

(2006) 11 MAD CK 0025

Madras High Court

Case No: CRP (PD) No. 998 of 2005 and C.M.P. No. 11811 of 2005

Faysudeen

APPELLANT

Vs

Kader Mohideen, Mumtaz and
Abdul Subahani

RESPONDENT

Date of Decision: Nov. 16, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17

Hon'ble Judges: S. Ashok Kumar, J

Bench: Single Bench

Advocate: C.R. Prasannan, for the Appellant; N. Vanchinathan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Ashok Kumar, J.

The plaintiff is the revision petitioner. He filed the suit O.S. No. 211 of 2001 for permanent injunction based on the Hibba given to himself and his brother by Ayesha Bibi and under the said Hibba, the first defendant is granted mere right of enjoyment and the vested interest in the suit properties is given in favour of the plaintiff and his brother.

2. The defendants in their written statement pleaded that without a prayer for declaration, the suit is vitiated. the first defendant is in constructive possession of the suit property under the Hibba and so, the plaintiff cannot seek to amend the plaint to declare that the first defendant is in constructive possession for and on behalf of the plaintiff.

3. In such circumstances, the plaintiff filed I.A.No:21 of 2004 under Order 6 Rule 17 CPC to amend the plaint, contending that the first defendant is in constructed possession as set out in the plaint. The said possession of the first defendant is only

under the Hibba and that is why he seeks for amendment praying for the relief of declaration.

4. The said I.A., was resisted by the defendants by filing counter contending that unless and until the oral Hibba is not proved, the plaintiff is not entitled to any relief either permanent injunction or for declaration. If the amendment for declaration is to be considered, then the jurisdiction of the court would be ousted as the District Munsif Court has no pecuniary jurisdiction because of the value of the suit property. The relief of permanent injunction based on oral Hibba and the present relief seeking for declaration based on constructive possession are contradictory to his own pleadings. The I.A., has been taken out only to drag on the proceedings.

5. The learned District Munsif, Kangeyam, on considering the averments of the parties and hearing the submissions of the respective counsels, dismissed the Interlocutory Application. Aggrieved over the same, the present revision has been filed by the plaintiff.

6. Learned Counsel for the revision petitioner/plaintiff contended that the plaintiff having had the vested remainder, he is in possession of the suit property as his father's possession of the suit property is only on his behalf and that there is nothing wrong in asking for amendment of the plaint for including a prayer of declaration. He also contended that it is out of her own will and accord Ayisha Bibi declared Hibba in favour of the plaintiff and his brother who were minors at the time of delivery to the father of the plaintiff which is constructive in nature.

7. A perusal of the order passed in the Interlocutory Application would show that the first defendant has remained ex parte. The 2nd and 3rd defendants have filed their written statements on 2.9.2002. Thereafter the present I.A., has been filed only on 12.11.2003 which was filed for default on 20.4.2004 and the suit was also posted on 12.8.2004. Thereafter the plaintiff filed I.A. No. 1053 of 2004 on 18.8.2004 to restore I.A. No. 21/2004 which was dismissed for default on 20.4.2004 and it was restored and enquiry was conducted. The prayer of the plaintiff in the amendment petition is to declare that the first defendant is in constructive possession of the suit property for and on behalf of the plaintiff. As rightly held by the learned District Munsif, when the suit is for bare injunction, by seeking the amendment, the plaintiff himself admits that he is not in possession of the suit property. Further, unless and until the oral Hibba is proved by the plaintiff, he cannot seek for any relief to the suit property. Moreover, when it is admitted in the plaint itself that the first defendant is in constructive possession, the relief of declaration of such constructive possession is unnecessary.

8. In the result, the CRP is dismissed. Consequently, connected CMP is also dismissed. No costs.