

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 20th DAY OF APRIL 2021

THE HON'BLE MR. JUSTICE V PARTHIBAN

A. No.1090 of 2021

in

C.S. No.430 of 2019

1. Mrs.Jayashree Selvakumar,
aged 52 years,
D/o.Late Mr.A.R.Jagadeeswaran,
W/o.Mr.Selvakumar,
BIK 131B, Kim Tian Road,
#05-171, Singapore - 162131.
 2. Mrs.J.Rajashree,
aged 50 years,
D/o.Late Mr.A.R.Jagadeeswaran,
W/o.Mr.Lingeswer,
Old No.17/3, New No.47
Kariappa Street, Purasawalkam,
Chennai 600 007.
- ... Applicants/Plaintiffs

-Versus-

1. Mrs.J.Dhakshayini,
aged 72 years,
W/o.Late Mr.A.R.Jagadeeswaran,
Old No.17/3, New No.47,
Kariappa Street, Purasawalkam,
Chennai 600 007.

2. Mr.J.Saravanan,
aged 47 years,
S/o.Late Mr.A.R.Jagadeeswaran,

No.161/284, 2nd Street,
 Kellys, Purasawalkam, Chennai 600 007.
 Also at: Old No.17/3, New No.47
 Kariappa Street, Purasawalkam,
 Chennai 600 007.

... Respondents/Defendants

Application praying that this Hon'ble Court be pleased to permit the petitioners to amend the prayer in A.No.2932 of 2020 as “to appoint a Commissioner for ascertaining the quantum of rent derived from and rental potential of the schedule mentioned properties” instead of “to appoint a Commissioner for ascertaining the mesne profits derived from the schedule mentioned properties”.

This application coming on this day before this court for hearing, the Court made the following order:-

The above application has been filed by the applicants/plaintiffs seeking to amend the prayer as follows:

“to permit the applicants to amend the prayer in A.No.2932 of 2020 as “to appoint a Commissioner for ascertaining the quantum of rent derived from and rental potential of the schedule mentioned properties” instead of “appoint a Commissioner for ascertaining the mesne profits derived from the schedule mentioned properties””

2. The applicants/plaintiffs filed a suit seeking declaration that they are entitled to 5/16th share in the schedule mentioned properties by a preliminary decree,

(a) declaring the plaintiffs' 5/16th share each in the schedule mentioned properties by passing a preliminary decree;

(b) dividing the schedule mentioned properties by metes and bounds and allot 5/16th share thereof to each plaintiff through appointment of an Advocate Commissioner by passing a final decree;

(c) directing the defendants to pay the plaintiffs the mesne profits being 5/16th share each in the rental income of about Rs.1,00,000/- (Rupees one lakh only) per month, accrued from the schedule mentioned properties for the period from August, 2018 till June 2019 and in the future rental income;

(d) declaring the settlement deed registered as Document No.2283 of 2018, on the file of the Sub Registrar, Purasawalkam, executed in favour of the second respondent as null and void; etc.

3. The applicants herein are the daughters of the deceased

of the deceased. The said A.R.Jagadeeswaran died on 12.07.2018, left behind the applicants/plaintiffs herein and the respondents/defendants as his legal heirs. The family has been in possession and enjoyment of the ancestral properties from their fore fathers which are described in the suit scheduled properties in Item Nos.I and II. According to the applicants/plaintiffs that they have 5/16th share in the suit properties which share was sought to be denied to them and therefore, the suit has been laid by them.

4. In the suit, the applicants herein originally filed an application in A.No.2932 of 2020, seeking to appoint Advocate Commissioner for ascertaining the mesne profits derived from the schedule mentioned properties. In response to the said application, on behalf of the respondents/defendants herein, a counter affidavit has been filed objecting to the prayer for appointment of Advocate Commissioner for ascertaining the mesne profits derived from the suit schedule properties by raising objections as follows in paragraph No.3 of the counter affidavit:

“3. I state that the above application filed by the applicants/ plaintiffs for appointment of a commissioner for ascertaining mesne profits derived from the suit schedule mentioned properties at this juncture, even before a judgment has been passed in the suit, is not

maintainable both in law and in facts. In fact, the said prayer has been sought for in paragraph 13(b) of the plaint itself. It would be seen that said prayer which has been sought for in the plaint as one of the reliefs has been sought for in the present application at the interlocutory stage as if the same is being sought for the first time. As the main prayer and interlocutory prayer sought for presently are identical and one and the same, the present application is liable to be dismissed at the threshold.”

5. According to the above objections that the question of Advocate Commissioner ascertaining the mesne profits derived from the schedule mentioned properties did not arise before the preliminary decree is passed and hence, the same was not maintainable and sought the dismissal of the application as being unsustainable in law.

6. Taking note of the objections as found in the counter affidavit filed on behalf of the respondents/defendants which is extracted above, an amendment application was filed by the applicants/plaintiffs herein in Application No.1090 of 2021, seeking to appoint Advocate Commissioner for ascertaining the quantum of rent derived from and rental potential of the schedule mentioned properties, instead of the original prayer seeking

derived from the schedule mentioned properties.

7. On behalf of the respondents/defendants herein, a counter affidavit has been filed *inter alia* contending that the Application No.1090 of 2021, is not maintainable in terms of the provisions of Order VI Rule 17 of CPC. Along with that, the same objection which was taken in respect of the Application No.2932 of 2020 has also been taken in the counter affidavit. The application was posted for enquiry before this Court.

8. Mr.T.Mohan, the learned counsel for the applicants/plaintiffs would submit that in view of the objections raised by the respondents/defendants in their counter to Application No.2932 of 2020, as to its maintainability, the applicants/plaintiffs were advised to amend the prayer as reflected in the Judges Summons filed in Application No.1090 of 2021 and by the amendment that is being sought in the said application, the applicants/plaintiffs herein are not attempting to introduce any new prayer. According to the learned counsel, instead of ascertaining the mesne profits derived from the schedule mentioned properties, what is sought presently by way of the present amendment is ascertaining the quantum of rent derived from and rental potential of the schedule mentioned properties. According to

him, there cannot be any valid or legitimate objections for allowing the

application by the respondents/defendants.

9. However, Mr.K.Bijai Sundar, learned counsel appearing on behalf of the respondents/defendants on the other hand, has very strong objections for allowing the application as according to him that application itself is not maintainable and it has to be dismissed *in limine*. The learned counsel would draw the attention of this Court to Order VI Rule 1 of CPC which reads as under:

“1.Pleading- “Pleading” shall mean plaint or written statement.”

10. According to the learned counsel, the amendment can be sought only in pleadings which is defined in the above provision namely plaint or written statement. But, in this case, the amendment is being sought in the affidavit filed in support of the application. Such amendment is not permissible in terms of the provisions of the CPC. In support of his contention, the learned counsel would heavily rely on the decision of the Andhra Pradesh High Court rendered in **C.R.P.Nos.1754 of 2017 and batch dated 04.08.2017**. The learned counsel would draw the attention of this Court to the following observations of the learned Judge of the Andhra Pradesh High Court:

<https://hcservices.ecourts.gov.in/hcservices/> *“These two strange applications are filed by the*

petitioners seeking leave of the Court to amend the affidavit by exercising power under Order VI Rule 17 r/w Section 151 C.P.C. According to Order VI Rule 17 C.P.C the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The term pleading is defined as plaint or written statement under Order VI Rule 1 C.P.C. If, such restricted meaning is accepted, it is difficult for the Courts to exercise its power under Order VI Rule 17 C.P.C, granting leave to amend the original petitions and other incidental proceedings therefore, a wider meaning has to be given to the word pleading as defined under Order VI Rule 1 C.P.C. But, affidavit is not a part of pleadings and it is not defined anywhere in the Code of Civil Procedure. However, According to [Section 3\(3\)](#) of The General Clauses Act, 1897, the term affidavit means: affidavit shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing Similarly, according to Rule 34 (new) of The Andhra Pradesh Civil Rules of Practice and Circular Orders, 1980, the word affidavit is interpreted as follows:

The word affidavit in this Chapter shall include any document required to be sworn; and the words swear and sworn shall include affirm and affirmed.

Rules 35 to 52 deals with various aspects like Form of an affidavit, description, title of affidavits and before whom the affidavit may be sworn. But, those Rules are not necessary for deciding the present controversy.

Order XIX C.P.C deals with what the affidavit should contain. Therefore, in the absence of any definition in the Civil Procedure Code, the definition in [The General Clauses Act](#) and interpretation in Civil Rules of Practice and Circular Orders is to be taken into consideration and applied for deciding the real controversy in this revision petition

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It is clear from the definition and form of affidavit and persons authorised to administer oath etc, as discussed in the judgment, the affidavit is only a statement and affirmation or a declaration by the parties, as to the facts of a particular case filed before the Trial Court. But, such statement sought to be on affirmation or oath is sought to be amended by the petitioners in I.A.No.1582 of 2016 in I.A.No.781 of 2016 and I.A.No.1583 of 2016 in I.A.No.780 of 2016 in O.S.No.306 of 2016 before the Trial Court.

Thus, by virtue of Order XXXIX Rule 1 C.P.C, which permits the Court to dispose of interlocutory applications by an affidavit or otherwise, the petitioners filed affidavit along with petitions in compliance of Order XXXIX Rule 1 C.P.C. That apart, Rule 60 of Civil Rules of Practice (new) deals with proof of facts by affidavit, and fact

required to be proved upon an interlocutory proceeding shall unless otherwise provided by these rules, or ordered by the Court, be provided by affidavit but the Judge may, in any case, direct evidence to be given orally, and thereupon the evidence shall be recorded, and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibits shall be prepared and annexed to the judgment.

Thus, Order XXXIX Rule 1 C.P.C permits filing of an affidavit in proof of certain facts in an interlocutory application, the Courts allowing the parties to file affidavits along with application for interim reliefs by virtue of power conferred on Court.

Section 94(3) C.P.C deals with supplemental proceedings and in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold.

On a cogent reading of Section 94 C.P.C and Order XXXIX Rule 1 C.P.C, coupled with Rule 60 of Civil Rules of Practice and Circular Orders, an application under Order XXXIX Rule 1 C.P.C can be decided basing on an affidavit filed by the party who is seeking an interlocutory order.

Thus, viewed from any angle, the affidavit is only a solemn affirmation or a declaration made before a person who is competent to administer oath, which is only a

substitute to the oral statement. Such statement on affirmation would not fall within the definition of pleadings under Order VI Rule 1 C.P.C. It is an elementary principle that leave can be granted to amend the pleadings under Order VI Rule 17 C.P.C and the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The heading of the rule and the word used his pleadings in such manner must be read in conjunction with Rule 1 of Order VI C.P.C. In such case, Order VI Rule 17 C.P.C shall be confined to the pleadings.

In the present facts of the case, pleading is only a petition, but not an affidavit, since the affidavit is a solemn statement affirmed before the competent officer or a declaration. Leave cannot be granted to amend solemn affirmation made before a competent officer, who is authorised to administer the oath, as discussed above.

An affidavit is statement of facts in writing made voluntarily before an officer authorised to administer oaths. An affidavit is different from a plaint. As already stated, in the writ petition, evidence in support of facts in the petition is accepted in the form of affidavit. But the allegations in the plaint are to be proved by producing evidence, unless they are admitted by the defendant. An affidavit which is not properly verified cannot be treated

as an affidavit in the eyes of the law. When there is no original affidavit in the eyes of the law, the question of amending it does not arise because amendment is referable to an existing one. In Dwaraka Nath v. Income Tax Officer, the Supreme Court held that, if an affidavit is defective in any manner, instead of rejecting it a reasonable opportunity is to be given to the party concerned to file better affidavit complying with the requirements of law. The above decisions indicates that, if an affidavit is defective for lack of proper verification, an opportunity must be given to the party concerned to file a properly verified affidavit. This shows impliedly that amendment of verification of affidavit cannot be allowed but the party concerned must be given an opportunity to file a properly verified affidavit. For these reasons, the verification of affidavit cannot be amended. In the facts and circumstances of the case and keeping in view the decision in Dwaraka Nath³ case, the Supreme Court afforded an opportunity to the respondents to file properly verified affidavits complying with the relevant provisions of the rules without changing the contents of the original affidavits except the relevant paragraphs relating to verification.

In Pannalal Ganguly v. State of Tripura, the Gauhati High Court held that amendment means, to alter by addition, substitution, or omission. If re-verification in the manner sought is allowed, and it alters the original affidavits, either by addition or by substitution, it would

amount to amendment of the original affidavit, so far as it concerns the verification. An affidavit which is not properly verified, cannot be treated as an affidavit in the eyes of the law. When there is no original affidavit in the eyes of the law, the question of amending it does not arise, because amendment is referable, only to an existing one.

In Nandakumar Shabnkar Mhatre v. Dayanand Mahadev Mhatre , the Bombay High Court held that, the affidavit once made cannot be allowed to be changed by amending the same. The affidavits without verification and the affidavits with defective verification cannot be admitted in evidence. In paragraph 6 of the same judgment, the Court observed as follows:

6. The learned Counsel for the petitioner orally applies for amendment of the petition and thereby wants to correct the verification of the petition. I am unable to see how a party can be allowed to amend the affidavit which has been already made by him. The affidavit once made cannot be allowed to be changed by amending the same. Consequently, the prayer of the learned Counsel for the petitioner for permission to amend the petition cannot be granted.

Thus, the consistent views taken by the Gauhati and Bombay High Courts is that an affidavit cannot be permitted to be amended, since it is a statement of fact, made on affirmation before an officer authorised to administer oath. Even, ignoring the judgments of Gauhati

and Bombay High Courts, it is clear from the definition of affidavit under [Section 3\(3\)](#) of General Clauses Act and Rule 34 of Civil Rules of Practice and the judgment of the Apex Court in M. Veerabhadra Rao case, that the affidavit is only a statement by affirmation or a sworn statement before an officer competent to administer oath, it is not a pleading within the definition of Order VI Rule 1 C.P.C, even if wider meaning is given to such pleading. Therefore, the power under Order VI Rule 17 C.P.C. cannot be exercised to grant leave to the petitioners to amend the affidavit, which is a statement on solemn affirmation and at best, the petitioners are entitled to file an appropriate affidavit or additional affidavit after obtaining leave of the Court. It is also clear that the proceedings in a civil court are governed by Civil Procedure Code and A.P. Civil Rules of Practice and Circular Orders, 1980. The Writ Rules in the High Court and Appellate Side Rules, have no application to proceedings in Civil Court. Consequently, the question of exercising power under Order VI Rule 17 C.P.C to grant leave to the petitioners to amend the affidavit does not arise.”

11. The learned counsel would submit that the above ruling of the Andhra Pradesh High Court would have to be applied on the factual matrix of the case, as the applicants/plaintiffs herein are attempting to amend the affidavit which is sworn statement and once the affidavit is filed after

affirmation on oath, the same cannot sought to be amended at all. According to the learned counsel, the view of the Andhra Pradesh High Court is also the views of the High Court of Gauhati and Bombay as reflected in the above order itself. Therefore, the learned counsel would submit that the amendment presently sought is not maintainable in terms of Order VI Rule 1 of CPC. Hence the application has to be rejected outright.

12. At this, the learned counsel Mr.TMohan, submitted that the submission made on behalf of the respondents/defendants is incorrect and invalid for the simple reason that what is sought to be amended is only in relation to the prayer as reflected through the Judges Summons and the amendment is nothing to do with the contents of the affidavit originally filed in the application. The learned counsel would also submit that as per Section 151 of CPC, an inherent power vested in this Court and such power could be resorted to while allowing any amendment application. The learned counsel however particularly submit that even the above judgment of Andhra Pradesh High Court, there are clear passages against the contention of the respondents/defendants and he would refer to succinct observation of the High Court that the term 'Pleading' defined as plaint or written statement in Order VI Rule 1 of CPC, if any restricted meaning given, it is difficult for

leave to amend the original petitions and other incidental proceedings and therefore, a wider meaning has to be given to the word 'Pleading' as defined under Order VI Rule 1 of CPC.

13. The learned counsel would also point out that in that case, a direct amendment to the affidavit was sought by oral application to correct the verification as contained in the affidavit and such application was rejected by the High Court. Therefore the ratio laid down in that decision, cannot validly be applied to the factual matrix of the present case. According to the learned counsel, such objections are frivolous and not for bonafide reasons.

14. This Court considered the submissions of the learned counsels for the rival parties, perused the pleadings, decisions and the materials placed on record. The objections raised vehemently against the proposed amendment in Application No.1090 of 2021 by the learned counsel Mr.K.Bijai Sundar, appears to be a case of incorrect understanding as to the nature of the amendment that is being sought in the present application.

15. Firstly, when the original application No.2932 of 2020 was filed for appointment of Advocate Commissioner for ascertaining the mesne profits derived from the schedule mentioned properties, the objection was

taken in the counter affidavit by the respondents/defendants that such application was not maintainable even before the preliminary decree could be passed in the suit. The objection so taken had its effect on the applicants/plaintiffs and therefore, they were constrained to file the present Application No.1090 of 2021 seeking to colour the prayer with slight modification in order to overcome the objections of the respondents/defendants. When the prayer seeking appointment of Advocate Commissioner with slight modification in fact necessitated as a response to the objections of the respondents/defendants, this Court is unable to appreciate as to how the respondents/defendants could still have objections to the amended prayer *dehors*, whether the contents of the pleading of this nature could be amended in terms of Order VI Rule 17 of CPC. Section 151 of CPC is an inherent power enjoined upon the Civil Court, which gives this Court a wide leverage to pass any orders for securing the ends of justice. The power of the Court in terms of the said section is not limited by any express or implicit provisions of the CPC. On this ground alone, the objections of the respondents/defendants need to be rejected.

16. Be that as it may, as regards the construction of the provisions in Order VI Rule 17 of CPC and the definition of pleading, the contention of the learned counsel Mr.K.Bijai Sundar for the respondents/defendants, is

awfully misplaced and misconceived, as this Court is unable to countenance such off-hand and half-baked arguments. The applicants/plaintiffs herein merely seeking to amend the prayer as reflected in the Judges Summons filed in Application No.1090 of 2021 and they are not attempting to seek any amendment of the affidavit in the first place. The affidavit is merely a statement of fact and it is supportive of the prayer accompanying the application and in this case, no amendment is being sought in the averments or the statements contained in the affidavit. Only when such attempt is made, this Court can understand the opposition to the amendment as vociferously canvassed by learned counsel Mr.K.Bijai Sundar. However, what is sought to be amended is only a prayer modifying the scope of the appointment of Advocate Commissioner application which does not change the character of the earlier application in A.No.2932 of 2020 nor does it seek any amendment in the affidavit. Therefore, the learned counsel has misdirected himself by needlessly embarking upon worthless objections to the amendment that is sought in this application.

17. As regards the reliance placed by the learned counsel on the decision of the Andhra Pradesh High Court which has been extracted supra, in that case, the petitioner therein had sought amendment of the affidavit seeking leave of the Court at Paragraph No.23 of the affidavit in

I.A.No.1582 of 2016 in the pending suit and that was a subject matter of 'lis' before the High Court in civil revision petition.

18. The learned counsel without properly appreciating the facts which led to the ruling of the High Court, has attempted to pitchfork the decision in the factual matrix of the present case. In the bargain, the learned counsel has unnecessarily consumed valuable time of this Court on a pretence that he has a valid and formidable objection against the present amendment being sought on behalf of the applicants/plaintiffs. In the opinion of this Court, the objection is vexatious, frivolous and completely devoid of merits and substance. The objection which was premised on the ground on which such arguments were advanced was too glaringly, invalid and incorrect. Therefore, the objections need to be rejected outright.

19. Further, the learned counsel has also not come out with any clear case of what is the prejudice that is caused to the respondents/defendants, if the amendment is to be allowed. But, on the other hand, the entire focus of the learned counsel is to non suit the applicants by adopting a contrived stand of raising ungracious objection to the maintainability of the application as if the amendment is being sought to the contents of the

20. What is strange in the objection of the learned counsel is that he advanced the case of objection with such conviction as if he is supported by the definition of pleading in terms of the provisions of CPC without realizing that what is sought is a simple amendment to the prayer which can be otherwise allowed for the asking either in terms of Order VI Rule 17 or in terms of Section 151 of CPC. Section 151 of CPC gives a handle to this Court to traverse beyond the constricted sense of understanding of any provisions of CPC and in any case, the issue herein is not pertaining to the amendment to the contents of the affidavit. Therefore, the objection in its entirety by the learned counsel, is to be characterized as petty-fogging and is liable to be discountenanced outright.

21. Though arguments are advanced in regard to Section 153 of CPC by the learned counsel for the applicants/plaintiffs and the same was also opposed as to its applicability in the present case, on behalf of the respondents/defendants, this Court in view of the above conclusion, is not inclined to analyse the scope of Section 153 of CPC, as to its applicability in the present dispute raised herein.

22. For the above said reasons, the application in A.No.1090 of 2021,

23. Post the other applications and the civil suit for hearing on
26.04.2021.

Sd./-V.P.N.J

20/04/2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

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