

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.PD.No.2537 of 2017

and

CMP.No.12053 of 2017

1. N.Kodhanda Chetty
2. T.Gurunadha Mandhadi ... Petitioners

Vs.

T.Chinakuzhandai Pillai ... Respondent

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the fair and final order passed by the District Munsif-cum-Judicial Magistrate Court, Pallipattu, made in I.A.No.400 of 2015 in O.S.No.146 of 2010 dated 30.08.2016.

For Petitioners : Mr.B.Jawahar

For Respondent : Mr.V.Ayyapparaja for
: Mr.Bharath Kumar

ORDER

This Civil Revision Petition is directed as against the fair and decretal order passed in I.A.No.400 of 2015 in O.S.No.146 of 2010 dated 30.08.2016 on the file of the learned District Munsif-cum-Judicial Magistrate, Pallipattu, thereby, allowing the petition for amendment to include the prayer of declaration.

2. The petitioners are the defendants in the suit filed by the respondent for specific performance. When the suit was posted for arguments, the respondent filed a petition for amendment to include the prayer of declaration to declare that the sale deed executed by the first petitioner in favour of the second petitioner as null and void. The same was allowed and aggrieved by the same, the present Civil Revision Petition is filed.

3. The learned counsel for the petitioners submitted that the respondent filed a suit on 18.10.2010. Even at the time of filing the suit, the respondent categorically pleaded that the first defendant had executed nominal sale deed in favour of the second defendant with malafide intention to deceive the plaintiff. Hence, the sale deed if any executed by the first defendant in favour of the second defendant is not valid in law and is not binding on the plaintiff. The plaintiff categorically averred in his plaint that he asked for relief of declaration to declare that the sale deed executed in favour of the second defendant as void. Further, it shows that the plaintiff had full knowledge about the execution of the sale deed in favour of the second defendant. After examining all the witnesses on both sides, when the matter was posted for arguments, the plaintiff come forward with the

petition for amendment to include the prayer of declaration. As per Article 58 of the Limitation Act, the period for limitation to file a suit for declaration is 3 years from the date of knowledge.

4. Admittedly, the plaintiff had knowledge about the execution of sale deed in favour of the second defendant, even at the time of filing the suit itself. Thereafter, on 11.08.2011, the defendants filed their written statement and categorically averred that a portion of the suit property was already sold out in favour of the second defendant by the registered sale deed dated 12.11.2009 for valid sale consideration. Even then, the plaintiff did not choose to file any petition for amendment of the prayer for declaration in respect of the suit property. He further submitted that as per Order II Rule 2 (2) of the Code of Civil Procedure, the respondent shall not pray for declaration, when he purposely omits to sue in respect of the prayer for declaration.

5. Per contra, the learned counsel for the respondent submitted that though the respondent pleaded that a portion of the property was transferred in the name of the second petitioner due to inadvertence, the respondent failed to add the prayer of declaration to declare the sale deed executed in

favour of the second petitioner as null and void. He further submitted that in respect of the limitation is concerned, the prayer for declaration can be allowed irrespective of limitation.

6. In this regard, the learned counsel for the respondent relied upon the judgment reported in **2007 (5) CTC 595** in the case of ***Church of South India Trust Association, Tiruchirapalli-Thanjavur Diocesan Council vs. Kovil Pillai.***, as follows :-

"Code of Civil Procedure, 1908 (5 of 1908), Order 6, Rule 17— 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 proceeding 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.

(Paras 16, 17 & 18)

Amendment of Pleadings — Principles thereof — Explained and stated. (Para 13)"

7. Heard the learned counsel for the petitioners as well as the learned counsel appearing for the respondent.

8. The petitioners are the defendants in the suit filed by the respondent for specific performance on the strength of the agreement dated 28.02.2007 of the suit property. On a perusal of the plaint, the respondent pleaded as follows:-

“10. The plaintiff now understands that the 1st defendant had executed nominal sale deed in favour of the 2nd defendant with a malafide intention to deceive the plaintiff. Hence, the sale deed if any executed by the 1st defendant in favour of 2nd defendant is not valid in law and is not binding on the plaintiff.”

9. Then, the respondent failed to include the prayer of declaration to declare that the sale deed executed in favour of the second petitioner as null and void. The suit was filed on 18.10.2010 and the petitioners filed their written statement on 11.08.2011. In the written statement, they averred specifically that the first petitioner has sold his remaining extent of 15 cents in the suit property in favour of the second petitioner herein under the

registered sale deed dated 12.11.2009. Even then, the respondent did not choose to file a petition for amendment to include the prayer of declaration. Thereafter, the trial commenced and both sides evidence closed. When the matter was posted for arguments, the respondent come forward with the petition for amendment to include the prayer of declaration.

10. On a perusal of the affidavit filed in support of the amendment petition, it is stated that due to inadvertence and ignorance, the respondent failed to pray for declaration to declare the sale deed as null and void. Except the said averment, nothing whisper about that inspite of due diligent, the respondent could not have raised the prayer before the commencement of trial.

11. In this regard the learned counsel appearing for the petitioners relied upon the judgment reported in **(2019) 4 SCC 332** in the case of ***M.Revanna Vs. Anjanamma (dead) by LRs and ors***, which reads the Hon'ble Supreme Court of India held as follows :-

"7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of

the suit. The proviso to Order VI Rule 17 of the CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the Court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

12. He also relied upon the judgment of the Hon'ble Supreme Court of India reported **(2020) 11 SCC 549** in the case of **Pandit Malahari**

Mahale Vs. Monika Pandit Mahale and ors, as follows :-

"7. In the present case, the Civil Judge has not returned any finding that the Court is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In Vidyabai & Ors. v. Padmalatha & Anr. [(2009) 2 SCC 409], this Court observed in para 19 as under:

"19. It is primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction in a case of this nature is limited. Thus unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

The Hon'ble Supreme Court of India categorically held that burden on person seeking amendment after commencement of trial to show due diligence, such an amendment could not have been sought earlier. There

cannot be any dispute than an amendment cannot be claimed as a matter of right and under all circumstances.

13. That apart, as rightly pointed out by the learned counsel for the petitioners under Order II Rule 2 (2) of the Code of Civil Procedure, where the respondent omitted or intentionally relinquished to sue for declaration, he shall not afterwards pray for declaration. It is relevant to extract the provision under Order II Rule 2 (2) of the Code of Civil Procedure as follows:-

“2.Suit to include the whole claim

.....

(2) Relinquishment of part of claim-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.”

14. Admittedly, the respondent omitted to sue in respect of the prayer for declaration and as such, he shall not afterwards sue in respect of the prayer for declaration as against the petitioners. Therefore, the above judgments cited by the learned counsel for the respondent are not applicable

to the case on hand. In view of the fact that the order passed by the Court below is perverse and illegal, it is liable to be set aside.

15. Accordingly, this Civil Revision Petition is allowed and the order dated 30.08.2016 passed by the learned District Munsif-cum-Judicial Magistrate, Pallipattu, in I.A.No.400 of 2015 in O.S.No.146 of 2010 is hereby set aside. Consequently, the connected Miscellaneous Petition is closed. No costs.

11.03.2021

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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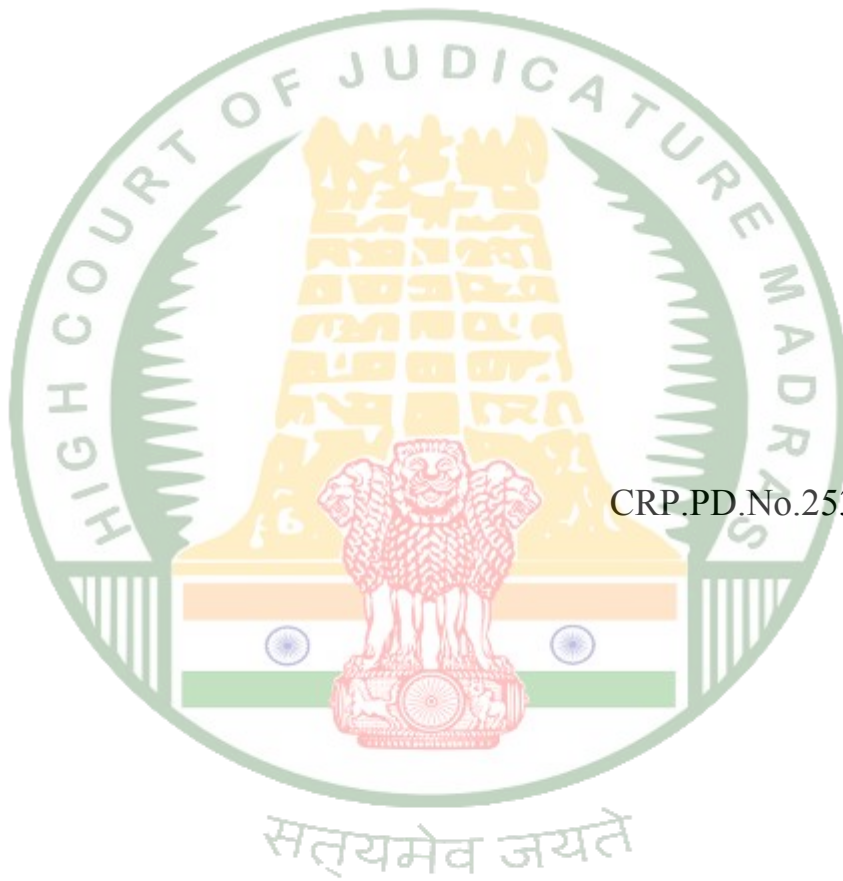
1. The District Munsif-cum-Judicial Magistrate,
Pallipattu.
2. The Section Officer,
V.R.Section, High Court of Madras.



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G.K.ILANTHIRAIYAN,J.

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