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C.R.P.(PD)No.3605 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD)No.3605 of 2019

1. Kaliammal
2. Subramani @ Mani .. Petitioners

Vs

1. Subbaraya Kounder
2. Palaniyappan
3. Sampooram
4. Nagamalai
5. Kunjayiammal
6. Valamathi .. Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the Order dated 12.04.2019 made in I.A.No.1070 of 2018 in O.S.No.435 of 2014 on the file of the Principal District Munsif Court, Kallakurichi and allow this revision Petition.

For Petitioners : Mr.R.Kumaravel

For Respondents : Mr.J.Deeraj (R2 to R4)
R1-Died (steps due)
R3,R5 and R6 (not ready in notice)



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ORDER

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2. The civil revision petitioners are the Plaintiffs in the suit.

O.S.No. 435 of 2014 had been filed for the following reliefs:

"(i) Declaring the right of the plaintiffs over the suit pathway and canal, and restraining the defendants, their men and agents from preventing the plaintiffs from using the suit pathway and canal or from obliterating the same, by means of perpetual injunction;

(ii) Award costs of the suit table by the defendants to the plaintiffs;

(iii) And pass such or further relief as the honorable court deems fit and proper, under the circumstance of the case and render justice."

3. The case of the plaintiffs is that the defendants have purchased the property from the mother of the 2nd plaintiff by way of a registered Sale Deed dated 10.06.1974. Even at the time of purchase, the suit mamool canal and the suit pathway were shown. Subsequently the defendants entered into a partition and did not show the aforesaid pathway and the canal. Sometime in October 2014, the defendants mutated the revenue records and did not disclose about the suit canal



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and pathway. This according to plaintiffs shows that the intention of the defendants was to obliterate the pathway and canal and occupy the same.

4. Summons were served on the defendants and the 2nd defendant has also filed the written statement.

5. When the suit was pending, the plaintiffs filed an application in I.A.No.1070 of 2018 pleading that the Plaint has to be amended to include paragraph no.4A and 5 and also to amend the prayer and include the prayer for mandatory injunction. The reason for seeking such an amendment was that the defendants had obliterated the pathway on 15.03.2018. The contesting 2nd defendant filed a counter opposing the said application. He pleaded that there is no canal or pathway in the suit property. Therefore, the Defendants could not have obliterated a non existing canal and pathway.

6. The learned Trial Judge dismissed the application on the following grounds:

- (i) The suit is one for permanent injunction.
- (ii) The petitioners have not taken steps for appointment of an Advocate Commissioner



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(iii) The pathway even as per the case of the plaintiffs had been obliterated on 15.03.2018 but the application came to be filed after six months.

(iv) No documents have been filed to prove the existence of the canal and pathway.

7. Aggrieved by the same, the plaintiffs are on revision.

8. I have heard Mr.R.Kumaravel,for the Civil Revision Petitioner and T.Deeraj for Mr.N.Loganathan for the respondents 2 and 3.

9. At the outset, I should point out that the suit is yet to see the commencement of trial. It is trite that pre-trial amendments should be given widest possible aptitude, as the parties have not yet entered the witness box, to tender evidence. Furthermore, at the time of considering an amendment application, there is no necessity for the plaintiffs to tender evidence to substantiate the truth and genuineness of their plea. The Code of Civil Procedure does not contemplate a trial during the course of considering an amendment application and another after the amendment is allowed. The demand of the Trial Judge that plaintiffs would have to prove the existence of the pathway and canal before the



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amendment in my view is contrary to the settled positions of law.

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10. Furthermore, if the Court had felt that report by an Advocate Commissioner is necessary, it need not have waited for an application from a party. It can, on the basis of averments in the plaint and written submission, suo motu appoint an Advocate Commissioner. This is because, in terms of Order XXVI Rule 9 of Code of Civil Procedure, an Advocate Commissioner is not appointed for the purpose of assisting a party. Instead she/he is appointed to assist the Court in elucidating the matter in issue.

11. The specific case of the plaintiffs is that, pending the suit, the Defendants had obliterated the canal and pathway. If a party changes the nature of the suit property pending a litigation, the plaintiffs need not even ask for an amendment. It is the duty of a court, at the time of final disposal, if it comes to a conclusion that the suit pathway and canal existed, and were subsequently obliterated, pending the litigation, to grant the relief of mandatory injunction and direct their restoration. The plaintiffs have not troubled the court to exercise that power but have voluntarily come forward with an application for amendment. This amendment neither changes the cause of action nor does it take the



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defendants by surprise. All that it does is, bring to the notice of the Court, certain events which has taken place pending the suit. The crucial error which has been committed by the Trial Court is, failing to see that the suit is filed for a declaration and it is not the suit for bare injunction.

12. In the light of the above discussion despite the vehement plea of Mr.Deeraj to sustain the order, I am not in a position to do so. The Civil Revision Petition Stands allowed. The order passed by the learned Principal District Munsif at in I.A.No.1070 of 2014 O.S.No.435 of 2024 dated 12.04.2019 is set aside. I.A.No.1070 of 2018 shall stand allowed. The plaintiffs are entitled to amend the plaint and include the prayer sought for by them in the said amendment petition. The defendant will file his Additional written statement within two weeks from the service of the amended plaint copy. The suit, being more than a decade old, the learned Principal District Munsif is requested to expedite the suit at all stages. No costs. Consequently, connected Miscellaneous Petition is closed.

20.11.2024

Index:Yes/No

Speaking order/Non-speaking order

Neutral Citation:Yes/No



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To

The Principal District Judge,
Dharmapuri.



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LAKSHMINARAYANAN,J.

arr

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