

IN THE COURT OF THE DISTRICT MUNSIF-CUM-JUDICIAL MAGISTRATE
THIRUKALUKUNDRAM

PRESENT: Thiru.A.Kadhiravan, B.A, B.L.,

District Munsif-Cum-Judicial Magistrate,
Thirukalukundram.

Tuesday the 30th day of August 2022

I.A. No. 3/2022

in

O.S.No. 6/2007

....

1. T.H.Hussain (Died)

2. S.Mariyan Bee

3. Misiriya Kalifa

4. T.H.Mohammed Farooq

5. T.H.Mohammed Refi

6. T.H.Arif

..Petitioners/Plaintiffs..

/Vs/

E.Sekar

...Respondent/Defendant...

This Petition coming before me today for final hearing in the presence of Mr.M.D.Tharanipathi, learned counsel for the petitioners/plaintiffs and Mr.P.Shankar Babu and Mr.G.Kumaran, learned counsel for the Respondent/Defendant. Upon perusal of documents and hearing arguments on both side and having stood over for consideration till this date, this court delivers the following.

ORDER

The petitioners have filed this petition under Order VI Rule 17 of CPC to amend the plaint as per this petition mentioned particulars of amendment and to pass

such other suitable orders.

1. The averment in affidavit along with petition in brief:

The petitioners submitted that the deceased 1st plaintiff who is the husband of 2nd petitioner has filed the main suit praying for declaration of his title and for consequential permanent injunction and in alternative for recovery of possession. That the deceased 1st plaintiff was examined as PW1 and when he was partly cross examined on respondent side he was died on 01.04.2018. That the deceased 1st plaintiff has not shared the details of suit with these petitioners and the petitioners have come to know about the suit after they were impleaded as parties.

That when the commissioner visited the suit properties on 13.08.2011 it was found that a well and a motor pump shed with electric connection are situated in suit properties. That the defendant did not stated the details of existence of said well and pump shed in his written statement and hence the defendant may be unlawfully encroached the suit property after filing of this suit, but he claims to be in possession since 14.06.1995 under an invalid sale deed. As the petitioners came to know about the well in suit property which is claimed to be dug by defendant, it becomes necessary to amend the plaint regarding deletion of prayer for permanent injunction and to include the details of encroachment by defendant. Hence this petition.

2. The averments in counter in brief:

The respondent in his counter denied the petition averments and stated that already a petition in I.A.No.62/2021 was filed by the petitioners to delete the prayer for permanent injunction which was dismissed by this court on 29.04.2022. Hence this petition is barred by res-judicata. Further there is no date, month or year of defendant's alleged encroachment in suit property was stated by the petitioners and actually this respondent is in possession of suit property from 14.06.1995. Hence prays for dismissal.

3. Now the point for consideration is whether this petition is allowed?

1) Heard both sides. Perused entire records. While considering the above said rival submission on both sides, as stated in the counter already a petition in I.A.No.62/2021 was filed by these petitioners which was dismissed on 29.04.2022 with an observation as follows,

"...2. While considering the above rival submissions on both side, admittedly the case is now at the stage of Defendant side evidence. Further strangely the plaintiff had valued the suit u/s. 25(a) and (b) of TNCF Act and the contents of plaint appears as the plaintiffs are alleged to be in possession of suit property. In such circumstances, praying to withdraw the prayer for permanent injunction alone, will create confusion in trial. Further the petitioners had not submitted any reasons for such withdrawal and failed to mention about what prejudice would be caused, if the withdrawal is not permitted..."

2) Admittedly the suit is now at the stage of cross examination of DW1 on the side of Petitioners and the original plaintiff has valued the suit both under Section 25(a) and 25(b) of TNCF Act and he was alleged to be in possession of suit property on the date of filing of suit. But the respondent in his written statement alleges to be in possession of suit property prior to filing of suit i.e. from 14.06.1995. In such circumstances, these petitioners came with this petition by stating that as the commissioner in his report stated about the existence of well in the suit property, **it may be** dug by the defendants after filing of suit. From above averments, it appears that the petitioners have filed this petition on speculation that the defendant may have encroached the suit property pending suit. As such the petitioners themselves are not sure about the date of defendant came in to the possession of suit property.

3) In above circumstances, as already observed by this court in I.A.No.62/2021, as there is already an alternative prayer pleaded for recovery of possession and as there is no details about what prejudice would be caused if the prayer for permanent injunction is not deleted was mentioned on the side of petitioners, the deletion of prayer for permanent injunction alone at this stage, that too without mentioning the date/month/year of alleged possession by defendants, will create confusion in trial. Further when the petitioners themselves are not aware of the time of defendant's alleged possession into the suit property, they cannot be permitted to amend the pleadings regarding alleged encroachment by the defendant, as in opinion of this court, it will create confusion during the trial and will amount to change the nature of suit.

4) As objected by the respondent in counter already a prayer to withdraw the plea of permanent injunction was dismissed by this court in earlier application under Section 151 of CPC and the petitioners again came with the same prayer under the guise of an application under Order VI Rule 17 of CPC. But what cannot be done directly, cannot be done indirectly. Hence this court holds that the petitioners' prayer to withdraw/delete the prayer for permanent injunction for the second time is barred and under Section 11 of CPC.

5. For above discussed reasons this court comes to the conclusion that the petition is to be dismissed.

6. In the result, this petition is dismissed. No costs.

Dictated to the typist, typed by her corrected and pronounced by me in open court, this the 30th day of August 2022.

District Munsif-cum-Judicial Magistrate,
Thirukalukundram.

PETITIONERS SIDE WITNESSES AND EXHIBITS:

- Nil -

RESPONDENT SIDE WITNESSES AND EXHIBITS :-

- NIL -

District Munsif-cum-Judicial Magistrate,
Thirukalukundram.

