



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.01.2022

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THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P (MD)No.2006 of 2017

and

M.P (MD) No.10073 of 2017

WEB COPY

S.Sankaranarayanan

... Petitioner/Petitioner/
Plaintiff

Vs.

1.S.Palavesam
2.S.Petchimuthu
3.S.Subramanian
4.Enamuthukonar
5.Esakki
6.Raman

... Respondents/Respondents/
Defendants

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decretal order passed in I.A.No.831 of 2016 in O.S.No.24/11 dated 19.06.2017 on the file of the Additional Sub Court, Tirunelveli, by allowing this civil revision petition.

For Petitioner : Mr.H.Arumugam
For Respondent : No appearance

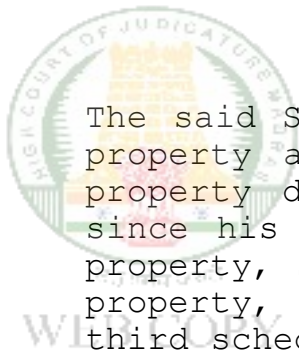
ORDER

The plaintiff is before this Court challenging the dismissal of his application for amending the plaint.

2.The brief facts are as follows:-

(i) The revision petitioner / plaintiff has filed O.S.No.24 of 2011 on the file of the Additional Sub Court, Tirnelveli, for partition and separate possession of his $\frac{1}{4}$ th share in the first item of the first schedule and second and third schedule properties by metes and bounds.

(ii)It is the case of the plaintiff that the properties mentioned in the first schedule and the other properties belonged to the three brothers Enamuthu Konar, Velu Konar and Sudalaimuthu Konar. By a partition deed, dated 26.01.1952, they had partitioned the suit schedule properties and other properties and under this deed, the first item of the first schedule which was described as the third schedule property was allotted to the share of Sudalaimuthu Konar. The second item of the first schedule property was described as the fourth schedule property in the deed and this was a common pathway, which was jointly allotted to the brothers.



The said Sudalaimuthu Konar was in enjoyment and possession of the property allotted to his share till his death. Thereafter, the property devolved on the mother of the defendants and plaintiff, since his wife had predeceased him. Apart from the first schedule property, Sudalaimuthu Konar had also purchased the second schedule property, through a registered sale deed, dated 23.03.1962. The third schedule is the movable property of the Sudalaimuthu Konar and his wife Puthiyaval. Sudalaimuthu Konar died intestate and therefore, the properties devolved equally on the defendants and the plaintiff. The plaintiff has been calling upon the defendants to partition the property from the third week of October 2010. However, the defendants have been evading the same pretext or other. Therefore, the plaintiff had issued the legal notice dated 01.11.2010 to which there was no reply from the defendants. Therefore, the suit.

(iii) The plaintiff would contend that he and the defendants are each entitled to 1/4th share in the first item of first schedule and second and third schedule properties. The second item of the first schedule is being enjoyed in common along with legal heir of the Velu Konar. However, to date there has been no disturbance by the legal heirs of the Velu Konar. While seeking the relief, the plaintiff had originally sought for the following relief:-

9.It is therefore prayed that this Hon'ble Court may be pleased to pass

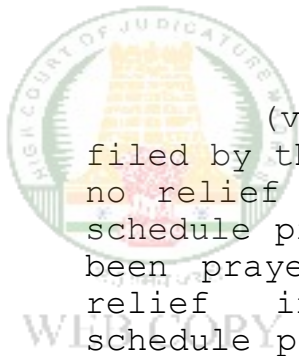
a) A preliminary decree for partition and separate possession of the plaintiff's 1/4th share over the 1st item of the 1st schedule and 2nd and 3rd schedule properties by metes and bounds

b)directing the defendants to pay the cost of the suit.

c) To pass other orders as deem fit and proper in the circumstances of the case and thus render justice.

(iv) The defendants had entered appearance and the defendants 1 and 3 had filed a written statement in which they have submitted that in the suit first item house, the third defendant has been residing with his family and has been paying all the public outgoings. The defendants would submit that the plaintiff and defendants 1 and 2 have their own houses, in fact, the plaintiff has given his house on a mortgage and is residing at Palayamkottai. Therefore, the defendants 1 and 3 would submit that while partitioning the property, the first item of the first schedule can be allotted to the share of the third defendant.

(v) The second defendant had filed a written statement stating that he had no objection for partition and he had also paid his share for the preliminary decree.



(vi) Thereafter, the additional written statement has been filed by the defendants 1 and 3 *inter alia* contending that there was no relief claimed with reference to the second item of the first schedule property. He would further contend that they should have been prayed for declaration and joint enjoyment and without any relief in respect of second item of first schedule, the first schedule property cannot be enjoyed. The plaintiff has failed to ask for a prayer. Since the plaintiff has not asked any prayer with reference to the second item, its inclusion was unnecessary. Therefore, the suit may be dismissed.

(vii) The plaintiff had thereafter come forward with an application to amend the plaint and in the amendment petition, the plaintiff has sought for an amendment that the new door No.18 had to be added to the schedule of properties. The prayer in paragraph No.9 of the plaint prayer B was to be changed as Prayer C and the prayer B was sought to be introduced after prayer A, which reads as follows:-

For a declaration that the plaintiff and defendants had jointly entitled the second item of the first schedule property, common pathway.

(viii) In the affidavit filed in support of the said application, the petitioner would submit that in the written statement, although the plaintiff had stated that the plaintiff and the defendants had jointly entitled to the common pathway in the second item of the first schedule, however in the relief portion, they had omitted to seek the relief for declaring the joint enjoyment in this common pathway. Therefore, they sought to have the plaint amended. The plaintiff/ petitioner had submitted that this amendment does not in any fashion change the nature and character of the suit and if it is not allowed, it would lead to lot of hardships to the petitioner/plaintiff.

(ix) The first defendant had filed a counter contending that the amendment is belated as it is filed six years after filing of the suit and the plaintiff is trying to amend the plaint piecemeal. Despite the defendants raising the defence in the written statement, the plaintiff has not come forward to amend the plaint.

(x) By order, dated 19.06.2017, the learned Additional Subordinate Judge, Tirunelveli, proceeded to dismiss the amendment petition. The learned Judge had dismissed the application primarily on the ground that the petitioner was ignorant about the relief that is to be claimed by him and in the earlier application for amendment, this amendment has not been sought for. Therefore since the, plaintiff was not keen on projecting his case properly and prosecuting the same, the amendment petition had to be dismissed. Challenging the same, the revision petitioner / plaintiff is before this Court.



3.The respondent though served has not entered appearance. Heard the learned counsel for the petitioner and perused the records.

4.A perusal of the plaint would show that in the plaint, the plaintiff has clearly stated that the second item of the first schedule property, which is the fourth schedule property in the partition deed is a common pathway and is jointly enjoyed by all three brothers Ennamuth Konar, Sudalaimuthu Konar and Velu Konar. It appears that by oversight while seeking the relief, the plaintiff has mentioned that he is entitled to partition even with reference to the second and third schedule of properties. By oversight, he has not sought for relief with reference to the second item common pathway. This omission has been brought out by the first defendant in his additional statement filed in September 2016. Immediately, the plaintiff has come forward with this amendment petition in December 2016. Therefore, the learned Judge has totally failed to appreciate the contents of the plaint and has simply been proceeded to dismiss the application only on the ground that earlier I.A.No.1007 of 2015 had been filed. The learned Judge has also proceeded to state that the plaintiff has not taken steps to amend the plaint, even after being put on notice by the defendants vide their counter. However, this reasoning is fallacious, since it is only in the additional written statement that such a plea has been taken and within three months of the additional written statement, the plaintiff has come forward with the impugned application. Therefore, the reasoning of the learned Additional Subordinate Judge, Tirunelveli, is unsustainable.

5.In the result, this Civil revision petition is allowed and the order passed in I.A.No.831 of 2016 in O.S.No.24 of 2011, dated 19.06.2017, is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2022

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 Additional Subordinate Judge,
Tirunelveli.

COPY TO:-

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-1093[F] dated 10/01/2022)

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and

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07.01.2022

MA (CO)

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