



C.R.P.(MD)No.2266 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.10.2023

Pronounced on : 08.12.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.2266 of 2023

and

C.M.P.(MD)No.11656 of 2023

J.Kumar

... Petitioner/
Plaintiff

Vs.

T.Selvaraj

... Respondent/
Defendant

Prayer : This Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order passed in I.A.No.5 of 2023 in O.S.No.220 of 2021 dated 20.07.2023 on the file of Additional District Court (Fast Track), Tenkasi and allow the civil revision petition.

For Petitioner : Mr.T.S.Mohamed Mohideen

For Respondent : Mr.G.Sridharan



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ORDER

The Civil Revision Petition is directed against the order passed in I.A.No.5 of 2023 in O.S.No.220 of 2021 dated 20.07.2023, on the file of the Additional District Court (Fast Track Court), Tenkasi, dismissing the application filed under Section 26 of Specific Relief Act r/w. Order 6 Rule 17 of the Code of Civil Procedure.

2. The revision petitioner/plaintiff has filed the suit in O.S.No.220 of 2021 against the respondent/defendant, claiming the reliefs to declare that the suit property is belonging to him and for recovery of possession from the respondent/defendant.

3. The case of the revision petitioner/plaintiff is that the suit property was originally owned by the respondent/defendant and he sold the same to the revision petitioner/plaintiff, vide sale deed dated 18.11.2013, that the respondent/defendant at the time of sale asked for six months time to vacate the property, that the respondent/defendant has subsequently failed to vacate the property and that since the respondent/defendant has disputed the title of the revision petitioner/plaintiff in the



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reply notice, the revision petitioner/plaintiff was constrained to file the above suit to get his title declared and for getting possession of the suit property.

4. The respondent/defendant has filed a written statement taking a main defence that the sale deed dated 18.11.2013 was executed only as a security for the loan obtained from the revision petitioner/plaintiff and not with any intention to sell the suit property and that is why, the buildings in the suit property was omitted to be mentioned in the sale deed, that there existed no relationship of landlord and tenant between the parties and that the above suit came to be filed to grab the suit property and to cause loss and hardship to the respondent/defendant.

5. It is evident from the records that after the closure of the evidence of both the sides and when the case was posted for arguments, the above application came to be filed.

6. The revision petitioner/plaintiff, by alleging that the sale made by the respondent/defendant was an outright sale, that the non-inclusion of buildings in the sale deed was a mistake, that the respondent/defendant is



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very well aware of the above mistake and that in order to avoid technicality, he was advised to file an application to amend the pleadings for including the relief of rectification of the instrument dated 18.11.2013 and accordingly, filed the above application seeking permission to amend the prayer so as to include the relief of rectification of the instrument dated 18.11.2013.

7. It is the further case of the revision petitioner/plaintiff in the affidavit filed in support of the above application that the respondent/defendant taking advantage of the said mistake in the sale deed had taken an U-turn and claimed that the sale deed was not executed with an intention to sell, that the respondent/defendant is not legitimately expected to make such a plea taking advantage of the said mistake, that the revision petitioner/plaintiff is advised that the said mistake in the document can be rectified by seeking a specific prayer as provided under Section 26 of Specific Relief Act and the rectification can also be claimed at any stage of the suit, that the said amendment is very much essential for deciding the case effectively and to avoid multiplicity of proceedings and that the revision petitioner/plaintiff may put to irreparable loss and immense hardship, if the proposed amendment is not permitted.



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8. The respondent/defendant has filed a counter statement raising serious objections stating that the contention of the revision petitioner/plaintiff that the non-inclusion of the pleading in the sale deed is a mutual mistake is absolutely false and incorrect, that the respondent/defendant has specifically pleaded that the sale deed was executed only as a security for the loan transaction and also adduced evidence in that regard, that the revision petitioner/plaintiff has not pleaded that the non-inclusion of the pleading was by a mistake or with fraudulent intention, that the revision petitioner/plaintiff was cross-examined in the above aspects and he has not deposed that the house property was not mentioned in the sale deed by mistake or with fraudulent intention, that the revision petitioner/plaintiff ought to have filed the application for amendment before the commencement of trial, that the revision petitioner/plaintiff cannot be allowed to erase the evidence already given through the proposed amendments and that the above application is legally unsustainable.

9. Before proceeding further, it is necessary to refer Section 26 of the Specific Relief Act,

“When instrument may be rectified.-(1) When, through fraud or a mutual mistake of the parties a contract or other



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instrument in writing (not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956) applies) does not express their real intention, then-

(a) either party or his representative-in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit, as is referred to in Cl.(b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may in its discretion direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his



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pleading and the Court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section, unless it has been specifically claimed: Provided that, where a party has not claimed any such relief in his pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.”

10. It is pertinent to note that an instrument or contract can be rectified when through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their prayer intention. It is settled law that in case, if the parties had deliberately and wantonly left out something from the written contract or other instrument that cannot be included by invoking Section 26 of Specific Relief Act.

11. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***State of Karnataka and another Vs. K.K.Mohandas and others*** reported in ***(2007) 6 SCC 484*** and the relevant passage is extracted hereunder:



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“9. Under Section 26 of the Specific Relief Act, an instrument or contract may be rectified when through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their real intention. According to Dr. Banerjee in his Tagore Law Lectures on the “Law of Specific Relief”, “if the parties had deliberately left out something from the written instrument, that cannot be put in.” by resort to the remedy of rectification. Here, the parties have entered into written contracts and admittedly no term is incorporated therein regarding enforcement of the ban on trade of toddy to the public in the District of Dakshina Kannada. Nor is there any case pleaded in the plaint of any mutual mistake in the matter of setting down the terms of the contract. There is also no plea of fraud on the part of the State in entering into the contract. On the terms of the contract, the plaintiffs had obtained the right to vend arrack for the Excise Year 1990-91 on their obligation to pay the bid amount in monthly instalments. In the absence of any foundation in the pleadings being laid by the plaintiffs establishing a ground for the grant of the relief of rectification, the mere adding of a prayer by way of an amendment could not be considered sufficient to grant them the relief of rectification.”



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12. The learned counsel appearing for the respondent would rely on the judgment of the Kerala High Court in *Aliyar Vs. Raju V. Vayalat* reported in **2016 (1) Ker L.J. 799**, wherein, it has been specifically held that pleading and proof of fraud or a mutual mistake of the parties are mandatory requirements for obtaining a relief of rectification of an instrument and the relevant passages are extracted hereunder:

“11. First sentence in the Section shows that in order to get an instrument rectified, the foremost thing to be established is that through fraud or mutual mistake of the parties a contract or other instrument in writing does not express the real intention of the parties. Pleading and proof of fraud or a mutual mistake of the parties are mandatory requirements for obtaining a relief of rectification of an instrument. In this particular case, the plaintiff/respondent has no case that the wrong descriptions did occur in Ext.A1 on account of any fraud played by the defendant/appellant. No such pleading is raised in the plaint. It is clear from Order 6 Rule 4 of the Code of Civil Procedure that particulars like fraud, breach of trust, wilful default, undue influence, etc. have to be specifically pleaded. From the records it is borne out that no evidence relating to fraud was let in at the time of trial, rightly because there is no pleading. Therefore, that element in Section 26 of the Act does not arise in this case.



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12. *What is relevant here is the factum of pleading and proof of mutual mistake of the parties. It is pertinent to note that the expression “mutual mistake of the parties” is not defined under the Act. Section 2(e) of the Act says that all other words and expressions used in the Act, but not defined, and defined in the Indian Contract Act, 1872 have the meanings respectively assigned to them in that Act. We do not find a definition for “mutual mistake” in the Indian Contract Act as well. Section 20 of the Contract Act says that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, then the agreement will become void. That provision is not applicable here as nobody has such a case.*

.....

15. *The principle underlying in Section 26 of the Act has been lucidly stated by the learned authors Anand and Iyer in the commentary on the Specific Relief Act, 1963 (13th Edition, page 789) in the following words:*

“The actual expression of a thought very often fails to express the whole thought, sometimes more may be expressed, sometimes less and sometimes; sometimes totally different may be expressed. When parties have come to contract, but have failed to express themselves correctly,



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and the mistake is a real one and mutual and can be established by satisfactory proofs, a court of equity, will reform the written instrument, so as to make it conformable to the precise intent of the parties. The real intention may have been misrepresented in writing, either by mutual mistake or fraud. Equity affords relief in either case, in faith and confidence in the formation of contracts.”

16. It is needless to restate that the courts exercising power under the Act have both legal and equitable jurisdictions. It is common knowledge that in our country we do not have Courts of Equity and Law Courts separately. The Act confers equitable jurisdiction on the civil courts for granting specific reliefs.

17. Essentials for claiming rectification of an instrument, as revealed by the precedents, can be summarised. Firstly, the relief will not be granted unless a completed agreement is reached prior to the written agreement, which is sought to be executed. In other words, if the negotiations leading up to the execution of the document were vague and inconclusive or if it is impossible to ascertain what was the intention of the parties and what they really meant, then the challenged instrument can only be said to represent the agreement that



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has been concluded. If there is no antecedent agreement proved, upon which a rectification can be based, the relief cannot be granted. Secondly, both the parties must have intended that the exact term of the prior agreement should be reduced to writing and this intention should remain unchanged up to the moment of the actual execution of the instrument. That is, if it is proved that the parties subsequently changed their original intention and that the instrument finally represents the true intention of the parties, it becomes fatal to a suit for rectification. Thirdly, the evidence relating to mistake common to both the parties must be clear and the burden of proving this lies on the party praying for rectification. It is also settled that the mistake should be obvious and not a mere probability. Fourthly, a party should seek rectification of literal mistakes, so as to enable the parties to act according to their intentions already revealed clearly and unequivocally, so as to prevent them from nullifying their prior agreement.”

13. The learned counsel appearing for the revision petitioner has relied on the following decisions;

(i) (2008) 4 SCC 102

(Puran Ram Vs. Bhaguram and another):

“15. Before parting with this judgment, we may deal with the submission of the learned counsel for the respondent that the



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application for amendment could not be allowed inasmuch as the same was barred by limitation. We are unable to accept this contention of the learned counsel for the respondents. In this regard, we may observe that the court may, in its discretion, allow an application for amendment of the plaint even where the relief sought to be added by amendment is allegedly barred by limitation. This view was also expressed by this Court in Pankaja & Anr. Vs. Yellappa (Dead) by LRs. & Ors. [(2004) 6 SCC 415]. In that decision, it was held that there is no absolute rule that in such a case, the amendment should not be allowed and the discretion of the court in that regard depends on the facts and circumstances of the case and such discretion has to be exercised on a judicious evaluation thereof. It was further held in that decision that an amendment, which subserves the ultimate cause of justice and avoids further litigation, should be allowed. It is well settled by a catena of decisions of this Court that allowing and rejecting an application for amendment of a plaint is really the discretion of the Court and amendment of the plaint also should not be refused on technical grounds. In this connection reliance can be placed on a decision of this court in Jai Jai Ram Manohar Lal Vs. National Building Material Supply, Gurgaon [AIR 1969 SC 1267]. In paragraph 8 of the said decision this Court observed that "since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint



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must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted." A reading of this observation would amply clear the position that no question of limitation shall arise when misdescription of the name of the original plaintiff or mis-description of the suit property arose in a particular case. Apart from that in the present case, although, the relief claimed before as well as after the amendment remained the same i.e. a decree for specific performance of the contract for sale, even then, in the facts and circumstances of the present case, as noted herein earlier, we do not find why the High Court should have interfered with the discretion used by the trial court in allowing the application for amendment of the plaint."

**(ii) 2009 (1) CTC 624
(Chandran Vs. Mariappan):**

"10. In view of the fact that Section 26(1)(a) of the Specific Relief Act 1963 permits either party or his representative in interest may institute a suit to have the instrument rectified and inasmuch as the mistake which has crept in the agreement of sale and incorporated in the plaint has come to the notice of the parties only during the course of trial, the act of the trial Court in allowing the amendment application I.A.No.43 of 2008 in O.S.No.161 of 2006 cannot be found fault with and the trial Court in the considered opinion of this Court has



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exercised its discretion in a proper and effective way for the purpose of complete adjudication of controversies/disputes involved in the suit between the parties and in that view of the matter, this revision petition fails and the same is hereby dismissed.”

14. In the first case above referred, the plaintiff therein has filed an application for amendment of the plaint under Order 6 Rule 17 of the Code of Civil Procedure to amend the description of the suit property by alleging that it was a mutual mistake, but the same was rejected by the trial Court, that when the same was challenged before the District Court, the amendment was allowed and when the same was taken before the High Court, application for amendment was rejected and that when the said rejection was challenged, the Hon'ble Supreme Court, by observing that the amendment is only to rectify the description of the property and as such, the question of limitation does not arise and that the relief claimed before as well as after the amendment remained the same, by setting aside the order of High Court, allowed the proposed amendments.

15. In the second case above referred, the plaintiff therein in a suit for specific performance has also filed an application to amend the plaint



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by correcting the mistake in the survey number and also one of the boundaries of the suit property by alleging that it was a mutual mistake. This Court, by referring the judgment of the Hon'ble Supreme Court in **Puran Ram's** case above referred, dismissed the revision by confirming the order of the trial Court allowing the proposed amendments.

16. In the case on hand, as already pointed out, the amendment sought is to include a prayer for rectification of Ex.A.1-sale deed in the plaint and also for rectification of the document under Ex.A.1 dated 18.11.2013. More importantly, in the present case, trial has already been completed and when the case was pending for arguments, the above application to amend the plaint so as to include the relief for rectification of the mistake and also for rectification of the instrument under Ex.A.1 came to be filed.

17. As rightly contended by the learned counsel appearing for the respondent, the revision petitioner/plaintiff has nowhere whispered about the mutual mistake or fraud in Ex.A.1-sale deed, in not showing the super structures found therein. As observed by the Hon'ble Supreme Court in



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State of Karnataka'a case above referred, in the absence of any foundation in the pleadings laid by the plaintiffs for establishing a ground for the grant of the relief of rectification, the mere adding of a prayer by way of an amendment could not be considered sufficient to grant them the relief.

18. The Hon'ble Apex Court in **Joseph John Peter Sandy Vs. Veronica Thomas Rajkumar** reported in **AIR 2013 SC 2028** has held that Section 26 of the Act has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties was not expressed in relation to an instrument.

19. At this juncture, it is also necessary to refer the judgment of the Andhra Pradesh High Court in **S.Anuradha Vs. Goluguri Lakshmi Narayana Reddy** reported in **2023 (2) ALT 258**, wherein, it has been held that the object behind Section 26 of the Act is to avoid multiplicity of proceedings, but that does not mean a party can file it at any stage without seeking such relief at an earlier stage though it could have been exercised and the relevant passage is extracted hereunder:



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“13. Though Section 26 of the Specific Relief Act provides amendment of plaint at any stage of the proceedings, the discretion given is not unbridled and cannot be used as a tool to seek the relief at any time if one can take it before, yet does not take without any reason, and thereafter at the wish and whims of the party, at the fag end of proceedings stating that it can be allowed at any stage cannot be allowed. Though Order VI Rule 17 CPC and Section 26 of the Specific Relief Act operate in the same field but with some difference, both must be read together in harmony. The proviso to Order VI Rule 17 CPC keeps a rider on exercise of such right of seeking amendment of pleading at a stage subsequent to commencement of trial. No such rider is provided under Section 26 CPC. The object behind Section 26 is to avoid multiplicity of proceedings and to render justice. But that does not mean a party can file it at any stage without seeking such relief at an earlier stage though it could have been exercised. Law is never meant to aid a party who is negligent or passive. Every area of discretion is always guided by the principles of judicious approach. Therefore, the provision under Section 26 of the Specific Relief Act cannot be read to mean that though the petitioner, like in the present case, has got ample opportunity of seeking such relief at a prior stage failed to do so and at the fag-end can approach and seek the relief, that too, when the same relief was once declined after thorough examination on entitlement at that current stage.



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Though the parameters under Order VI Rule 17 CPC in strict sense may not be applied to Section 26 of the Act, the same can be taken as aid while exercising the discretion for examining the relief to be granted under Section 26 of the Specific Relief Act. As such, considering all these facts and circumstances, the petitioners have no merit and the trial Court has rightly declined the relief. Since the necessity to incorporate the amendment has already been exclusively dealt with in the previous petition, it is not necessary again to discuss the same in the light of the foregoing discussion.”

20. Considering the above, the impugned order dismissing the application for amendment cannot be found fault with and this Court is in entire agreement with the finding recorded by the learned trial Judge. Consequently, this Court concludes that the revision is devoid of merit and the same is liable to be dismissed.

21. In the result, this Civil Revision Petition is dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

08.12.2023

NCC :yes/No
Index :yes/No
Internet:yes/No
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K.MURALI SHANKAR,J.

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To

1. The Additional District Court (Fast Track Court),
Tenkasi.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

Pre-Delivery Order made in
C.R.P.(MD)No.2266 of 2023
and
C.M.P.(MD)No.11656 of 2023

Dated : 08.12.2023