

**Simon and Another Vs. Thankammal and Another**

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**Court :** Chennai

**Decided On :** Apr-12-1999

**Reported in :** 1999(2)CTC705

**Judge :** K. Sampath, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 11, 100, 105 and 115 -- Order 8, Rule 9 -- Order 6, Rule 17 -- Order 41, Rule 23; [Transfer of Property Act, 1882](#) -- Sections 52

**Appeal No. :** C.R.P. No. 2955 of 1998 and C.M.P. No. 14836 of 1998

**Appellant :** Simon and Another

**Respondent :** Thankammal and Another

**Advocate for Def. :** Mr. O. Venkatachalam, Adv.

**Advocate for Pet/Ap. :** Mr. G.S. Thamby, Adv.

**Judgement :**

ORDER

1. The civil revision petition has been filed against the order allowing the application for amendment of the written statement by the learned District Munsif, Eraniel in I.A.No. 133 of 1997 in O.S.No. 2 of 1997 on his file. The amendment sought for is for adding the pleading that the compromise effected in A.S.No. 137

of 1973 is fraudulent and collusive. The main objection raised by the revision petitioner before the lower court was that in the same proceedings, at an earlier point of time, the respondents had asked for permission to file an additional written statement to the same effect and it was rejected.

2. The learned District Munsif has taken pains to point out the distinction between the additional written statement and the amendment of written statement. While prior leave of the court is necessary for filing an additional written statement, no such leave is necessary for filing an amendment petition and held that the amendment has to be allowed as no injustice is caused to the other side. Consequently, the learned District Munsif allowed the amendment of the written statement on payment of costs of Rs. 250 to the revision petitioners.

3. It is contended by the learned counsel for the revision petitioners that for the same relief the respondents filed an earlier application for reception of additional written statement before the appellate court in the appeal against the decision in the suit. The same was dismissed by the appellate Judge. Against that a revision was filed in C.R.P.No. 985 of 1983 and this Court by order dated 7.3.1983 confirmed the view of the appellate judge and dismissed the civil revision petition. The attempt by the respondents was to circumvent the order which had become final in respect of the same relief.

4. Mr.O. Venkatachalam, learned counsel for the respondents submitted that there was an ocean of difference between filing an additional written statement and amendment of written statement and in the instant case the revision petitioners themselves were permitted to file a replication and a similar opportunity to have the written statement amended for elucidating a plea already set up in the written statement could not be refused. In any event, the learned counsel also submitted that the lower court had exercised its judicial discretion and had done justice and this court sitting in revision ought not to interfere with the order, of the lower court. The learned counsel also relied on a number of decisions in support of his stand.

5. It is necessary to refer to the background of the case for better appreciation of the issue involved. There was an earlier suit filed in O.S.No. 811 of 1969 before the District Court, Padmanabhapuram by one Vedanayagam for partition and

separate possession of his 1/36th share of the plaint items. There were 13 defendants to start with and on the death of some of the parties, the number of plaintiffs increased to 5 and the number of defendants increased to 19. One Induchoodan Tambi was the first defendant. He filed his written statement and contested the suit. Defendant number 2 Chelvamany Nadar, D6 Chellan, D12 and D13 Ponnayyan Nadar and Gabriel all filed their written statements and resisted the suit. Defendants 4,5,7 to 11 and 14 to 19 in that suit remained ex parte and the 3rd defendant one Aseervatham was reported dead. The suit was dismissed on 23.11.1972, Vedanayagam's heirs Sornammal, John Rose, Wilson and Leela alias Glory filed appeal 137 of 1973. On 31.10.1975 Induchoodan Tambi sold a specific item to Gnanaprakasam son of Aseervadam for Rs. 7,000. On 28.2.1976 there was a compromise in the appeal and a compromise decree was passed. On 30.11.1979 O.S.NO. 784 of 1979 was filed by Chelvamany Nadar, the second defendant in the previous suit. He died pending the new suit and his legal representatives Simon and Paulraj came on record as plaintiffs 2 and 3 in the new suit. Induchoodan Tambi was the first defendant in this suit. He died pending suit. Thangammal who was the 15th defendant in the previous suit is the second defendant in the present suit and Gnanaprakasam son of Aseervatham is the 3rd defendant. The prayer in the present suit is for declaration of the plaintiff's title, possession and injunction. The second defendant Thangammal filed written statement on 20.2.1980 contending that she was not a party to the compromise, that the suit property was sold by Induchoodan to her brother Gnanaprakasam and that she was in possession on behalf of Gnanaprakasam. In January 1982, Gnanaprakasam on his being impleaded as 3rd defendant in the suit filed a written statement alleging that the compromise in the previous suit was void abinitio and had no binding force. He also contended that he was not aware of the suit and the appeal and as he was away in Madras, his sister Thangammal was in possession in his behalf. Thangammal also filed an additional written statement objecting to non impleading of the owner namely Gnanaprakasam.

6. There was an application filed by plaintiffs 2 and 3 disputing the sale by Induchoodan and also contending that the sale was hit by lis pendens. On 23.4.1982 the suit was decreed. The learned District Munsif also observed in paragraph 9 of his judgment that there was no contention raised in the suit that

there was fraud or collusion in the compromise that the sale deed Ex.A1 was obtained pending suit, and that as purchaser pending suit the 3rd defendant was bound by the decree in the earlier suit. Induchoodan Tambi had died. In the meantime the other defendants filed appeal A.S.No. 60 of 1982 and in the appeal they took out an application in LA. No. 489 of 1982 to receive additional written statement. There was a counter filed on 10.1.1983 objecting to the receiving of additional written statement and this I.A. was dismissed by the appellate court on 17.1.1983. Against this dismissal C.R.P.No. 985 of 1983 was filed and as already stated the revision was dismissed by this Court by Maheswarah, J. on 7.3.1983. The order in the revision petition refers to the rejection by the appellate judge on two grounds namely.

(1) no reason to give an opportunity at the appellate stage and

(ii) the averments in the affidavit do not in any way explain or augment the contentions already taken in the written statement.

These grounds of rejection by the appellate court were accepted by this Court and the revision was dismissed as not vitiated by any irregularity or illegality.

7. After the dismissal of the civil revision petition on 8.9.1983 the respondents filed I.A.No. 405 of 1983 for amendment of the written statement by adding a sentence that 'the compromise in A.S.No. 137 of 1973 and the decree passed thereon are vitiated by fraud and collusion between the defendants 1 and 2 in O.S.No. 811 of 1969 and so they are invalid and not binding on this defendant.' In September 1983 a counter was filed opposing the amendment. On 24.10.1994 A.S.No. 60 of 1982 was allowed and the matter was remanded. The appellate judge while remanding the matter observed that only if the trial court came to the conclusion that the compromise was bona fide, only then Section 52 of the Transfer of Property Act relating to lis pendens would apply as the said section talked about the decree being not collusive. I.A.No. 405 of 1983 was also sent back to the trial court. Against the remand order C.M.A.No. 347 of 1984 was filed to this Court and Raju, J. as the learned Judge then was allowed the C.M.A.on 8.3.1991 holding that no opportunity could be given to the parties to fill up lacunae in the evidence and directed the lower court to restore the appeal to its file and deal with the

appeal on merits giving opportunity to both the parties in accordance with law and decide the appeal as was expected of it and dispose of the same on merits and if the appellate court interim of Order 41 Rule 23 of the C.P.C. and procedure laid down in the series of decisions came to the conclusion that the matter deserved to be remanded, there will not be any embargo for the lower Appellate court to do that for proper and requisite reasons. After the disposal of the C.M.A. by this court A.S.No. 60 of 1982 was taken up by the appellate judge and on 24.10.1994 the appeal was allowed and the matter was remanded to the trial court setting aside the judgment and the decree of the trial court. The trial court was directed to take in to consideration the additional application and the additional written statement as also the additional issues and after affording adequate opportunity to the parties to let in evidence dispose of the suit within a period of three months therefrom. Thereafter the suit O.S.No. 784 of 1979 was transferred to the District Munsif Court, Padmanabhapuram to the newly set up District Munsif Court, Eraniel renumbered as O.S.No. 2 of 1997 and I.A.No. 405 of 1983 in A.S.No. 60 of 1982 renumbered as I.A.No. 133 of 1997. This I.A. as noticed in the beginning of this order was allowed by the lower court on 26.2.1998 in the interest of justice. The serious obstacle in confirming the order of the lower court is the order in C.R.P.No. 985 of 1983. It is not disputed nor can it be disputed that the purpose of the earlier petition which culminated in dismissal by the appellate court and confirmed in revision by this Court on the one hand and the object for which I.A.No. 133 of 1997 (previously I.A.No. 405 of 1983) has been filed on the other are one and the same. What cannot be done directly cannot be done indirectly.

8. It is necessary at this stage to refer to the authorities relied on by the counsel on either side. Dealing with the revisional powers under Section. 115 of the C.P.C. M.M. Ismail, J. as the learned Judge then was in Chennichi alias Parikkal v. D.A. Srinivasan Chettiar, 1970 (1) MLJ 234 has observed as follows:

'The exercise of the revisional powers of the High Court under Section 115, Civil Procedure Code, is purely discretionary. The High Court will not take a technical view and necessarily interfere in every case, where an order is wrong and even improper, if such interference will produce hardship or injustice. The revisional jurisdiction of the Court is intended to secure and subserve the ends of Justice and

not to deny or defeat it. If interference in a particular case will result in hardship or injustice to a party, the High Court will be justified in refusing to interfere in the exercise of its revisional jurisdiction, even if the order is found to be one without jurisdiction.'

9. In *S.N. Kuba v. P.P.I, Vaithyanathan*, 1988 T.L.N.J. 1 a Division Bench of this Court has held that the discretionary jurisdiction of this Court under Section 115 of the C.P.C. should not be exercised where the order of Subordinate Court renders justice.

10. To the same effect is the judgment of Abdul Hadi, J in *Balambika v. Elizabeth*, 1990 T.L.N.J. 116.

11. All the above three decisions are relied on by Mr. O. Venkatachalam learned counsel for the respondents to contend that justice had been rendered by the lower court by ordering amendment of the written statement and there is no warrant for interference.

12. As against the above decisions the learned counsel for the revision petitioners relied on the decision in *Kumaraswami Gounder and others v.D.R. Nanjappa Gounder and others*, : AIR1978 Mad285 . In that case dealing with the scope of Order-VI Rule -17 Code of Civil Procedure it was held by the Division Bench after the point raised regarding the scope of Section 100 had been answered by the Full Bench in paragraph-19 as follows:

'Having regard to the age of this litigation, and also for the reason that the amendment sought for sets up a totally different cause of action which ex facie cannot stand on a line with the original pleading, we are unable to allow this application for amendment. A pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of an amendment a new cause and a case cannot be substituted and the courts cannot be asked to adjudicate the alternative case instead of the original case. Though it is expedient under certain circumstances to take into consideration the supervening facts in the course of a litigation which is long drawn, yet the march and lapse of such time alone cannot

be the foundation to mechanically accept the request for amendment because due to such passage of time, several events have happened and several matters have intervened. It would be hazardous to accept such an application for amendment to a plaint on the only ground of passage of time and change of circumstances, for, that would run counter to the essential ratio governing the principle of amendment of pleading which is that no amendment can introduce a cause of action which was never thought of originally or could not have been thought of earlier and which is diametrically opposite to that stated in the original plaint.'

13. Two things have to be noticed in this connection. The respondents cannot be faulted on the ground of delay and laches. It is on record that they filed the application in the year 1983 itself, no doubt, after the dismissal of the application for reception of additional written statement. The learned counsel for the respondents apparently taking the cue from this decision submits that the amendment sought for is only to substantiate, elucidate and expand the pre-existing facts already contained in the original pleading. According to the learned counsel the necessary averment is there already in the written statement originally filed. What the respondents attempted to do was only to substantiate, elucidate and expand the already existing plea. The original plea is that the compromise is void ab initio and has no binding force and the additional sentence sought to be introduced is that the compromise in A.S.No. 137 of 1973 and the decree passed thereon are vitiated by fraud and collusion between defendants 1 and 2 in O.S.No. 811 of 1969 and they are invalid and not binding on this defendant. I do not wish to express an opinion as to whether the amendment sought for by way of additional sentence is to substantiate, elucidate and expand the pre-existing facts. If the facts pre-exist it is not necessary to substantiate, elucidate or expand. If the facts do not pre-exist there is no question of substantiating, elucidating or expanding. I do not wish to say anything further.

14. In *Murthi Gounder v. Kamppanna Gounder* : AIR1976 Mad302 C.J.R. Paul, J. upheld the rejection by the trial court of a request for filing an additional written statement after the written statement had been filed, issues framed and trial commenced, on the ground that the additional written statement set up a new case. In the view of the learned Judge having regard to the stage at which the

application for filing additional written statement came to be filed, prejudice would be caused to the plaintiff who will be forced to file reply statement and the consequence thereof fresh and different issues would have to be framed and the trial would have to begin once over again. In the course of his judgment the learned Judge also referred to the judgments of this Court by a learned Single Judge (Rajagopalan, J.) in *Md. Ibrahim v. Ahmed Maricar* : (1948)2MLJ576 where the learned Judge countenanced the reception of an additional written statement setting up an apparently inconsistent plea on the ground that the suit had not come up for trial and the proposed additional plea though inconsistent would not embarrass the trial of the suit. Unfortunately, in the instant case, the prayer for reception of additional written statement was rejected by the appellate court and the same was confirmed in revision by this Court. As already noticed there is no difference between what was sought to be raised in the additional written statement and what is now sought to be introduced by way of amendment.

15. In *Hindu Baktha Jana Sabai v. State of Tamil Nadu and others*, 1998 (2) L.W. 733 it was held by a Bench of this Court that a compromise decree could not be challenged in writ proceedings and no writ lay. Even a void decree is binding on the parties until in a suit for declaration the same is set aside for which limitation period is three years. Apparently, the learned counsel for the revision petitioners wants to contend that the respondents were trying to get over the bar of limitation by seeking this amendment. It is unnecessary to give a decision on this at this stage of the proceedings.

16. It is also not very material to refer to my decision on *lis pendens* in *Karuppiah v. Karuppiah Servai and 5 others*, 1998 (3) L.W. 382 at this stage of the proceedings.

17. In *N. Srinivasan v. Muthammal*, : (1998)III MLJ466 , K.P. Sivasubramaniam, J. with regard to amendment has stated as follows:

'The view of the Supreme Court as could be gathered from the judgment reported in *Heeralal v. Kalyan Mal and others*, 1997 (10) Supreme 56 : 199845(1) L.W. 340, is that an amendment which was sought for in the proposed additional written statement was of such a nature as would displace the plaintiff's case, it cannot be

allowed. No such amendments to written statement putting forth inconsistent or alternative plea which could displace the plaintiff's case and cause him irretrievable prejudice, can be allowed.'

I fail to see how, by the proposed amendment any irretrievable prejudice would be caused to the revision petitioners. However, as already noticed the only obstacle is the decision in C.R.P.No. 985 of 1983.

18. In *T.S. Richu Ayyangar v. Sri Perarulala Ramanuja Jeer Swamigal, Dharmakartha and Manager of Sri Alagia Nambirayar Temple* : AIR1940 Mad756 worshippers filed a suit in the District Court for settling a scheme. The main objection was that Court had no power to frame a scheme. The District Judge found the issue in favour of the plaintiffs but on revision the High Court reversed the order. In consequences the District Judge dismissed the suit and plaintiffs appealed, and a preliminary objection was taken that the decision of the Judge in revision was final and cannot be questioned in appeal. It was held by a Division Bench of this Court that the order in Revision affected the decision of the trial court in passing decree and therefore it was clearly open to the court on appeal by virtue of Section 105 to consider its correctness.

19. I was wondering as to whether the ratio of this decision could be summoned to get over the obstacle caused by the decision in the earlier civil revision petition. But then the order in the civil revision petition in the decision by the Bench was held to be capable of being challenged by virtue of the provisions of Section 105 of the Code of Civil Procedure in an appeal against the final decision in the suit. That is not the position here. It is difficult to ignore the order in the earlier civil revision petition for upholding the decision of the lower court. May be the lower court has rendered justice and normally it should not be interfered with under Section 115 of the Code of Civil Procedure. However, in the teeth of the order in the civil revision petition as at present, the hands of the court are tied and there cannot be a decision contrary to the earlier decision in the civil revision petition. Decisions abound for the position, that an order passed in the course of a suit will operate as *res judicata* in the subsequent stages of the same proceedings. Thus it is not open to the respondents at the stage of the suit itself to contend that the order in the

earlier civil revision petition can be ignored on the principle of doing justice. The civil revision petition deserves to be allowed and the order of the lower court is set aside. There will however be no order as to costs. Consequently, C.M.P.No. 14836 of 1998 is closed.

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