to an end to the litigation and it would also avoid the multiplicity of proceedings. Further, while allowing or disallowing the Amendment Application,

the Court should not go into the merits of the Amendment and the lower Court has committed an error in deciding the merits of the Amendment and held that the properties, which are sought to be included are the properties exclusively belong to the Plaintiffs 1 and 2. Therefore, without going into the merits, whether the properties, which are sought to be included in the Plaint Schedule by way of Amendment belongs to the joint family of the Plaintiffs and the Defendants, in a Suit for partition, the parties are entitled to bring to the notice of the Court about the properties to be included for partition.

16.The Division Bench of this Court in the case of ***Solavaiammal versus Ezhumala Gounder*** reported in **2012 (1) CTC 159** has also upheld the decision of the learned Single Judge of this Court referred to supra in the case of ***A.A. Ganga and another versus A.R. Usha and others*** reported in **2010 4 CTC 331**. However, it has clarified that the Court will have to be prima facie satisfied as to whether the properties are joint family properties or not.

17.In the instant case, admittedly the first respondent /plaintiff has himself admitted in his counter affidavit filed in I.A No.43 of 2013 that some of the properties were left out in the partition suit, though he disputes the remaining properties are Joint family properties.

Further in the instant case, the written statement was filed by the petitioners in the suit in the month of February 2012, where the petitioners have taken a specific plea that various other properties were not included in the partition suit as they are also joint family properties and admittedly, the first respondent / plaintiff has not filed any reply statement.

18.The learned counsel for the first respondent has referred to the decision of the Single Bench of this Court in the case of ***M.Ramalingam versus Muthu Sadayan reported in 1993 TLNJ 302.*** He further submitted that the view taken by the learned Single Judge is different from the view taken by another single Judge in the decision ***A.A. Ganga and another versus A.R.Usha and others*** reported in ***2010 (4) CTC 331.*** But as seen from the decision of the Division Bench of this Court reported in 2012 1 CTC 159, the Division Bench has upheld the view taken by the learned Single Judge of this Court reported in ***2010 4 CTC 331*** permitting the defendant to file an application to seek amendment of the plaint filed in a partition suit under Order 6 Rule 17 CPC. Since, the Division Bench has upheld the view taken by the learned Single Judge of this Court in the decision

reported in **2010 4 CTC 331**, the contention of the learned counsel for the 1st respondent / plaintiff that the defendant cannot file an application to amend the plaint under Order 6 Rule 17 CPC cannot be accepted.

19.This Court has perused the impugned order. The Trial Court has rejected the amendment application only on the ground that the defendant cannot file an application under Order 6 Rule 17 CPC to amend the plaint as the defendant is not the author of the plaint. In view of the decisions referred to above and in view of the fact that no reply statement has been filed by the first respondent / plaintiff to the written statement filed by the petitioners, wherein they have taken a specific plea that some of the properties have been left out in the partition suit and further, the first respondent / plaintiff having himself admitted in the counter that certain properties were left out in the partition suit and in view of the decisions referred to above, this Court is of the considered view that the Trial Court has passed an erroneous order by dismissing the amendment application viz., I.A. No.43 of 2013. In the considered view of this Court, allowing of the amendment application will not prejudice the first respondent / plaintiff

and in fact it will help in the effective adjudication of the disputes between the parties considering the fact that the suit filed by the first respondent / plaintiff is a partition suit and the parties to the suit are brothers and sisters.

20. For the foregoing reasons, the impugned order, dated 01.09.2014 passed by the I Additional Subordinate Judge, Mayiladuthurai in I.A. No.43 of 2013 in O.S. No.94 of 2011 is hereby set aside and the Civil Revision Petition is allowed. However, liberty is granted to the petitioners to amend the pleadings consequent to the allowing of the amendment application in I.A. No.43 of 2013. It is also made clear that the Trial Court shall decide the suit uninfluenced by any of the observations made by this Court in this order.

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14.08.2019

Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
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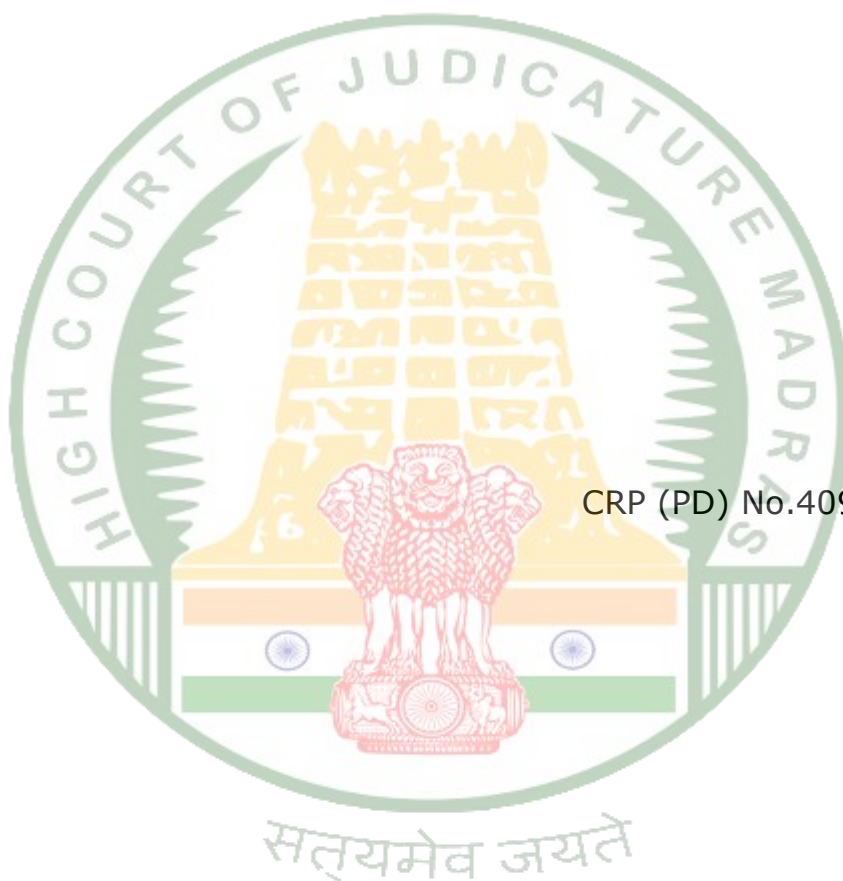
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ABDUL QUDDHOSE, J.

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To :

The Additional Subordinate Judge,
Mayiladuthurai.



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