



C.R.P(MD)No.736 of 2013

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 23.06.2023

DELIVERED ON : 20.07.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P(MD)No.736 of 2013

and

M.P(MD)No.1 of 2013

and

C.M.P(MD)No.4872 of 2020

- 1.Nirmala Rani
- 2.Nithyananda Prakash
- 3.Stella Rani
- 4.Edwin

... Petitioners

Vs.

- 1.Pachan
- 2.Nesamani
- 3.Ponnupillai
- 4.Sarojam
- 5.Suresh Kumar
- 6.Suni
- 7.Palthangam
- 8.Victor Keba
- 9.Rani
- 10.Jenisha

... Respondents

PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated

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04.10.2012 passed in I.A.No.268 of 2009 in A.S.No.107 of 2007 on the file of the Subordinate Judge, Kuzhithurai.

For Petitioners : Ms.J.Anandhavalli

R-1 : Died

For R-2, R-9

& R-10 : No appearance

For R-3 to R-6 : Mr.M.R.Sreenivasan

R-7 & R-8 : Dispensed with

ORDER

This Civil Revision Petition has been filed assailing the order passed by the learned Subordinate Judge's Court at Kuzhithurai in I.A.No.268 of 2009 in A.S.No.107 of 2007 dated 04.10.2012. The original suit in O.S.No. 292 of 1989 on the file of the District Munsif Court at Kuzhithurai was one for partition, demarcation of plaint 'B' schedule property and declaration of the title and possession over plaint 'C' schedule property and recovery of possession of plaint 'C' schedule property. The suit was dismissed on merits on 22.06.2006. As against which, A.S.No.107 of 2007 was preferred by the plaintiffs 2 to 5 before the Subordinate Judge's Court at Kuzhithurai. For the sake of convenience, the parties herein are referred to as arrayed in I.A.No. 268 of 2009 in A.S.No.107 of 2007.



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2. During the pendency of the appeal suit, the appellant / plaintiffs preferred a petition in I.A.No.268 of 2009 seeking to amend the plaint on 8 counts including the relief column and the survey number of the plaint 'B' and 'C' schedule properties. The respondent / respondent / defendants have filed a counter to that interlocutory application and on merits the said interlocutory application was dismissed on 04.10.2012 in the first appellate stage. Assailing the same, the present Civil Revision Petition was filed by the revision petitioner / petitioner / appellant / plaintiff.

3. Heard the learned Counsels for the revision petitioners and the respondents anxiously and carefully perused the materials available on record. The learned Counsel for the petitioners took me through various grounds of the Civil Revision Petition and the contents of the documents.

4. The learned Counsel for the revision petitioners submitted that the amendment which is sought for in the first appellate stage ought not to have dismissed by the first appellate Court.



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5. Per contra, the learned Counsel for the respondent / respondent / defendant vehemently argued that an amendment which is sought to amend the plaint at the first appellate stage is liable to be dismissed in merits and there is no coherence either in the plaint or in the amendment sought for by the petitioner in the said interlocutory application and he pressed for dismissal of the Civil Revision Petition relying on the following decision of the Hon'ble Supreme Court of India:

The Hon'ble Supreme Court of India in a judgment reported in ***[MANU/SC/1093/2022] in Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and Another*** dated **01.09.2022** in paragraph No.70 has held as follows:

“70.(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,



(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.



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(vii) *Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.*

(viii) *Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.*

(ix) *Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.*

(x) *Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.*

(xi) *Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission*



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by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi and Ors., MANU/DE/2236/2022)”

6. The suit was one for partition filed by the legal heirs of one deceased Sinkara Rajan. Plaint 'A' schedule property consist of 5 items of properties. Plaint 'A' schedule property originally belonged to one Kochumani Nadar, son of Pankathan Nadar and the said Kochumani Nadar was a Christian. He was survived by 5 sons, namely, Mathevan, Pachen, Nesamani, Ponnu Pillai and Sinkara Rajan. One of the sons of the said Kochumani Nadar, namely, Sinkara Rajan died on 30.10.1986. After which, he was survived by his wife and four children. The aforesaid legal heirs of the deceased Sinkara Rajan has filed the original suit in O.S.No.292 of 1989 seeking their 1/5th share over all the items in plaint 'A' schedule property inclusive of their house equitably by *metes and bounds*. In furtherance to the same, alternately they also sought a decree for demarcation of plaint 'B' schedule property through Court and to put up boundaries.



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7. In addition to the same, another relief seeking to declare their title and possession over the plaint 'C' schedule property and recovery of possession of the said 'C' schedule property was also sought for by the plaintiffs. The other surviving sons of Kochumani Nadar, namely, Mathevan, Pachen, Nesamani, Ponnu Pillai and one Sarojam and her children, namely, Justin, Suresh Kumar and Mini were impleaded as defendants 1 to 8. While plaint 'A' scheduled property consist of five items, plaint 'B' scheduled property consist of one acre and 23 cents land inclusive of a building comprised in old S.Nos.2375/26 and 28 of Pacode Village, Vilavancode Taluk, Kanyakumari District. Likewise plaint 'C' scheduled property consist of an area of 5 cents land. It was further pleaded paragraph No.4 in the said plaint of the original suit that during the lifetime of her husband Sinkara Rajan, the first plaintiff by selling her jewels had put up a small building in plaint 'B' scheduled property in old S.No.2575, wherein herself her husband and plaintiffs 2 to 5 were residing. Even subsequent to the death of the said Sinkara Rajan, till date the plaintiffs were residing thereat.



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8. In paragraph No.5 of the plaint, it is further pleaded that on 21.12.1987, the defendants 5 to 8, that is, Sarojam and her children trespassed into the house situated in plaint 'B' schedule property and attempted to take forceful possession of the building and it is further contended that the defendants 5 to 8 have no manner of right over the house or properties of the deceased Sinkara Rajan. It is further admitted, the pleadings of the plaint would reveal that the said 5th defendant, namely, Sarojam is the concubine of the deceased Sinkara Rajan and defendants 6 to 8 are her children through Sinkara Rajan. It is also mentioned thereat that Sinkara Rajan was a Christian and he died as a Christian. In such factual background, the original suit came to be filed seeking partition of 1/5th share over all the items in plaint 'A' schedule property, to demarcate the boundary of plaint 'B' schedule property and also to declare the title and possession and recovery of possession of plaint 'C' schedule property. The plaint is full of contradictions and uncertainty. While the pleadings would reveal that the attempt of the defendants 5 to 8 to trespass into the plaint 'B' scheduled property proved futile, the 'C' relief sought for by the petitioners / petitioners / appellants / plaintiff was declaration of title and recovery of possession over the plaint 'C' schedule property. In furtherance to the same,



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the 'B' and 'C' scheduled properties would reveal that both the items are one and the same.

9. The 'B' relief sought for in the plaint was to demarcate the boundaries of the plaint 'B' scheduled property consisting an area of one acre 23 cents including the building comprised in old S.Nos.2375/26 and 28 of Pacode Village. The 'C' relief sought for is to declare the title and possession over the plaint 'C' schedule property and recovery of possession of the same consisting an area of 5 cents land inclusive of the building thereat comprised in old S.Nos.2375/26 and 28 of Pacode Village. A quick perusal of the same would reveal that the plaint 'B' and 'C' scheduled property are one and the same. When paragraph Nos.5, 6 and 7 of the plaint categorically substantiates that the possession of the plaint 'B' and 'C' schedule properties, the possession of the house situated therein the plaint 'B' and 'C' scheduled properties is with the plaintiffs. The 'C' relief shakes the entire foundation of the plaintiff's case where the relief sought for is to recover the possession of plaint 'C' scheduled property from the defendants. Appreciating all these contradictions and on merits, the learned Trial Court dismissed the said original suit.

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10. In an attempt to fill up the lacuna in the conduct of the case before the trial suit, the petitioners / petitioners / appellants / plaintiff has filed this I.A in the first appellate stage to amend the plaint, that too seeking to amend the survey number of the plaint schedule property and to substitute the relief 'A' seeking to partition the plaint 'B' schedule property thereby allotting 80 cents to the plaintiffs in the plaint 'B' schedule property. The learned Subordinate Judge's Court at Kuzhithurai on appreciating the contentions of both the parties has dismissed the said amendment application. Though the learned Counsel for the petitioners / petitioners / appellants / plaintiff sought this Court to take a liberal approach by allowing the amendment application in order to avoid multiplicity of suit, this Court is not inclined to accept the said contention.

11. It is clear that this interlocutory application seeking to amend the plaint came to be filed in the first appellate stage and the same is filed without giving any valid reason for not filing the amendment before the learned trial Court. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament *inter alia* inserted a proviso to Order



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VI, Rule 17 of the Code of Civil Procedure, 1908 which reads as under:

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"Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of the trial"

12. Such a provision is couched in a mandatory form. The Court's jurisdiction to allow such an application is taken away unless the condition precedent is satisfied namely it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. Hence, it is the primal duty of this Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties and whether such an amendment was not filed due to genuine reasons before the trial commenced. Only on fulfillment on such condition, the amendment can be allowed. It is clear that the proviso appended to Order VI, Rule 17 of the Code of Civil Procedure, 1908 restricts the power of the Court and it puts an embargo on the exercise of its jurisdiction. Thus this Court's jurisdiction to consider the amendment application preferred by the petitioners / petitioners / appellants / plaintiff in the first appellate stage is certainly limited. Thus, unless the jurisdictional



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fact, as envisaged therein the said proviso, it is found to be existing, this Court will have no jurisdiction at all to allow the amendment of the plaint.

13. With the above said observation, this Court is not inclined to interfere with the decision made by the learned first appellate Court in I.A.No.268 of 2009 in A.S.No.107 of 2007 on the file of the Subordinate Judge's Court, Kuzhithurai.

14. In fine, this Civil Revision Petition stands dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions stand closed.

20.07.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes
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To

1.The Subordinate Court,
Kuzhithurai.

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L.VICTORIA GOWRI, J.

BTR

2.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.

Order made in
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20.07.2023