



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.10.2021

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

C.R.P(PD) (MD) No. 2136 of 2014

and

M..P(MD) No.1 of 2014

Noorjahan Beevi ...Petitioner/3rd Respondent/3rd Defendant

Vs.

1.Mohaideen Kunju ... 1st Respondent/Petitioner/Plaintiff
2.Fathummal Beevi
3.Syed Mohamed
4.Muzhamil ...Respondents 2 to 4/Respondents 1, 2 & 4/
Defendants 1, 2 & 4

PRAYER : Civil Revision Petition filed under Article 227 of the Constitution of India to call for the records relating to the fair and decreetal order dated 25.08.2014 made in I.A.No.334 of 2014 in O.S.No. 373 of 2009 on the file of the Principal District Munsif, Kuzhithurai and set aside the same.

For Petitioner : Mr.Antony ArulRaj
for Mr.D.Rajkumar
For Respondents : Mrs. Jessi Jeeva Priya

O R D E R

The revision petition has been filed seeking to set aside the order permitting the amendment of plaint.

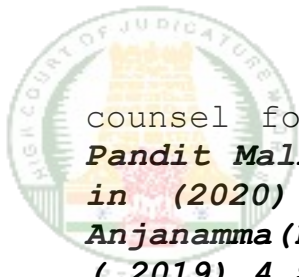
2. The learned counsel for the petitioner would submit that the petitioner is the third defendant in O.S.No.373 of 2009 filed by the plaintiff seeking for decree to demarcate the western three cents in the scheduled property from the eastern portion and to put up boundary to the demarcating land through Court with the materials to be supplied by the plaintiff. Even prior to the filing of the suit, the plaintiff has sent a pre-suit notice on 20.04.2007 calling up on the petitioner/3rd defendant to restore the boundaries separating the plaintiffs western three cents from the eastern portion four cents as described in the sale deed dated 18.12.1995 within seven days from the date of receipt of notice. In the notice, the plaintiff had claimed that the first and second defendants are bound by the sale deed dated 18.12.1995 and that their right is confined to the portion there under and they were required to



restore the boundary separating the plaintiff western three cents from the eastern portion as described in the sale deed dated 18.12.1995. Thereafter the plaintiffs have filed the suit on 24.07.2009. In the suit the relief sought for by the respondent/plaintiff is for a decree to demarcate western three cents in the scheduled property from the eastern four cents and to put up the boundary to the demarcating land to the Court with the materials supplied by the plaintiff.

3.The learned counsel would further submit that, in the plaint description of the property was in respect of the entire seven cents. Meanwhile property has been changed several hands. The petitioner/third defendant being a purchaser from the second defendant had filed a detailed written statement disputing the claim made by the plaintiff with regard to the boundaries and the petitioner has also taken the specific plea in the written statement that the plaintiff has no title or possession in the suit property and the plaintiff is not entitled to claim any demarcation of his alleged area of three cents in the suit property since out of three cents was sold. The claimed property was already sold by first defendant to third parties and the property was in possession of third parties.

4.The learned counsel would further submit that it is pertinent to submit that the parties in whose possession the property is now are not added as party in the suit. Thereafter the Court framed issues and had taken up the case for trial. The respondent/plaintiff has also filed proof affidavit. Even in the proof affidavit the plaintiff have made same narration about the same schedule and boundaries. While the matter was posted for cross examination the first defendant had filed a petition seeking for appointment of Advocate Commissioner stating that the property sought to be demarcated was in the possession of one Sheik Mohamed who is not the party to the suit and the said Sheik Mohamed had also put a building in the specified plot and that there was well defined compound wall in all sides of the building. The Commissioner has also filed a report. At that stage when the case was posted for cross examination the respondent/plaintiff had come up with a petition seeking amendment of plaint. In the petition nowhere it has been pleaded that despite due diligence the plaintiff could not have raised the matter before the commencement of trial. Further it is the specific case of the plaintiff right from the issuance of notice that the demarcation was sought on the western side of her alleged property and not on the southern side. It would tantamount to changing the very nature of the relief in the suit itself. The petitioners have also filed a detailed counter objecting to the amendment of the plaint. However the Trial Court without taking into consideration the specific proviso in Rule 17 of Order 6 and without rendering the finding with regard to the due diligence had allowed the petition to the detriment of the petitioners, against which the



counsel for the petitioner on the judgments of the Apex Court in **Pandit Malhari Mahale .vs. Monika Pandit Mahale and others reported in (2020) 11 Supreme Court Cases 549 and in M. Revenna .vs. Anjanamma (Dead) by legal representatives and others reported in (2019) 4 Supreme Court Cases 332.**

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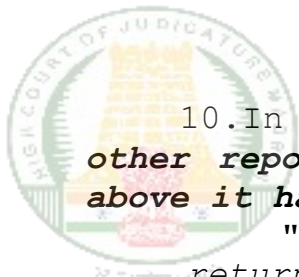
5. Per contra the learned counsel for the respondent/plaintiff would submit that out of seven cents the respondent/plaintiff have sold portion of their land measuring 4 cents to the first defendant by deed dated 18.12.1985. In the deed the description of the property has been clearly shown and remaining portion is left on the southern part only. Mistake has crept in the notice and the plaint due to the inadvertence of the Counsel who was conducting the case and the respondent/plaintiff cannot be blamed for the mistake committed by the Counsel. She would also submit that in the suit, the plaintiff had stated that the respondent are bound by the schedule as described in the sale deed dated 18.12.1995 and thereby, it is necessary the plaint had to be amended. The trial Court rightly finding that such amendment would not alter the nature of the suit and in order to avoid multiplicity of proceedings had rightly allowed the petition.

6. In reply the learned counsel appearing for the petitioner would submit that the property as claimed by the respondent/plaintiff had been sold to various other parties even prior to the filing of the suit by the purchaser and that they are necessary parties. The respondent /plaintiff had not impleaded them as party to the suit and further there is no averment with regard to due diligence in not filing the amendment petition before the commencement of trial.

7. Heard the learned counsel appearing on either side and perused the materials available on record.

8. In this case suit has been filed on 24.07.2009. Even prior to that the plaintiff had issued pre suit notice on 20.04.2007 describing the schedule of properties, subsequently the petitioner/defendant had filed written statement on 23.02.2010 and chief examination of the plaintiff had been done on 12.11.2010. Even in the proof affidavit filed no correction had been carried out with regard to the description of the property. When the case was posted for cross examination the petition for amendment has been filed.

9. Perusal of the petition shows that the respondent/plaintiff has not shown or averred anything with regard to the showing any due diligence for not having filed application for amendment of plaint prior to the commencement of trial.



10. In **Pandit Malhari Mahale .vs. Monika Pandit Mahale and other reported in (2020) 11 Supreme Court Cases 549 as referred above it has been held 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."

8. There being no finding by the Court that the Court is satisfied in spite of due diligence, the party could not introduce amendment before commencement of the trial, the order of the Trial Judge is unsustainable. The High Court has not adverted to the above aspect of the matter. In view of aforesaid, we allow the appeal and set aside the order of the High Court as well as of the Civil Judge, the amendment application stands dismissed.

11. In **M. Revenna .vs. Anjanamma(Dead) by legal representatives and others**, referred above, the Hon'ble Apex Court has held that amendment of pleadings after commencement of trial is not permissible except under conditions stated in proviso to Rule 17 of Order 6 of CPC. The burden is on the person seeking amendment after commencement of trial to show due diligence on his part as contemplated under the proviso. As stated above, neither can amendment be claimed as matter of right nor has the Court got absolute discretion to allow amendment in view of the proviso.

12. As stated above, the perusal of the materials on record show that the petitioner has not pleaded any due diligence for not filing amendment within time and the trial Court has not returned any finding with regard to the same.

13. In view of the above the order passed by the trial Court suffers from infirmity and error and the order passed by the trial Court is liable to be set aside.



14. In the result, the Civil Revision stands allowed and the order 25.08.2014 made in I.A. No.334 of 2014 in O.S. No.373 of 2009 stands set aside. No costs. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

The Principal District Munsif,
Kuzhithurai.

+1 CC to M/s.D.RAJKUMAR, Advocate (SR-33483[F] dated 01/11/2021)

+1 CC to M/s.P. JESSI JEEVAPRIYA, Advocate (SR-33120[F]
dated 28/10/2021)

C.R.P(PD) (MD) No. 2136 of 2014

and

M..P(MD) No.1 of 2014

28.10.2021

VR(CO)

GC/JC(12.11.2021) 5P 4C