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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.06.2023

PRONOUNCED ON : 24.08.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Application Nos.3021 of 2023 & 5147 of 2022
in C.S.No.823 of 2013

K.Sridevi ... Applicant /
Plaintiff
[in both Applications]

versus

S.S.Krishnamurthy (deceased)
1.K.Prema
2.K.Palani
3.K.Senthil Raj
4.K.Shanthi
5.Jayanthi ... Respondents /
Defendants 2 to 6
[in both Applications]

PRAYER in Application No.3021 of 2023: Application filed under Order XIV Rule 8 of O.S. Rules, Clause 12 of Letters Patent, praying to grant leave to sue against the properties morefully described in the schedule.

PRAYER in Application No.5147 of 2022: Application filed under Order XIV Rule 8 of O.S. Rules read with Order VI Rule 17 & 151 CPC, praying to amend the short cause title, long cause title, prayer and the schedule of property in C.S.No.823 of 2013.

For Applicant : Mr.M.Jaikumar
[in both Applications]



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For Respondents
[in both Applications]

: Mr.R.Thiagarajan

COMMON ORDER

Application No.3021 of 2023 has been filed to grant leave to sue against the properties and Application No.5147 of 2022 has been filed to amend the cause title in C.S.No.823 of 2013.

2. The applicant is the plaintiff; the suit in C.S.No.823 of 2013 has been filed to declare that the plaintiff is entitled to 1/6th share in the suit schedule properties and for partition and separate possession of the same.

3. Heard the learned counsels for the applicant / plaintiff and respondents / defendants 2 to 6 and perused the materials available on record.

Applications in brief:-

4. The grandfather of the first defendant had executed a Settlement Deed on 06.07.1974 and settled the ancestral business in favour of the first defendant; from the surplus income derived from the ancestral



business, the first defendant had purchased the suit properties; during the pendency of the suit, a compromise was arrived between the applicant / plaintiff and respondents / defendants 2 to 6 in respect of Item No.1 of the suit schedule property and the said property is known as 'Kamalalaya' at Old No.8, New No.13, present Door No.25, South Boag Road, T.Nagar, Chennai.

4.1. As per the terms of compromise, a Joint Development Agreement and General Power of Attorney has been executed by the applicant as one of the owners of the property in Item No.1; at the time of entering into the compromise through the builder, the applicant came to know that through the surplus income from the ancestral business, the first defendant had also purchased a property at Door No.29B, Desi Chetty Palayam Street, Kancheepuram and Nanja / Punja lands to the extent of 14 acres and 53 cents in Chinnivakkam Village, Wallajabad in various survey numbers.

4.2. The applicant came to know subsequently that two more properties which are described in schedule Item Nos.12 and 13 were also



purchased at the time of entering into a compromise in respect of Item No.1; since the properties are situated outside the jurisdiction of this Court, the applicant has filed the application in A.No.3021 of 2023 seeking leave to sue; since more properties were purchased from and out of the joint family income and two properties have been omitted to be included, the applicant has filed the application in A.No.5147 of 2022 to carry out the amendment to include those properties.

Counter of the 3rd respondent / 4th defendant:-

5. The allegation that the suit properties were acquired from and out of the income generated from the ancestral business is denied; the settlement was arrived in respect of Item No.1 is factually correct; the plaintiff received the payments and thereafter signed the same; the applicant / plaintiff has made some self serving statement about the properties described in her application; the properties were acquired by the 4th defendant's father and he dealt them during his life time itself and as such, the properties are not available for partition and separate possession; Item No.12 belongs to one Shanthi and the same is also not available for partition and separate possession and a few items of the properties sought to be



included do not belong to the father of the 4th defendant and they cannot be included in the suit; the leave to sue ought to have been obtained before the institution of the suit and the applications had been filed as an after thought.

Hence, both the applications are liable to be dismissed.

Submissions of the applicant / plaintiff:-

6. The learned counsel for the applicant submitted that the applicant / plaintiff is one of the daughters of the deceased first defendant and she has got equal right in the properties which belong to her father; since there are some other properties known to have been purchased by the first defendant from and out of the joint family income, the applicant has filed Application No.3021 of 2023 for granting permission to include those properties and Application No.5147 of 2022 has also been filed seeking permission to amend the plaint.

6.1. Despite a compromise in respect of Item No.1 is arrived, the payment has not been made to the applicant / plaintiff completely; despite 4 years are over, no concrete steps have been taken to make the payment; some of the properties are situated in Madurai, leave has already been



granted and hence, there is no difficulty in granting leave to include the alleged properties and all the properties are acquired from the ancestral business income.

Submissions of the respondents / defendants:-

7. The learned counsel for the respondents / defendants submitted that the suit is at the stage of trial and the connected Tr.C.S.No.568 of 2018 is also at the stage of arguments; further the properties alleged by the applicant are not available and the father of the parties have also dealt the same; there is no pleadings in the plaint and no documents were produced to show the existence of those properties, the properties are outside the jurisdiction of this Court and hence they cannot be included; these applications have been filed just to protract the proceedings; the properties were acquired by the father and there is no joint family income. The learned counsel for the respondents relied on the following decisions of this Court:-

“[i] A.Giridhar and another vs. A.Suresh & others

[(1998) 2 LW 308]

[ii] T.S.S. Natarajhun vs. T.S.S.Nilakanthan & another

[(2009)1 MLJ 117]”



Discussion:-

8. The applicant / plaintiff is the sister of the 4th defendant who has filed the counter and contested the matter; the applications have been filed to amend the plaint by including some new items as suit properties along with the leave to sue; so the order to grant leave to sue will arise only if the applicant is granted with the permission to amend the plaint by including the properties alleged in the application; the fact that the applicant and the defendants had arrived into a compromise in respect of Item No.1 is not denied.

9. The learned counsel for the applicant submitted that some of the properties have been purchased by the first defendant by utilising the surplus income derived from the ancestral business and they should also be included in the suit. It is claimed by the applicant that the knowledge about the existence of these properties came to be known only through the builder with whom a Joint Development Agreement was executed by the plaintiff and the defendants.



10. The civil suit has been filed as early as in the year 2013. After 10 years the applicant / plaintiff had chosen to add more properties by stating that they are the properties purchased by her father through utilising the income derived from her alleged ancestral business. Even though the applicant had chosen to include the properties alleged in the judges summons by way of an amendment, no pleadings have been made in the suit in respect of these new properties. The applicant / plaintiff has not produced any document to show that the properties are available for partition.

11. It is the specific contention of the 4th defendant that the properties were purchased by the father as his self acquired properties and he had dealt them during his life time. Unless the applicant / plaintiff could show some *prima facie* proof that the new properties are still available, they cannot be included as the properties in this suit. The applicant / plaintiff had chosen to make some vague allegations even without any details as to the date of execution of the sale deed and whether the properties have been purchased by the father through one sale deed or several sale deeds or whether the sale deeds are in the name of the applicant's father or in the name of some other persons in the joint family etc.



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12. Even if the properties lie outside the jurisdiction of this Court, in view of Clause 12 of Letters Patent for High Court of Madras [Clause 12 of Letters Patent] read with 120 C.P.C. leave can be granted. But prior to that it has to be established by the applicant / plaintiff that the alleged properties are existing and if so, whether they are available for partition. In this regard, it is relevant to cite the decision of the Division Bench of this Court in *A.Giridhar and another vs. A.Suresh & others [(1998) 2 LW 308]* wherein it is held that the leave under Clause 12 of Letters Patent, the applicant has to show that the properties are in existence. Without establishing the existence of the properties, the leave to sue cannot be granted.

13. The Division Bench of this Court in the above case has made a reference about the case of *Shiv Bhagwan Motiram Saroji vs. Onkarmal Johards & others [AIR 1952 Bom. 365]* to affirm the point that the cause of action in a suit for partition and separate possession can arise only if the property is in existence. In the said case, it is held as under:-

“It is only in order to determine the jurisdiction that the question has to be considered as to whether certain facts arose. Therefore, in my opinion, if the existence of property is



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a material fact constituting a part of the cause of action in a partition suit, then the location of the property must be considered in order to determine the jurisdiction of the Court. If the property or part of the property is situated within the jurisdiction, then the cause of action or a part of the cause of action has arisen within jurisdiction.”

14. There is no bar to grant leave to sue in respect of the properties falling outside the jurisdiction of this Court in a suit for partition and separate possession, provided if a part of the suit properties is shown to be situated within the jurisdiction of the Court. But if the applicant / plaintiff herself was not able to show any *prima facie* document in respect of the new properties sought to be included, the fundamental aspect of establishing the existence itself will fail. If the property is no more in existence and it has already been dealt by the father of the applicant, it is a wasteful exercise to include these properties and that will only prolong the trial. No pleadings in respect of the suit properties have been made in the plaint. However, the applicant has included the same in the judges summons by way of an amendment.



Since the amendment application in A.No.5147 of 2022 is **dismissed**,
the application in A.No.3021 of 2023 to grant leave to sue itself will not
arise and hence, the same is **dismissed**.

24.08.2023

Speaking order

Index : Yes

Neutral Citation : Yes

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R.N.MANJULA, J.

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Pre-Delivery Common Order made in
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