



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.02.2020

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (MD)No.2200 of 2019

and

C.M.P. (MD)No.11479 of 2019

Udayarani @ Udayaselvi .. Petitioner/Respondent/Respondent

Vs.

Mohan .. Respondent / Petitioner/Petitioner

Prayer: This Civil revision petition is filed under Article 227 of Constitution of India, to set aside the fair and executable order dated 27.09.2019 passed in the application in I.A.No.85 of 2019 in G.W.O.P.No.7 of 2017 on the file of the learned Principal District Judge, Ramanathapuram.

For Petitioner : Mr.J.Barathan

For Respondent : Mr.K.Balasundharam

ORDER

Heard learned counsel appearing on either side.

2.This Civil Revision Petition has been filed against the order passed in I.A.No.85 of 2019 in G.W.O.P.No.7 of 2017 dated 27.09.2019 on the file of the learned Principal District Judge, Ramanathapuram.

3.The petitioner is the wife and the respondent is the husband. The respondent herein filed a petition in G.W.O.P.No.7 of 2017 for a prayer of declaring himself as the guardian of minor child Nishanth. In that petition, the respondent herein filed an application in I.A.No.85 of 2019 for a prayer of permission to amend the main petition under Order 6 Rule 7 of CPC. That petition was allowed by the trial Court. Against which the revision petitioner has preferred this appeal.

4.The brief substance of the application in I.A.No.85 of 2019 is as follows:

The petitioner and the respondent had a daughter by name Archana, born on 13.09.2006 and a son by name Nishanth born on 05.12.2010. Due to some family dispute, the parties lived separately. On 08.04.2011, the minor Archana died, and it was said that the girl fell down from the upstairs. The petitioner has filed a petition to hand over the custody of the minor boy but the Advocate wrongly filed a petition for declaring the petitioner as the guardian of the minor son. The petitioner came to know about these facts only at the time of arguments. The original petition has to be amended to include a prayer to hand over custody of the minor



child to the petitioner.

5.The brief substance of counter in I.A.No.85 of 2019 is as follows:

The petitioner has affirmed the particulars given in the petition as true and he cannot claim that the petition was wrongly prepared by his counsel. The petitioner has examined himself as witness. Two witnesses were examined on the side of the respondent, after the completion of the arguments on the side of the respondent, the petitioner sought for amendment in the short cause title in paragraph no.18 and in the prayer column thereby, changing the entire nature of the case.

6.After considering both sides, the learned Principal District Judge has allowed the petition. Against which, the petitioner herein has come forward with this revision petition.

7.On the side of the revision petitioner, it is stated that the impugned order is against the provision of Order 6 Rule 17 of CPC. The respondent has filed the impugned application to amend the provision of law under which, he filed the petition in G.W.O.P.No.7 of 2017 and to change the entire prayer. The trial Court failed to consider that the statement of objections were filed only in respect of the earlier prayer. The entire evidence was taken on the basis of the earlier prayer. The statement of objection was filed on 16.02.2018. When the case was posted 'for arguments', after taking several adjournments for arguments, the impugned application for amendment was filed on 13.08.2019. It is wrong to state that the petitioner came to know about the mistake only at the time of arguments. The respondent changed his counsel twice and now he is appearing as a party in person. The provision of Order 6 Rule 17 of CPC clearly prohibits the amendment of pleadings after the commencement of trial.

8.On the side of the respondent, it is stated that the original prayer was to declare the father as the guardian. Later the father wants to amend the petition to hand over the custody of the child to the father. The petitioner filed a H.M.O.P petition for divorce and she obtained a divorce order in the year 2018. One of the child died during the year 2011. To save the other child, the respondent has filed the petition in G.W.O.P.No.7 of 2017. In the prayer column instead of seeking for custody of the child, the counsel wrongly mentioned to declare the father as guardian. Under Order 6 Rule 17 of CPC, the Court may at any stage allow the amendment in the pleadings for the purpose of settling the real question in dispute. Under Section 6 of Hindu Minority and Guardianship Act, the father is the natural guardian and the amendment sought for will not change the nature of the case and in the contents of the petition, the father has narrated his intention of getting the custody of the minor boy.



9. On the side of the petitioner, it is stated that only pre trial amendment can be allowed under Order 6 Rule 17 of CPC. The amendment petition under G.W.O.P. Was filed under Section 7 and 9 of the Hindu Minority and Guardianship Act. Only after the arguments on both sides were over, the father has come forward with this petition. The father made allegation against the counsel on record. The entire basis of the petition is to be altered. The prayer and provision of law and the object of the case are to be altered. As per proviso to Order 6 Rule 17 of CPC, there cannot be an amendment after the commencement of trial. In this case, the arguments are over. When the matter is at the stage of judgment, the petition for amendment has been filed. What prevented the father to seek for the prayer for custody at the time of filing of the original petition was not stated. The question of due diligence on the part of the father is to be proved.

10. It is stated that the trial Court wrongly mentioned in paragraph no.3 that the case is pending for arguments. Even in the affidavit filed by the father, it is stated that both sides arguments were over. The trial Court made an observation that the father is appearing as a party in person and he would have made his submission up to his knowledge whereas at the time of filing of the original petition, the father was represented by a counsel. The father is not an illiterate person. He instructed his counsel to file the petition and the father preparing the petition up to his knowledge is a wrong observation made by the Court. After the trial is completed and arguments were over, there is no question of sympathy over a party in person.

11. The learned counsel for the petitioner would rely upon the judgment passed by this Court in the case of **Mohinder Kumar Mehra v. Roop Rani Mehra and others** reported in **(2018) 2 Supreme Court Cases 132**, wherein it is stated as follows:

"Question not possible to be decided at stage of grant of amendment of pleadings prior to recording of evidence."

12. The learned counsel for the petitioner would rely upon the judgment passed by this Court in the case of **N.Sankara Iyer and Others V. M.Sankarasugumar and others** reported in **2019 (1) CTC 202**, wherein it is stated as follows:

"Amendment cannot be made to take away effect of admission - Amendment not permissible, if not done in good faith."

13. The learned counsel for the respondent would rely upon the judgment passed by this Court in the case of **Church of South India Trust Association and others v. Kovil pillai and others** reported in **2007 (5) CTC 595**, wherein it is stated as follows:



"Suit for declaration and for mandatory injunction - application for amendment of pleading for an alternative prayer of perfection of title by adverse possession - Rejection of same by Court below on ground of delay and if allowed would further delay proceeding - not proper - amendment could be ordered at any time and at any stage of proceedings for purpose of determining real questions in controversy between parties - proposed amendment would not alter nature and character of suit - application for amendment of pleading allowed."

14. In support of this contention, the judgment passed by this Court in the case of **Kubbammal v. N. Santhanamuthu** in **C.R.P. (NPD) (MD) Nos.1626 and 1627 of 2015** is cited, wherein this Court has dismissed the civil revision petition on similar grounds.

15. On the side of the respondent, it is stated that the counter was filed only for the prayer of declaring the father as the guardian and the entire evidence was taken on that stand only and that the prayer is under Section 7 and 9 of the Hindu Minority and Guardianship Act and not for custody of minor son and that the father wants to introduce a new case and that the observation of the trial Court is wrong in this aspect.

16. It is seen that the revision petitioner is the wife of the respondent. The husband filed G.W.O.P.No.7 of 2017 to declare himself as the guardian of the minor child. In that petition, after the completion of trial and after the arguments are over, the father filed a petition to amend the prayer for custody of the minor child. The claim of the father is that the counsel mistakenly sought for a prayer of declaring the father as the guardian instead of filing the case for custody of the minor son. The trial Court has observed in paragraph nos.12 to 20, the father has sought for a prayer of custody but in the prayer column alone a prayer for declaring the father as guardian is stated.

17. The trial Court made an observation that the case is posted for arguments. Even in the affidavit, it is stated that only on hearing the arguments of the wife, the husband came to know that the prayer of custody is not sought for. The observation of the trial Court as to the stage of the case is also wrong.

18. The trial Court made another observation that since the husband was appearing as a party in person, there may be some mistake in preparing the main petition and that an opportunity for the father to amend prayer is to be given. Whereas the respondent husband appeared through counsel till the completion of the trial. Later only he appeared as a party in person. Hence, the observation of the trial Court that the party in person might have committed



some mistake in drafting of the original petition is wrong. A per Proviso to Order 6 Rule 17 of CPC, post trial amendment cannot be entertained unless the party seek amendment proves that irrespective of due diligence, he was not able to make out the amendment at the earlier point of time. The original petition was pending from the year 2011. The husband is not an illiterate person and why the amendment was not carried out earlier was not stated in the petition.

19.The amendment sought for changes the entire character of the main petition. After completion of the arguments, the parties to the petition cannot be allowed to amend the petition so as to change the entire nature of the petition. If the petition is allowed, the wife has to be given opportunity to file additional counter. The entire evidence has to be taken again. In short, the amendment will result in fresh trial. In case if the father was declared as the guardian for the minor child, the father is at liberty to file a separate petition for custody of the minor boy.

20.With the above observation, this Civil Revision Petition is allowed and the order in I.A.No.85 of 2019 in G.W.O.P.No.7 of 2017 dated 27.09.2019 on the file of the Principal District Court, Ramanathapuram is set aside. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

MRN

To

The Principal District Judge, Ramanathapuram.

+2 CC to M/s.K.BAALASUNDHARAM, Advocate (SR-5018[F] AND 5091

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