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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 21.02.2019

DELIVERED ON : 12.03.2019

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (PD) (MD) No.2223 of 2015

S.Maria Francis

.. Petitioner/Petitioner

Vs.

1.Lordu Mary

2.Sagaya Mary

3.Kulandai Theras

.. Respondents/Respondents

Prayer : This Civil revision petition is filed under Article 227 of Indian Constitution, to set aside the order dated 04.07.2015 passed in I.A.No.466 of 2014 in O.S.No.173 of 2014 by the learned Principal Sub Judge, Thanjavur.

For Petitioner

: Mr.P.Sesubalan Raja

For Respondents 1 and 3

: No Appearance

For 2nd Respondent

: Mr.P.Vadivel

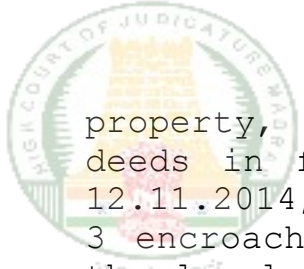
ORDER

Heard Mr.P.Sesubalan Raja, learned counsel appearing for the petitioner and Mr.P.Vadivel, learned counsel appearing for the second respondent.

2.This petition has been filed against the order passed in I.A.No.466 of 2014 in O.S.No.173 of 2014 dated 04.07.2015 by the learned Principal Sub Judge, Thanjavur.

3.The petitioner is the plaintiff and the respondents are the defendants in the suit. The plaintiff has filed a suit in O.S.No.173 of 2014 before the learned Principal Sub Judge, Thanjavur. In the suit, the petitioner filed a petition in I.A.No.466 of 2014 under Order 6 Rule 17 of C.P.C., seeking permission to amend the plaint. The petition was dismissed by the lower Court. Against the order of dismissal, the petitioner has filed this revision petition.

4.On the side of the petitioner, it is stated that the suit property was vacant site at the time of filing of the suit. Subsequently on 10.06.2014, when the petitioner visited the suit



property, he came to know that the first defendant executed sale deeds in favour of the defendants 2 and 3 and subsequently, on 12.11.2014, the petitioner came to know that the defendants 2 and 3 encroached upon the property and constructed a building up to the level of basement. Hence, the prayer in the plaint has to be amended to insert the prayer for mandatory injunction to remove the construction and for recovery of possession.

5.On the side of the petitioner, it is stated that the lower Court has made an observation in the order in paragraph no.8 that under Section 22 of Specific Relief Act, the petitioner has to file a petition for amendment of the plaint for recovery of possession and to make further amendment in the Court fee and the trial Court has given a finding that the petitioner has only sought for a mandatory injunction without a prayer of recovery of possession and the amendment sought for is only with regard to the payment of Court fee for the prayer of mandatory injunction and not for recovery of possession.

6.On the side of the petitioner, it is stated that proper recourse is to seek for mandatory injunction to restore the possession. In support of his contention, the Judgment passed by this Court in the case of **G.Sasikumar v. Manickavasagam** reported in **CDJ 2018 MHC 5734** is cited, which reads as follows:

"Petitioner very much in possession of suit property at time of filing of suit and during pendency of suit, was illegally dispossessed from suit property-Trial Court ought not to have rejected petitioner's application seeking for amendment by relief of mandatory injunction"

7.On the side of the petitioner, it is stated that no separate suit for recovery of possession is necessary. In support of his contention, the Judgment passed by this Court in the case of D.Gopal v. The Kilpauk Muslims Welfare Association and another in C.R.P.No.1897 of 1994 is cited, which reads as follows:

"the Court could very well mould the relief and grant the relief of possession even without amendment of the plaint. While so, there can be no bar for granting the proposed amendment seeking the possession relief based on the alleged possession title of the plaintiff"

8.On the side of the second respondent, it is stated that the plaintiff and the first respondent entered into an agreement on 26.06.1998 but the suit was filed 16 years after the date of agreement. In the original suit, no relief for recovery of possession was sought for and that the Court fee was not paid for the said relief and that the prayer for mandatory injunction is not maintainable and that the petitioner has to amend the suit for the recovery of possession and that the amendment petition filed by this petitioner is not maintainable.



9. The case of the petitioner is that the petitioner entered into an agreement with the first defendant on 26.06.1998 for the purchase of the suit property and the sale consideration was fixed as Rs.75,000/- (Rupees Seventy Five Thousand only) and an advance of Rs.50,000/- (Rupees Fifty Thousand only) was paid on the date of agreement and on 25.07.1998, the first defendant received the balance sale consideration of Rs.25,000/- (Rupees Twenty Five Thousand only) and handed over the possession of the property and handed over the original settlement deed with the petitioner. It is stated that the first defendant made an endorsement on 25.07.1998 to execute the sale deed as and when required by the petitioner.

10. It is seen that the third respondent is the wife of the first respondent. The first respondent executed a sale deed in favour of the second respondent on 26.06.1998 and the second respondent in turn executed a sale deed in favour of the third respondent on 01.10.2013. The contention of the third respondent is that the agreement period was over on 25.12.1998 itself and the suit is barred by limitation.

11. It is seen that the petitioner sought for a prayer of mandatory injunction and for vacant possession. The petitioner did not sought for the separate prayer of recovery of possession and did not came forward to amend the suit to insert the Court fee for the prayer. So separate Court fee has to be paid for mandatory injunction. Though the petitioner sought for possession of vacant site in the prayer column, the petitioner has not come forward to amend the Court fee column to include the Court fee for the recovery of possession.

12. Whether the agreement is barred by limitation and whether the petitioner is entitled for the relief of mandatory injunction or relief of recovery of possession can be decided only after the completion of the trial. But an opportunity for the petitioner to put forth his case is to be given. Already the prayer for possession of vacant site was stated in the prayer column.

13. In the above circumstances, this Court deems it fit to permit the petitioner to make necessary amendment in the amendment petition including the prayer for recovery of possession and the necessary Court fee to be paid for all the specific prayer. The order passed by the trial Court is set aside and the matter is remitted back to the trial Court with liberty for the petitioner to carry out necessary amendments in the amendment petition.

<https://hcservices.ecourts.gov.in/hcservices/> 14. In view of with the above observation, this Civil Revision Petition is allowed and the order passed in I.A.No.466 of 2014 in O.S.No.173 of 2014 dated 04.07.2015 by the learned Principal Sub



Judge, Thanjavur is set aside and I.A.No.466 of 2014 is remanded back for fresh disposal in accordance with law. No Costs.

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Sd/-

Assistant Registrar (CS-III)

Sub Assistant Registrar(CS)

To

The Principal Sub Judge, Thanjavur.

+1 CC to M/s.P.SESUBALANRAJA, Advocate (SR-53708[F] dated 13/03/2019)

+1 CC to M/s.P.VADIVEL, Advocate (SR-54114[F] dated 14/03/2019)

MRN

C.R.P. (PD) (MD) No.2223 of 2015

12.03.2019

KM/ (22.03.2019) 4P 4C