



C.R.P.(MD)No.399 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 07.08.2024

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.R.P.(MD)No.399 of 2023

and

C.M.P.(MD)No.1958 of 2023

1.Umarani

2.Thirunavukkarasu @ Senthil

... Petitioners / 5th & 8th Respondents

5th & 8th Defendants

Vs.

1.Babu

2.Suseela

... Respondents / Petitioners /
Plaintiffs

3.Nagarathinam Ammal

4.Premkumar

5.Nagarajan

6.Vasugi

7.Nagalakshmi

8.Pushpalatha



C.R.P.(MD)No.399 of 2023

9.Veerammal

10.A.Vengadeswari @ Renuga

11.A.Gopalakrishnan

12.C.Jeyalakshmi

13.Siranjeevi

... Respondents / Respondents
3,4,6,7,9 to 13 / Defendants 3,4,6,7,9 to 13

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 03.11.2022 passed in I.A.No.5 of 2022 in O.S.No.98 of 2010 on the file of the Subordinate Judge, Theni.

For Petitioners : Mr.V.Ramakrishnan

For Respondents : Mr.H.Arumugam
for R1 & R2
: Mr.S.Ayyanar Premkumar
for R3 to R7 & R9 to R13

: no appearance for R8

ORDER

Heard the learned counsel on either side.

2. The respondents 1 & 2 herein filed O.S.No.98 of 2010 on the file of the Sub Court, Theni seeking partition. The suit properties belonged to one



C.R.P.(MD)No.399 of 2023

Subba Naidu. He was blessed with three sons and three daughters. Two of the daughters filed the said suit for partition. The defendants 1 to 4 are the legal heirs of the deceased first son. The defendants 5 to 8 are the legal heirs of the deceased second son. The third son of Subba Naidu was shown as 9th defendant. The 10th defendant was the third daughter of Subba Naidu. The plaintiffs and the 10th defendant are on the same page. When the case was posted for trial and P.W.1 had been examined in chief and the matter was posted for her cross examination, I.A.No.5 of 2022 was filed for amending the plaint. The plaintiffs wanted declaration that the partition deed executed among the sons is null and void. The defendants 5 to 8 filed counter affidavit opposing the amendment prayer. The learned trial Judge however allowed IA on payment of cost of Rs.5,000/-. It is relevant to mention here that the defendants were given liberty to raise the plea of limitation by filing a additional written statement. Challenging the said order dated 03.11.2022, the present civil revision petition came to be filed.

3. The learned counsel appearing for the revision petitioners contended that the impugned order deserves to be set aside for more reasons than one. He pointed out that the suit was filed way back in 2010. The written statement was filed in the year 2017. There is a specific pleading regarding the existence



of 1984 partition deed executed among the brothers. Issues were framed and the trial commenced on 23.09.2021. The prime contention of the learned counsel for the petitioner is that the Court below appears to have lost sight of the statutory mandate set out in the proviso to Order 6 Rule 17 of C.P.C. He relied on the decision of the Hon'ble Supreme Court reported in **2019 4 SCC 332 (M.Revanna Vs. Anjanamma (dead) by LRS.)**. The Hon'ble Supreme Court in the said decision had held as follow:-

“5. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to [Order VI Rule 17 of the CPC](#) virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the Court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money. ”

He also drew my attention to yet another decision reported in **2021 (2) MWN (Civil) 102 (Pandi Malhari Mahale Vs. Monika Pandit Mahale & Others)**.

Paragraph Nos.5 & 8 of the said decision read as follows:-



“5. Learned counsel for the appellant submits that evidence had already begun and in view of Order VI Rule 16 of the Code of Civil Procedure, 1908 the amendment could not have been considered unless the Court return a finding that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

8. In the present case, the Civil Judge has not returned any finding that the Court is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In [Vidyabai & Ors. v. Padmalatha & Anr.](#) [(2009) 2 SCC 409], this Court observed in para 19 as under:

“19. It is primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court’s jurisdiction in a case of this nature is limited. Thus unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.” There being no finding by the Court that the Court is satisfied in spite of due diligence, the party could not introduce amendment before commencement of the trial, the order of the Trial Judge is unsustainable. The High Court has not adverted to the above aspect of the matter. In view of aforesaid, we allow the appeal and set aside the order of the High Court as well as of the Civil Judge, the amendment application stands dismissed.”

He called upon this Court to set aside the impugned order, since no finding has been specifically rendered as regards the due diligence that ought to have been shown by the plaintiffs.



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4. The learned counsel appearing for the contesting respondents submitted that the impugned order does not warrant interference.

5. I carefully considered the rival contentions and went through the materials on record. The case on hand pertains to partition. The daughters of Subba Naidu are against their surviving brother and the legal heirs of the deceased brother. It is seen that the partition deed was executed among the brothers in the year 1984. In the written statement, there is a specific pleading in this regard. I am certain that the validity of the partition deed would have been framed as one of the issues. The learned counsel appearing for the contesting respondents draws my attention to the decision reported in (2022) 7 SCC 90 (*UMADEVI NAMBIAR Vs. THAMARASSERI ROMAN CATHOLIC DIOCESE REP. BY ITS PROCURATOR DEVSSIA'S SON REV. FATHER JOSEPH KAPPIL*). Paragraph Nos. 11,14 &15 of the said decision reads as follows:-

“11. The High Court has held and in our view rightly so, that if the respondent had exercised reasonable care as required by the proviso to [Section 41](#), they could have easily found out that there was no power of sale.

14. The reasoning given by the High Court for holding that the appellant ought to have challenged the alienations, is that the appellant was out of possession. Here again, the High Court failed to appreciate that the possession of an agent under a deed of Power of Attorney is also the possession of the Principal and that any unauthorized sale made by the agent will not tantamount to the Principal parting with possession.



C.R.P.(MD)No.399 of 2023

15. It is not always necessary for a plaintiff in a suit for partition to seek the cancellation of the alienations. There are several reasons behind this principle. One is that the alienees as well as the co sharer are still entitled to sustain the alienation to the extent of the share of the cosharer. It may also be open to the alienee, in the final decree proceedings, to seek the allotment of the transferred property, to the share of the transferor, so that equities are worked out in a fair manner. Therefore, the High Court was wrong in putting against the appellant, her failure to challenge the alienations.”

6. I endorse the stand of the learned counsel appearing for the petitioners that post trial, amendments will have to be viewed through a different lens. In this case, the court below probably for rendering substantial justice has chosen to bypass the statutory mandate underlying Order 6 Rule 17 of C.P.C. I am clearly of the view that there was no need for the plaintiffs to mount a formal challenge or seek a formal declaration as to the validity of 1984 partition deed. When a specific defence has been taken in the written statement, issues would have definitely been framed. It is for the court below to pronounce decision on the merits of the matter after considering the evidence adduced on either side. This amendment was strictly not necessary. In this view of the matter, the impugned order is set aside. Since the suit is of the year 2010, the court below is directed to dispose of the same on merits and in accordance with law within a period of six months from the date of receipt of a copy of this order.



C.R.P.(MD)No.399 of 2023

7. This Civil Revision Petition is allowed. No costs. Consequently,
connected miscellaneous petition is closed.

07.08.2024

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

The Subordinate Judge, Theni.



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C.R.P.(MD)No.399 of 2023

G.R.SWAMINATHAN, J.

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C.R.P.(MD)No.399 of 2023

07.08.2024