

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.03.2021

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.R.P.No.43 of 2021 and
C.M.P.No.297 of 2021

1. G.S.Hallan
2. G.S.Bhojan
3. G.S.Iyyappan
4. G.S.Rajan
5. G.S.Muthumani

... Petitioners

Vs.

1. B.Iyyappan
2. B.Chandran
3. B.Mani
4. Janaki
5. Radhika
6. Geetha
7. N.Karthik
8. Kamala
9. B.Vinoth
10. J.Murugan

... Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the order dated 27.02.2020 made in I.A.No.74 of 2018 in O.S.No.99 of 2012 on the file of District Munsif, Udhagamandalam and to allow the present Petition.

For Petitioner :Mr.C.Prabakaran

For Respondents:Mr.S.Elambharathi for R1 to R4, R7 and R8
R9 and R10 - served, name printed, No appearance

O R D E R

The present Civil Revision Petition has been filed under Article 227 Constitution of India to set aside the order dated 27.02.2020 made in I.A.No.74 of 2018 in O.S.No.99 of 2012 on the file of District Munsif, Udhagamandalam and to allow the present Petition.

2. The case of the petitioners is that the petitioners are the plaintiffs in O.S.No.99 of 2012 and the respondents are the defendants. The petitioners have filed the said suit for permanent injunction restraining the respondents / defendants, their men and all those claiming through or under them from entering the properties described in the schedule hereunder or interfering in any manner whatsoever with the possession and enjoyment of the petitioners / plaintiffs, except through Court by due process of law. A written statement was filed by the defendants stating that the petitioners have filed the suit by pressing into service false and misleading allegations by suppressing all material facts, hence prayed to dismiss the suit for nonpayment of correct and proper court fees.

3. In consequence, pending suit, the petitioners had filed I.A.No.347 of 2016 for amendment of the description of the properties given in the plaint schedule by deleting the said schedule and by substituting the schedule given in the petition filed therein and to consider the claims put forward by the parties. A detailed counter was filed by the respondents / defendants resisting the same by contending that the said petition is not sustainable in law, in view of the fact that the trial has commenced as early as on January 2014 and the 5th petitioner was already examined in-chief and the suit is posted for cross examination. Further, the respondents had also contended that petitioners failed to produce any authenticated documents to substantiate their claim that they are in possession and enjoyment of the alleged property, which they now sought to substitute by amending the plaint. In the absence of any such documents, the petition filed to amend the plaint schedule properties is not sustainable, was the crux of the respondents before the court below. After considering the arguments and the documents placed on record on either side, the court below had allowed the petition for amendment of plaint by order dated 17.08.2016. Subsequently, amended plaint in O.S.No.99 of 2012 was filed by the petitioners / plaintiffs on 17.10.2016 and additional written statement was filed by the respondents on 11.01.2017.

4. Thereafter, the 5th petitioner has filed I.A.No.74 of 2017 seeking to eschew the proof affidavit already filed the said petitioner, viz., evidence in-chief by P.W.1, since the same was not in-conformity with the amended pleadings and sought permission to file a fresh proof affidavit. A counter was filed by the respondents / defendants stating that Section 151 of CPC does not empower any litigant to undo a thing, which has already been done. The law is well settled that the litigant have to stand on their own pleadings and evidence and the petitioners have no right to seek the indulgence to eschew the

entire evidence, when there is no discrepancy found between the pleading of the plaint and the proof affidavit, hence sought to dismiss the petition.

5. After going through the entire pleadings the court below in I.A.No.74 of 2018 on 27.02.2020 had observed that "the 5th petitioner / plaintiff was examined as P.W.1 and exhibit A.1 to A.7 were marked. Subsequently, the petitioners' side, plaint was amended. In this circumstances, this Court decided need not eschew the entire evidence of P.W.1, therefore not inclined to allow the petition." Challenging the said order, the petitioners are before this Court by way of the present Revision Petition seeking to set aside the said order made in I.A.No.74 of 2018.

6. The learned counsel for the petitioners submitted that the trial court in dismissing an application under Section 151 of C.P.C seeking to eschew the proof affidavit of P.W.1 filed by the 5th petitioner is illegal, contrary to law. Further, the court below had failed to note that subsequent to the filing of the proof affidavit, an application for amendment petition was filed by the petitioners and the same was allowed and in pursuance to the said amendment, amendment plaint was filed, therefore, it is indispensable to file the proof affidavit by the plaintiffs in tune with the amendment plaint, therefore it is necessary to eschew to said proof affidavit.

7. It is the further contention of the petitioners that the court below ought to have considered that the proof affidavit filed originally contains based on the averment of the original plaint, therefore, the petitioners / plaintiffs ought to have filed the necessary proof affidavit with the amended facts enabling the petitioners to sustain the claim made in the plaint and more particularly, the burden of proof heavily lies on the petitioners.

8. The learned counsel for the petitioners would also contend that the court below ought to have considered that the amendment application was allowed relating to the schedule of the properties and with clear boundaries and extent. Apart from that, lesser extent of the suit item have been shown in the amended plaint than that of the suit item have been shown in the original plaint. Therefore, all these aspects are need to be clarified by the petitioners in tune with the new plaint so that the petitioners can prove their case and further, no additional documents are sought to be marked. Therefore, the character and nature of the suit does not change in the event of filing new proof affidavit by eschewing the existing proof affidavit of P.W.1.

9. Resisting the same, the learned counsel for the respondents 1 to 4, 7 and 8 submits that the impugned petition

has been filed with a malafied intention to eschew the entire evidence, so that the petitioners can introduce fresh and new pleadings to fill up the lacunas. Further, the petitioners have no right in law to eschew the entire evidence after a lapse of 6 years in the year of 2018, hence the court below had rightly considered the same and dismissed the said petition. Accordingly, pleaded to dismiss the present petition also. Though the respondents 9 and 10 were served and name has been printed in the cause list, there is no appearance for them either-in-person or through learned counsel.

10. Heard the learned counsel on either side and perused the documents placed on record.

11. It is pertinent to point out that originally, the suit in O.S.No.99 of 2012 was filed by the petitioners / plaintiffs by mentioning the Schedule of Property, which is as follows:-

"In the Registration District of Nilgiris, in the Registration Sub District of Uthagamandalam in the Taluk of Uthagamandalam : in Ithalar Village: Patta No.5/176/A;

Item-1:

11.97 acres in Old S.No.251; R.S.Nos.251/2A; 251/2B; 251/2C; 251/2D; 251/2E and 251/2F, now comprised in new R.S.Nos.167/4P; 166/1 to 5; 6P; 7P; 8P; 9P and 10; 167/2, 3,4P,5 and 6; 169/1P; 2P; 3 to 8 and 168/1P; and 168/2 to 8;

Item - 2

4.60 acres in Old S.No.261; R.S.Nos.261/1 to 4; presently in new R.S.Nos. 175/4 to 6, 244/1 to 5; (261/1); 175/2 & 3 (261/2); 175/1; 176/5,6; 245/4,5; (261/3) and 176/3 and 4; 245/2,3 (261/4);"

subsequently, amendment was sought to change the schedule of property and the same is as follows:-

"Item-1

O.S. No.	New R.S.No	Total Extent	Extent belonging to the plaintiffs and in their possession.
251	167/3	1.73 acres	1.00 acre
251	167/4	2.16 acres	2.16 acres (full extent)
251	167/5	1.18 acres	1.18 (full extent)
251	167/6	0.74 acres	0.66 acres

Boundaries of the Plot of 1 acre in R.S.No.167/3

North: J.Bheeman's land

South: R.S.No.167/4 belonging to the plaintiffs

East: Ginna Joghee Gowder's portion of land in R.S.No.167/3

West: Land in R.S.No.167/1

Boundaries of 0.66 acres in R.S.No.167/6:
North: Ginna Joghee Gowder's land
South: G.T.Hallan's land
East : Government forest
West : R.S.No.167/4 belonging to the plaintiffs

ITEM 1			
261	175/4	2.50 acres	1.15 acres
261	176/2	0.64 acres	0.57-1/2 acres
261	176/4	1.63 acres	1.63 acres (full extent)

Boundaries of 1.15 acres in R.S.No.175/4
North: Ooty - Avalanche Road
South: Late Muthoor Pillay's family's lands
East: Malliah Bojan's land
West : I.B.Nandhi Gowder's brothers' ;amd
Boundaries of 0.57-1/2 acres in R.S.No.176/2
North and south : Govt. Forest
East : Hattari nanjan's land
West : Nanja Maistry's land"

12. On going through the entire pleadings on either side and the documents placed on record, this Court finds some force in the submission of the learned counsel for the respondents, in view of the fact that the petitioners have no right in Law to eschew the entire evidence after a lapse of six years, that too without any sufficient reasons. That being the case, the court below has rightly dismissed the prayer of petitioners. That apart, the petitioners cannot ride both the horses at the same time and the petitioners cannot plead new set of facts in the subsequent proof affidavit, which will definitely cause hardship to the respondents.

13. Moreover, when the petitioners have filed a petition to amend the plaint and the court below has considered the same and amendment was carried out, further, a counter affidavit was also filed by the respondents, this Court is of the view that the petitioners can file proof affidavit with regard to the amended portion of the plaint alone and he cannot file any fresh proof affidavit, which will entirely change the case of the petitioners / plaintiffs.

14. In view of the above, the present Civil Revision Petition is allowed and the order passed in I.A.No.74 of 2018 in O.S.No.99 of 2012 dated 27.02.2020 is set aside and the learned District Munsif, Udthagamandalam is directed to accept the proof affidavit only to the portion, which was amended in the plaint

and not on any other facts, which has been already pleaded in the proof affidavit and the respondents are at liberty to file additional written statement in respect of the amended portion. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssd

To

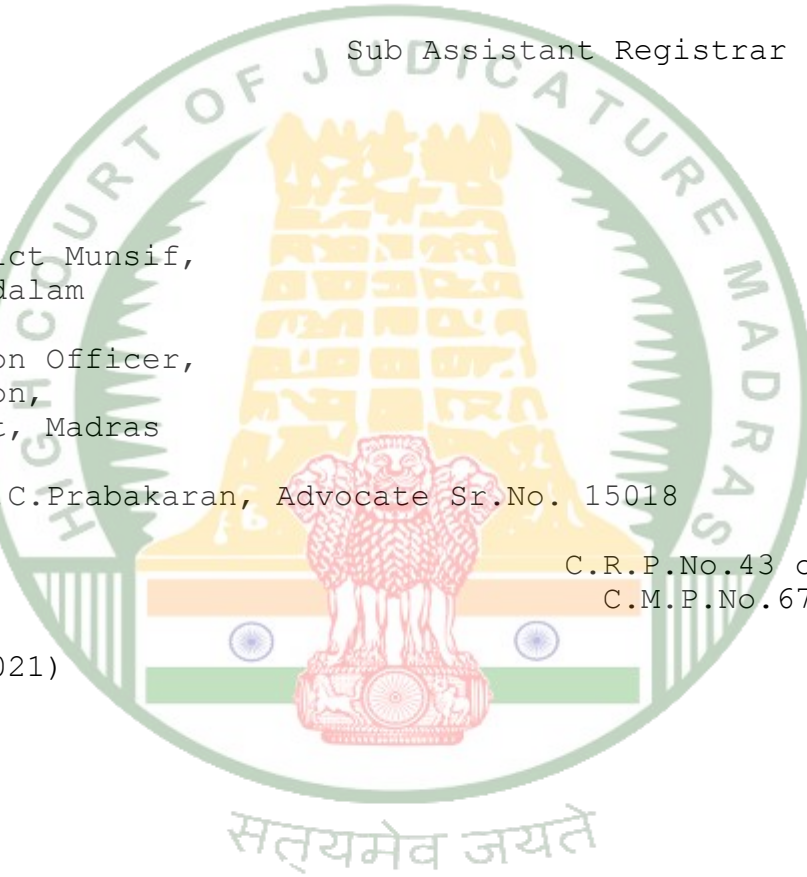
1.The District Munsif,
Uthagamandalam

2.The Section Officer,
V.R.Section,
High Court, Madras

+1 cc to Mr.C.Prabakaran, Advocate Sr.No. 15018

C.R.P.No.43 of 2021 and
C.M.P.No.6706 of 2020

GSN (CO)
RMP (17/04/2021)



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