

**(2010) 01 MAD CK 0139**

**Madras High Court**

**Case No:** C.R.P. (PD) No. 3819 of 2009 and M.P. No. 1 of 2009

Vadival and 2 Others

APPELLANT

Vs

Saroja

RESPONDENT

**Date of Decision:** Jan. 6, 2010

**Citation:** (2010) 2 CTC 71

**Hon'ble Judges:** M. Jeyapaul, J

**Bench:** Single Bench

**Final Decision:** Allowed

**Judgement**

M. Jeyapaul, J.

The plaintiffs filed a Petition seeking amendment or the Plaintiff with respect to the extent of the property and also the share claimed by the plaintiffs with respect to item 5 of the Plaintiff schedule at the stage when the final decree Application is pending disposal. The Trial Court allowed the amendment Petition as prayed for by the plaintiffs. The defendants have challenged the said order. The plaintiffs have contended that the second plaintiff, who is the daughter of the deceased first plaintiff, being a member of the family, by mistake mentioned 1.25 acres instead of 2.50 acres in item 5 of the Plaintiff schedule. Therefore, the plaintiffs have sought for amendment of the Plaintiff.

2. The defendants have contended that no leniency could be accorded to the family member. The mistake crept in the schedule of property is deliberate. It is also contended that the proposed amendment would change the total extent of the property and would also deprive the rights of the defendants.

3. The Trial Court, having observed that there was no serious objection raised by the defendants for the amendment sought for by the plaintiffs, allowed the Amendment Petition in the interest of justice.

4. The learned counsel appearing for the defendants/revision petitioners would that the amendment sought for with respect to the Plaintiff schedule without seeking for

amendments of the preliminary decree is not at all maintainable. He would also submit that the defendants would lose an opportunity to contest the larger claim made by the plaintiff by way of amendment, if the amendment is simply allowed at the final decree stage. No amendment as to the extent of the property can be permitted as laid down by this Court, he would submit. When the defendants specifically deny the fact that item 5 of the Plaintiff schedule property measures 2.50 acres, the amendment as sought for by the plaintiffs cannot be permitted. The larger share of 1/4 instead of 1/8 share claimed by the plaintiffs by way of amendment cannot be permitted without introducing an amendment to the preliminary decree which had already settled the extent of shares of the respective parties.

5. The learned counsel appearing for the plaintiffs/respondents would contend that the defendants/revision petitioners, have not specifically disputed the fact that item 5 of the Plaintiff schedule measures 2.5 acres. It is his further submission that the plaintiffs are armed with two documents executed by the first defendant dealing with 2.50 acres in S.F. No. 31. As the preliminary decree settles down only an extent of share of the respective parties, no amendment need be made in the preliminary decree as such passed by the Trial Court. It is his further submission that if the Amendment Petition filed by the respondents is dismissed, it will definitely pave way for multiplicity of proceedings and if it is allowed, no prejudice would be caused to the revision petitioners. The Trial Court has rightly allowed the Petition seeking amendment, he would submit.

6. It is found that the respondent has been living for a long time away from the suit village. The suit properties have been actually in possession and enjoyment of the revision petitioners. Therefore, it is quite understandable that the family member who has been living away from the suit village was not aware of the exact extent of the property described in item 5 of the Plaintiff schedule. The Suit survey number has been rightly referred to by the respondent. Only the extent of the property has been out of the village.

7. As rightly pointed out by the learned counsel appearing for the respondent, the revision petitioners, have not specifically denied the fact that the Suit S.F. No. 31 measures 2.50 acres. Further, the respondent is armed with two documents executed by the revision petitioners in favour of third parties relating to item 5 of the Plaintiff schedule measuring 2.50 acres. If the amendment sought for by the respondent is denied, the respondent will have to necessary go in for another litigation claiming partition with respect to the remaining 1.25 acre in the very same survey number. It will definitely pave way for multiplicity of litigation.

8. The Preliminary decree has settled down only an extent of the share of the respective parties. Therefore, no effective amendment is required with respect to the preliminary decree already passed with respect to the shares of the parties concerned.

9. As far as share now claimed with respect to the motor room and the accessories found in the store room, the Court is not inclined to allow the extent of share already declared by the Trial Court in the preliminary decree passed by it.

10. The revision petitioners have not seriously disputed in the counter filed by them, the extent of 2.50 acres in survey No. 31 as described in the Amendment Petition filed by the respondent herein. Therefore, no triable issue with regard to the extent of the property would survive for consideration.

11. The Supreme Court in [Peethani Suryanarayana and Another Vs. Repaka Venkata Ramana Kishore and Others](#), has held that the Court can exercise its power to allow the Application for amendment if the Application is found to be bona fide and no prejudice would be caused to the other side. The Supreme Court in the aforesaid case also observed that the party, who challenges the Amendment Petition, could not show how and in what manner, he has been prejudiced by the amendment sought for by the party concerned.

12. In [Puran Ram Vs. Bhaguram and Another](#), the Supreme Court has held that if the amendment sought for subserves the ultimate cause of justice and avoids further litigation, the same should be allowed exercising the direction vested on the Court of law.

13. In the instant case, the revision petitioners have not shown that the amendment sought for would prejudice the interest of the revision petitioners. As already pointed out by this Court, if the extent of item 5 of the Plaintiff schedule is not amended as sought for by the respondent has to take another round of litigation through the Court seeking partition with respect to the remaining extent of property in the very same survey number.

14. The learned counsel appearing for the revision petitioners would refer to the decision of this Court in [Lingammal and 7 others Vs. Periappappa @ Lingammal and another](#). That was a case where no explanation was given in the affidavit for the enormous delay in moving Application for amendment. The plaintiff had simply put forward that clerical errors had crept in and as a result of which the amendment was warranted. The plaintiff, by way of amendment of the survey number, had sought to challenge the very same suit property mentioned in the suit schedules.

15. As the survey number itself was sought to be amended, this Court observed in the aforesaid decision that lead to further course of trial, has to be granted to the defendant.

16. In the instant case, it is found that there is no variation in the survey number. A Family member, who was out of possession of the suit property, has come out with the Amendment Petition, the moment he came to know that the suit survey number measures larger extent. Enlargement of the measurement of the property in a partition suit would not change the character of the Suit. Therefore, the aforesaid

decision would not apply to the facts and circumstances of this case.

17. The learned counsel appearing for the revision petitioners referred to yet another decision of this Court in [Alamelu and others Vs. Kunjalam and others](#) . That was a case where the plaintiffs sought to make an amendment with respect to the boundaries of the property pending final decree proceedings. Therefore, this Court observed in the aforesaid decision that the mistake in the description of the boundary cannot be termed as a genuine mistake or clerical error. Having, thus, observed, it has been held that the schedule of property cannot be amended when neither the survey number nor the boundaries of the property is sought to be amended by the respondent. In the instant case, the amendment is sought by the respondent only with respect to the extent of the property. The extent of property sought to be introduced by way of amendment was not specifically denied by the revision petitioners in their counter filed before the Trial Court. In the aforesaid facts and circumstances of this case, the above ratio will not apply to this case.

18. In view of the above, the respondent is permitted to amend item 5 of the Plaintiff schedule of properties introducing the measurement of the property as 2.5 acres instead of introduce share in the place of 1/8 share in the motor room and the accessories found therein stands rejected. The Revision is allowed in part in the aforesaid terms. There is no order as to costs. The connected Miscellaneous Petition stands closed.