

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CRP (PD) Nos.3585, 3587 and 3588 of 2018
& CMP No.20074 of 2018

Rasayammal (died)
Palanisamy

.. Petitioner in all CRPs

Vs.

1. T.K.Muthusamy
2. Kali Naicker
3. Palaniappan

... Respondents in all CRPs

Common Prayer: The Civil Revision petitions filed under Article 227 of the Constitution of India, against the fair and decretal order dated 06.04.2018 made in I.A.Nos.909, 910 and 911 of 2017 in O.S.No.75 of 2016 on the file of the Sub Court, Perundurai.

For Petitioner
in all CRPs

: Mr.N.Manokaran

For Respondents
in all CRPs

: Mr.C.Munusamy

COMMON ORDER

The 2nd plaintiff in O.S.No.209 of 2004 whose application for reopening the evidence of PW1, recall PW1 and to condone the delay in production of a Sale Deed dated 29.04.1965 were dismissed by the trial Court has come up with these three revisions.

2. The suit was actually filed by the mother of the petitioner herein Rasayammal seeking partition and separate possession of her 3/24th share in the suit property. During the pendency of the suit, the original plaintiff Rasayammal died and the petitioner herein was brought on record as the legal representative of the deceased plaintiff in the year 2012. Thereafter, there were at least two amendments to the plaint. Paragraph 9 (b) of the plaint was introduced by way of an amendment on 01.04.2013. The said paragraph 9 (b) reads as follows:

“9-b) The 2nd plaintiff submits that the 1st plaintiff is entitled to 9/24th share. The 2nd plaintiff is entitled to 29 cents in the suit properties by virtue of a registered sale deed dated 29.04.1965 executed in favour of his father. In fact, his father

has purchased the properties out of the income derived from the ancestral properties and ancestral nucleus. Since the 2nd plaintiff has mechanically filed an application, he is arrayed as 4th defendant as well as the 2nd plaintiff. The 2nd plaintiff has filed a memo to exonerate the 4th defendant and the memo was also recorded on 03.09.2012. The 2nd plaintiff is entitled to 3/24th share and the 1st plaintiff is entitled to 9/24th share. Totalling the 2nd plaintiff is entitled to 12/24 share.”

3. Claiming that by oversight, the plaintiff has omitted to file the sale deed dated 29.04.1965 referred to in paragraph 9 (b) of the plaint, the above applications were filed, of course, after the conclusion of the defendants evidence. These applications were opposed by the defendants contending that the plaintiff has not made out a sufficient cause for condonation of delay in producing the documents. It was also contended that there is no reference to the document in the plaint.

4. The learned trial Judge, who had probably looked into the un-amended plaint, concluded that the plaintiff has not set out the relationship

between the plaintiff and the purchaser under the Sale Deed dated 29.04.1965 namely Chinnasamy Gounder. The trial Court went on to hold that the sale deed dated 29.04.1965 has not been referred to all in the plaint and therefore the plaintiff is not entitled to have the case reopened for filing this document. Aggrieved, the plaintiff has come up with these revisions.

5. I have heard Mr.N.Manokaran, learned counsel appearing for the petitioner and Mr.C.Munusamy, learned counsel appearing for the respondents.

6. Mr.N.Manokaran, learned counsel appearing for the petitioner drawing my attention to paragraph No.9 (b) of the plaint would submit that the learned trial Judge had completely overlooked the statements made in the said paragraph to conclude that there was no reference to relationship between the plaintiff and Chinnasamy Gounder and that the Sale Deed dated 29.04.1965 has not been produced. Therefore, according him, the learned trial Judge was in complete error in dismissing the application.

7. Contending contra, Mr.C.Munusamy, learned counsel appearing for the respondents would submit that even assuming that the portion of the order of the trial Judge is wrong, there is no other sufficient cause adduced by the petitioner to enable the Court to admit the document and to reopen the evidence of PW1. He would also rely upon the Judgement of the Hon'ble Supreme Court in ***Vadiraj Naggappa Vernekar (D) through Lrs Vrs Sharad chandra Prabhakar Gogate*** reported in **2009 (4) SCC 410** and the Judgement of this Court in ***S.Sivakumar Vrs. P.Venkatachalam*** reported in **2012 (4) LW 49**.

8. In ***Vadiraj Naggappa Vernekar (D) through Lrs's*** case referred to above, the Hon'ble Supreme Court has held that Order XVIII Rule 17 of the Code of Civil Procedure is an enabling provision and in exercising the discretion, the Court must see that the party seeking recall of a witness is not allowed to fill up the lacuna in the evidence discovered on cross examination. The prejudice to one of the parties is not a ground for refusal to exercise power by the Court. In ***S.Sivakumar's*** case, Hon'ble Justice V.Dhanapalan has held that the reopening of evidence can be done at

any stage, but the Court must be cautious of attempts to fill up the lacuna and the power should be used sparingly in appropriate cases to enable the Court to clarify the doubts, it made have in regard to the evidence lead by the parties.

9. The scope of Order XVIII Rule 17 of the Code of Civil Procedure is very clear. It not only enables the Court to recall witnesses at any time, such recalling can be done at the instance of the parties also. Of course, a party who seeks recalling must show sufficient cause for recalling or sufficient cause for not adducing the said evidence even during examination of such party.

10. In the case on hand, the question as to whether the discretion should be exercised in favour of a party who seeks recalling or reopening of the evidence have to be decided on the facts and circumstances. The power to recall or reopen being discretionary cannot be put in a straight Jacket formula. The plaint has undergone at least two amendments. The petitioner herein has been brought on record only in the year 2012 and after the

impleading of the 2nd plaintiff, the plaint was again amended in 2013 and paragraph 9 (b) was added. It is in this paragraph 9 (b), a reference to a Sale Deed dated 29.04.1965 was made. Therefore, there is no possibility of this document having been produced even at the time of filing of the suit. The 2nd plaintiff claims 3/24th share by virtue of the Sale Deed and the 1st plaintiff claims 9/24th share by virtue of the two other Sale Deeds which have already been referred to by the trial Court.

11. In the affidavit filed in support of these applications, the plaintiff has very clearly stated that though a reference has been made to the Sale Deed dated 29.04.1965 and the purchase by Chinnasamy Gounder, the said document was not produced due to over site. Being old documents, they were also not immediately traceable and the 2nd plaintiff was able to get certified copies of the documents only on 22.11.2017. These applications have been filed on 27.11.2017, within five days from the date on which the plaintiff had procured the certified copies of the document. The trial Court has not adverted to any of these reasons. The trial Court had probably looked into the un-amended plaint and concluded that the 2nd plaintiff has

not pleaded the relationship between him and Chinnasamy Gounder and has also not referred to the Sale Deed dated 29.04.1965. Therefore, the refusal to exercise the discretion by the trial Court was based on an improper reading of the original plaint. Once it is found that the document has been referred to in the original plaint, all that is expected on the plaintiff to give a sufficient cause for its non production.

12. On going through the affidavit filed in support of these applications I am satisfied that the 2nd plaintiff has made out a sufficient cause for non production of the documents along with the plaint or at the time when the plaint was amended, it is clear that the defendants were also aware of the basis on which the plaintiff was claiming a right and therefore there would be no prejudice caused to the defendants because the plaintiff is allowed to produce the document namely the Sale Deed dated 29.04.1965.

13. In view of the above, I find that the order of the trial Court which stems out of an improper reading of the plaint has to be set aside and it is accordingly set aside. All the three applications namely I.A.Nos.909,

910 and 911 of 2017 in O.S.No.75 of 2016 on the file of the Sub Court, Perundurai will stand allowed subject to payment of cost of Rs.15,000/- to the counsel for the respondents before the trial Court on or before 25.09.2020. Upon such payment and production of the receipt, the trial Court namely the Sub Court, Perundurai shall allow the plaintiff to produce the documents and also let in evidence on the document alone. No further evidence shall be allowed.

14. Considering the fact that the trial is almost over and what remains to be done is only the evidence with reference to the Sale Deed dated 29.04.1965, the trial Court is directed to complete the trial within a period of three months from the date of resumption of physical hearing in the Courts at Perundurai.

15. In the result, all the Civil Revision petitions are allowed .
Consequently, connected miscellaneous petition is closed.

28.08.2020

Note: Time bound order

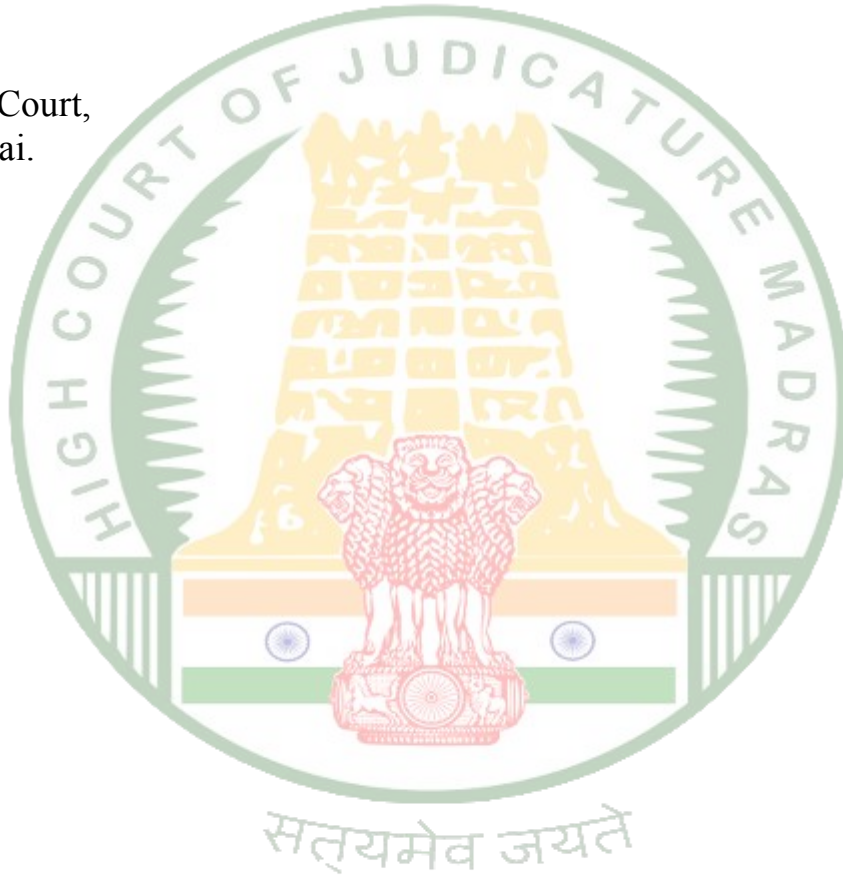
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Index: Yes

Speaking order

To

The Sub Court,
Perundurai.



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R.SUBRAMANIAN, J.

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