

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Order 15.07.2021	Date of Pronouncing Order 20.07.2021
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CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(PD).No.2316 of 2018
and C.M.P.No.14411 of 2018

K.Mohan Selvam

... Petitioner

Vs

1.Paranjothi Selvanayagam
2.Kaliammal
3.Pushpalatha
4.Shenbagaselvi
5.Chellammal
6.Sivakamasundari

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 11.07.2018 made in I.A.No.590 of 2017 in O.S.No.114 of 2011 on the file of the Subordinate Judge, Pollachi.

For Petitioner : Mr.D.R.Arun Kumar

For Respondents : Mr.S.Thangavel for R1
Mr.T.Vijay
for Mr.R.Nandhakumar for R2
R3 to R6 - Notice Served
and No Appearance

ORDER

This Civil Revision Petition is filed against the fair and decreetal order dated 11.07.2018 made in I.A.No.590 of 2017 in O.S.No.114 of 2011 on the file of the Subordinate Judge, Pollachi, thereby dismissing the application to receive the additional written statement.

2. The petitioner herein is the 5th defendant and the first respondent herein is the plaintiff in the said suit. The first respondent herein filed the said suit for partition and for separate possession.

3. Pending the said suit, the petitioner herein filed an application seeking permission to receive additional written statement and the same was

dismissed on 11.07.2018 on the file of the Subordinate Judge, Pollachi. Aggrieved by the same the above Civil Revision Petition has been filed.

4. The learned counsel for the petitioner herein would submit that when the said suit was filed by the first respondent herein for partition and separate possession, the petitioner herein was a minor and his mother / 4th defendant was appointed as guardian for the petitioner herein and she filed a written statement on behalf of the minor petitioner herein against his interest. After attainment of majority, he came to understand that the written statement filed on behalf of him by his mother is untrue and suppressed the existing facts and circumstances of the said suit. On 04.10.2009 the petitioner's father was expired and the petitioner herein was under the care and custody of his grandmother and his maternal uncle. If at all the suit is allowed to be proceeded on the strength of the written statement filed by the fourth defendant on behalf of the petitioner herein, the petitioner will be put to serious damage. The earlier written statement filed by the fourth defendant was only after colluding with defendants 3 and 6 and against the interest of the petitioner herein.

5. He further submitted that there is no legal embargo to take inconsistent pleas by way of additional written statement and it should be liberally entertained by the Courts. In support of his contention, he relied upon the following judgments :

***“1. the decision of this Court in AIR 1978
MAD 230 [Meenambal and Others -vs-
Chockalinga Chettiar and others];***

***2. the decision of this Court in C.R.P.(PD)
No.2881 of 2009 dated 16.12.2009
[P.N.Amirthavalli and others -vs-
S.V.Saravanan];***

***3. the decision of this Court in C.R.P.(PD)
No.996 of 2005 dated 15.09.2006 [Thiyagarajan
-vs- Manivannan]; and***

***4. the decision of the Hon'ble Supreme
Court in Civil Appeal No.685 of 1968 dated
18.09.1975 [Ratnam Chettiar and Ors. -vs-
S.M.Kuppuswami Chettiar and Ors].”***

6. Per contra, the learned counsel for the first respondent would submit that the averments made in the additional written statement are all new pleas and contrary to the pleadings raised in his earlier written statement filed by his mother. The fourth defendant was already examined as D.W.1 and thereafter the petitioner herein filed the application seeking permission to receive additional written statement in order to fill up the lacuna, colluded among themselves and raised new pleas by way of filing the additional written statement. It is a complete violation of the provisions contemplated under the Civil Procedure Code.

7. He further submitted that the fourth defendant is none other his mother, who is the guardian and she protects the petitioner's interest and contested the suit till he attains majority. Now the petitioner herein had over turned and stating that his own mother is acting against his interest. The mother of the petitioner herein provided education and shelter all along to him and now he has come with the plea that he is residing with his paternal uncle and grandmother. Therefore, the Court below rightly dismissed the application seeking leave to file additional written statement.

8. He further submitted that there is no provision in the Code of Civil Procedure giving a right to a minor - 5th defendant who is the petitioner herein and who attained majority during the pendency of the suit to file a fresh written statement. It is permissible to amend the written statement which was already filed in accordance with the provisions of Order VI Rule 17 of the CPC. Therefore, the petitioner herein has no right to get back the earlier written statement filed by his guardian and in support of his contention, the learned counsel for the first respondent herein relied upon the following decisions of this court:

“1. 2007 (1) CTC 586 [R.S.Nagarajan -vs- R.S.Gopalan and others];

2. 2019 (5) LW 547 [M.Devi and another -vs- D.Soodamani and others]; And

3. 2020 (4) LW 802 [Thimma Naicker -vs- Manimekalai and others];”

9. Heard, Mr.D.R.Arun Kumar, learned counsel appearing for the petitioner herein and Mr.S.Thangavel, learned counsel appearing for the

first respondent herein and Mr.T.Vijay for Mr.R.Nandhakumar, learned counsel appearing for the second respondent herein.

10. The first respondent herein filed the said suit for partition and separate possession as against the respondents 2 to 6 and the petitioner herein, in which, the petitioner herein was minor at the time of filing the suit and he was represented through his mother namely the fourth defendant. The case of the first respondent herein is that the first respondent and the 6th respondent herein are sisters and one Kannappan @ Shanmugavel and Kannusamy are their brothers. The respondents 2 to 4 herein are the legal heirs of the deceased Kannappan @ Shanmugavel. The petitioner and the 5th respondent herein are the legal heirs of the deceased Kannusamy. The first item of the suit property was allotted to the first respondent's father as per the partition deed dated 20.11.1939.

11. He purchased first item of the suit property from the income derived from the ancestral properties. He also purchased property in the name of his son Kannusamy in respect of the second item of the suit property. At the same time, he also purchased another property namely the

third item of the suit property purchased in the name of his another son Kannappan @ Shanmugavel. He purchased fourth item of the suit property from the income derived from the items 1 to 3 in the suit schedule property in the name of Kannappan @ Shanmugavel. After purchase, all the family members are in joint possession and enjoyment of the entire property. Therefore, the first respondent herein filed the suit for partition claiming 1/4th share in the suit properties.

12. Resisting the same, defendants 3 and 6 filed their written statement, accepted the case of the first respondent herein and prayed to decree the suit. Defendants 4 and 5 namely the petitioner herein and his mother filed written statement, accepted the case of the plaintiff and prayed to decree the suit. After attainment of majority, the petitioner herein filed the application seeking leave to file additional written statement for the reason that his mother filed written statement against his interest over the suit properties.

13. A perusal of the additional written statement filed along with the application, revealed that the property purchased in the name of his father

was not purchased from the income derived from the property which was allotted in favour of his grandfather.

14. Now, the point for consideration is as to whether the 5th defendant can be permitted to file his additional written statement after attainment of his majority.

15. The petitioner herein filed an application seeking permission to receive additional written statement under Order VIII Rule 9 of the CPC read with Section 151 of the CPC. If the petitioner herein fulfils the conditions enumerated under Order VIII Rule 9 of the CPC, leave can be granted to file his additional written statement after his attainment of majority during the pendency of the litigation. If the Court is satisfied that the case on behalf of the 5th defendant was not properly contested by their natural guardian, the interest of the guardian is found to be adverse to the interest of 5th defendant, who attained majority during the pendency of the litigation, where a serious prejudice will be caused to the 5th defendant during the pendency of the litigation due to gross negligence of his natural guardian.

16. In the case on hand, even according to the first respondent herein the subject properties stand in the name of the father of the petitioner herein and some of the properties stand in the name of the respondents 2 to 4 herein. After attainment of majority, the petitioner herein came to understand about the written statement filed by his mother and she is sailing with the case of the first respondent herein. After examination of his mother as D.W.1, the petitioner herein filed the present application seeking leave to file additional written statement.

17. In this regard, the learned counsel for the petitioner herein relied upon the following Judgments with the relevant portions:-

"1. AIR 1978 MAD 230 [Meenambal and Others -vs- Chockalinga Chettiar and others];

'22. As already pointed out, the lower Court has given a finding that the partition under Ex.A8 is unfair, unequal and prejudicial to the interests of the minors. This finding which is in favour of

the plaintiff has not been challenged by the respondents or by the appellants in A.S.No.389 of 1969. I have to, therefore, proceed on the basis of the said finding. The learned counsel, in support of his submission, that once the partition deed is found to be unfair and unequal, it can be ignored and no setting aside is necessary, refers to the following decisions:

In Lal Bahadur Singh v. Sispal Singh MANU / UP / 0060 / 1892 : ILR(1892) All 498 certain members of the joint family partitioned the family properties among them in such a way as to give one member of the family who, at the time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle who was not a natural guardian. The minor, on attaining majority brought a suit for recovery of the full share to which he was entitled. It was held by a Division Bench that the suit was not one for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstance affect in any way the rights of the minor and that therefore the suit was not subject to the limitation

of three years prescribed by Articles 95 and 96 of the second Schedule of Act 15 of 1877. But said ruling is based on the special facts of that case where the minor was not bound by his uncle's act, that the uncle had no authority to barter away the minor's rights and, that therefore, the minor can ignore the partition entered into by his uncle. In Ratham Chettiar v. S.M.Kuppuswami MANU / SC / 0540 / 1975: [1976]1SCR863 a partition effected between the members of detrimental to the interests of certain minor co-parceners. The Supreme Court pointed out that when the partition is effected between the members of the Hindu undivided family which consists of minor co-parceners it is binding on the minors also if it is done in good faith and in bona fide manner keeping into account the interests of the minors, that where, however, a partition effected between the members of the Hindu undivided family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors, the partition can certainly be reopened, whatever the length of time when the partition took place. But this decision cannot be taken to be an authority for the proposition that wherever

the partition is found to be unfair and unequal the same can be set aside without reference to the question of limitation. In the same decision the Supreme Court has pointed out:--

'It is true that minors are permitted in law to reopen a partition on proof that the partition has been unfair and unjust to them. Even so, so long as there is no fraud unfair dealing or overreaching by one member as against another, Hindu law requires that a bona fide partition made on the basis of the common consent of coparceners must be respected and is irrevocable.'

In this case, in the partition under Exhibit A8, the plaintiff was represented by his mother, the fourth defendant. The partition has also been acted upon. Even assuming that the partition is found to be unfair, unequal and unjust the plaintiff having been represented by his natural guardian is bound by the said partition until it is set aside at his instance on attaining majority. The above decision of the Supreme Court does not deal with the question of limitation for a suit to set aside a

partition by a quondam minor but it only deals with the right of the quondam minor to have the partition set aside on the ground that the partition is unequal and unfair.'

2. C.R.P.(PD) No.2881 of 2009 dated 16.12.2009 [P.N.Amirthavalli and others -vs- S.V.Saravanan];

'25. If the facts projected earlier in the written statement have not reflect the true state of defence projected by the respondent / defendant, then the leave may be granted by a Court of law to take into account of the averments made in the Additional written statement and that too when both the factual and legal pleas are raised, since there is no embargo in law to receive the same in the processual system of jurisprudence by adopting a Justice oriented approach to subserve the ends of justice and to do complete justice to the parties. Further, in the absence of prejudice leave will normally be granted to file subsequent pleading liberally. Really speaking, Order 8 Rule 9 of Civil Procedure Code invests the Court with the widest possible discretion and enables it to

accept the Additional written statement. It is to be pointed out that the Civil Law does not altogether prohibit inconsistent pleas.'

3. C.R.P.(PD) No.996 of 2005 dated 15.09.2006 [Thiyagarajan -vs- Manivannan]; and

'17. In the above decision, this Court held that Order 8 Rule 9 CPC does not say that no application for receiving the additional written statement should be allowed after the trial has commenced and Under Order 8, Rule 9 CPC., wide discretion is given to the Court to give a chance to the parties to agitate their rights even raising subsequent plea for which the Court should not be rigid and the Court should exercise their discretion liberally when it does not affect the rights of the parties.'

4. Civil Appeal No.685 of 1968 dated 18.09.1975 [Ratnam Chettiar and Ors. -vs- S.M.Kuppuswami Chettiar and Ors].

'19. (3) Where, however, a partition effected between the members of the Hindu Undivided Family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition'."

18. The Hon'ble Supreme Court of India held that when the partition is effected between members of Hindu undivided family which consists of minor coparceners, it is binding on the minors. However, if a partition effected between them proved to be unjust and unfair and his detrimental to the interest of the minors, the partition can certainly be reopened whatever be the length of time when the partition took place. It further held that the application filed under Order VIII Rule 9 of the CPC does not say that no application for receiving the additional written statement be allowed after the trial has commenced.

19. It is discretion of the Court to give a chance to parties to agitate their rights even by raising subsequent plea, for which, the Court should not be rigid and the Court should exercise their discretion liberally. Therefore, the above Judgments are squarely applicable to the case on hand. That apart, the petitioner herein filed the application by specifically averring that his mother was acted against his interest and as such, his rights are to be protected as contemplated under the Code of Civil Procedure.

20. The learned counsel for the first respondent relied upon the Judgments reported in

***"1. 2007(1) CTC 586 [R.S.Nagarajan -vs-
R.S.Gopalan and others];***

'12. Thus the above decisions will clearly establish that the defendant cannot raise mutually destructive pleas. In the case on hand, the petitioner now tries to introduce altogether a new case by way of filing an additional written statement. That cannot be allowed. The Court

below has rightly dismissed the application filed by the petitioner and I do not find any error of jurisdiction or illegality in the said order.'

2. 2019(5) LW 547 [M.Devi and another -vs- D.Soodamani and others];

'10. The judgment that has been referred supra will squarely apply to the facts of the present case. That apart, where an admission has been made in the earlier written statement, by tracing the title to the property in a particular manner, by virtue of filing an additional written statement, the petitioners cannot be permitted to withdraw that admission. If such practice is allowed, there will be no end to the pleadings and the defendants can always come up with a new case at every stage of the proceedings.'

3. 2020(4) LW 802 [Thimma Naicker -vs- Manimekalai and others];

'8. No doubt the fourth defendant is entitled to take contradictory or destructive pleadings, but at the same time, the fourth defendant is not

entitled to withdraw an admission made in the earlier pleadings. The fourth defendant in his original written statement has categorically admitted the right of the fifth defendant, he has also claimed that the defendants who are the children of Mallanaicker are in joint possession of the properties. The fourth defendant has also sought to invalidate the settlement deed on the ground that the fifth defendant could not have executed a settlement in respect of his undivided share in the co-parcenary property'."

21. In the above Judgments relied upon by the first respondent herein this Court held that whether an admission has been made in the earlier written statement by tracing the title to the property in a particular manner, by virtue of filing the additional written statement, the petitioner herein cannot be permitted to withdraw that admission. Whereas in the case on hand, as stated supra, when the guardian of the minor - 5th defendant acted against the interest of the minor, his interest has to be protected and as such, the Judgments relied upon by the learned counsel for the first respondent herein are not applicable to the case on hand.

22. In view of the above, the order dated 11.07.2018 made in I.A.No.590 of 2017 in O.S.No.114 of 2011 passed by the Subordinate Judge, Pollachi is set aside. However, the first respondent herein is permitted to file his reply statement to the additional written statement. After filing the reply statement, the Trial Court is directed to dispose the suit within a period of *three months* from the date of receipt of a copy of this order.

22. Accordingly, this Civil Revision Petition is allowed. No order as to costs. Consequently, the connected miscellaneous petition is closed.

20.07.2021

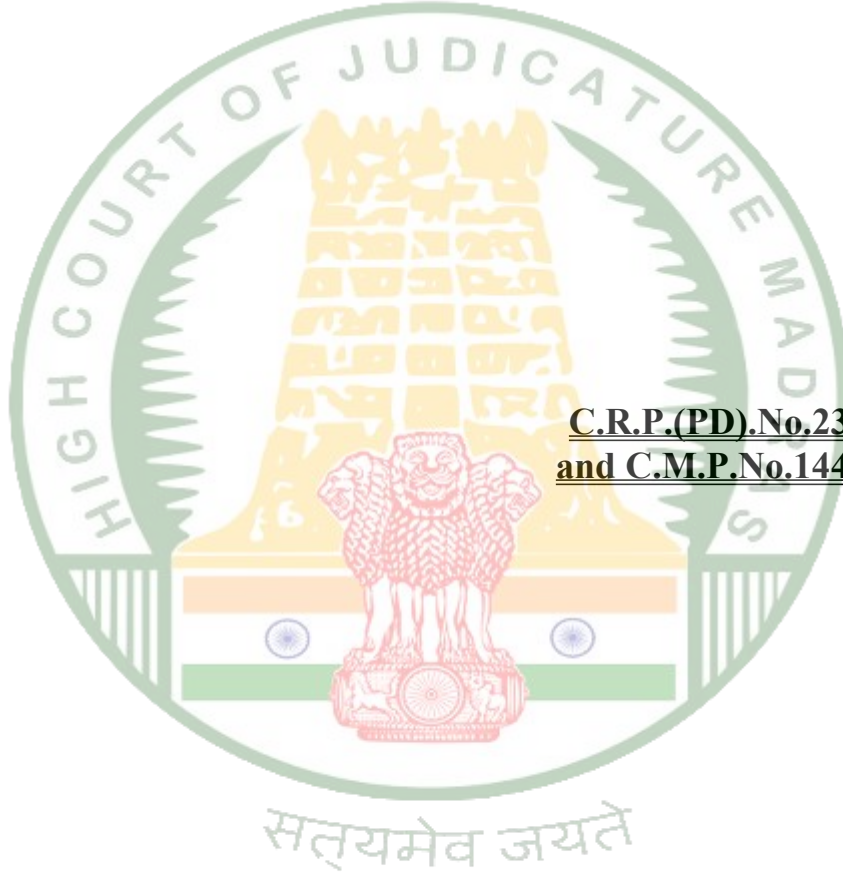
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To

The Subordinate Judge,
Pollachi.

G.K.ILANTHIRAIYAN. J,

rna



C.R.P.(PD).No.2316 of 2018
and C.M.P.No.14411 of 2018

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