

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2015

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THE HONOURABLE MS.JUSTICE R.MALA

CRP [PD] Nos.1014 & 1015/2015 & MP.No.1/2015 in CRP [PD] No.1014/2015

1.Periyasamy Pillai
2.Rajamanickam
3.Kumudham

.. Petitioners/Defendants

Vs.

Kamala @ Kamalam

.. Respondent/Plaintiff

Civil Revision Petitions filed under Article 227 of the Constitution of India against the fair and decretal order in IA.Nos.835 & 836/2014 in OS.No.172/2012 dated 03.02.2015 on the file of the learned Principal District Munsif, Rasipuram.

For Petitioners	:	Mr.N.Suresh
For Respondent	:	Mr.M.S.Sivakumar

COMMON ORDER

The above Revision Petitions have been filed challenging the impugned order dated 03.02.2015 made in IA.Nos.835 & 836/2015 in OS.No.172/2012 for re-opening and re-calling PW1 to mark some more documents.

2 Learned counsel for the petitioners would submit that the plaintiff/respondent has filed a suit in OS.No.172/2012 for declaration of

Easementary Right by grant and also for a consequential injunction. The petitioners herein, as defendants have filed written statement and after framing of issues, witnesses were examined. When the matter was posted for argument, the plaintiff has filed applications to reopen and recall P.W.1 for marking documents, which were allowed, against which, the present Revisions have been filed.

3 The learned counsel for the petitioners has challenged the said order dated 03.02.2015 on two grounds, viz.,

[a] Firstly, the respondent/plaintiff has already filed IA.Nos.577 and 578/2014 for reopening and recalling and after hearing the arguments, when the matter was posted for orders, the said interlocutory applications were withdrawn and hence, the plaintiff/respondent is not entitled to file a fresh application for the same cause of action, viz., to reopen and recall PW1 for marking some documents.

[b] Secondly, no person is permitted to reopen and recall the witnesses to fill up the lacunas and to substantiate the same, learned counsel placed reliance on the decision of the Hon'ble Apex Court reported in **2013 [14] SCC 1** *[BAGAI CONSTRUCTION THROUGH ITS PROPRIETOR LALIT BAGAI Vs. GUPTA BUILDING MATERIAL STORE]*.

4 Resisting the said contentions, the learned counsel for the respondent/plaintiff submitted that the withdrawal of the earlier applications will not be a bar to file a fresh application and to substantiate the said contention, he placed reliance on the decision of the Hon'ble Apex Court reported in **2011 [2] CTC 463** [*RAJENDRA PRASAD GUPTA Vs. PRAKASH CHANDRA MISHRA AND OTHERS*] and also on the decision of this Court reported in **2009-2-LW-170** [*G.AROCKIASAMY Vs.C.MARIARAJ*]. It is further submitted that the plaintiff has not filed the applications to fill up the lacuna and the petitioners herein have filed the parent document [Ex.B1], viz., Sale Deed dated 01.12.1960 and the Release Deed dated 10.07.1972 in the earlier suit filed by them in OS.No.141/2012 for bare injunction and when examined before the Court, they have wantonly not filed those documents and hence, the plaintiff/respondent was forced to file applications to reopen and recall PW1 to mark the documents which were already marked as Ex.B1 and hence, prayed for dismissal of the Civil Revision Petitions.

5 This Court considered the rival submissions made on either side and also perused the materials placed on record.

6 The respondent as a plaintiff, filed a suit for Easementary Right by Grant and for consequential injunction. The petitioners herein, as defendants,

have filed the written statement and contesting the same. It is an admitted fact that after both side evidence has been over and when the matter is posted for argument, the respondent/plaintiff herein has filed IA.Nos.577 & 578/2014 to reopen and recall PW1 and after hearing the arguments when the case was posted for orders, the said applications were dismissed as not pressed.

7 The moot question that arises for consideration is whether, once an application filed by the plaintiff is dismissed as not pressed, the plaintiff is estopped from filing fresh application for the very same cause of action? It would be appropriate to quote the decision of this Court in G.AROCKIASAMY's case [cited above], relied upon by the learned counsel for the respondent/plaintiff, wherein this Court has held that if an interlocutory application has been dismissed for non-prosecution or dismissed as withdrawn when no merits have been discussed thereon, a subsequent petition for the same relief is not at all barred by law and no question of *res judicata* will arise. The decision rendered by the Apex Court in *RAJENDRA PRASAD GUPTA* [cited above] will have no application to the facts of the instant case as the facts of the said case is entirely different from the case on hand. Hence, this Court is of the view that withdrawal of IA.Nos.577 & 578/2014 will not be a bar for the plaintiff to file fresh applications to reopen and recall since the said interlocutory applications were not disposed of on merits.

8 The second limb of argument advanced by the learned counsel for the petitioners is that no person is permitted to fill up the lacuna in the evidence by way of recalling and reliance was placed on the decision of the Apex Court in BAGAI CONSTRUCTION's case [cited supra]. There is no quarrel over the proposition laid down in the said decision because in the proviso itself, it was stated that no one is permitted to fill up the lacuna. This Court has to decide whether the applications in IA.Nos.835 & 836/2015 have been filed to fill up the lacuna in the evidence.

9 It is true that the respondent/plaintiff has filed the suit and she has to prove her case in accordance with law. But in the plaint pleading, it was stated that she has got the Easementary Right by way of Grant. In paragraph 7 of the Plaint, the earlier proceedings in OS.No.141/2012 filed by the plaintiff has been mentioned. But, admittedly, the petitioners herein as defendants have deposed before the Court and not filed the documents. In such circumstances, a duty is cast upon the plaintiff to prove her case. Hence, she was forced to file applications to reopen and recall PW1 to mark the documents.

10 Hence, this Court is of the view that it is not a case, where the plaintiff has filed application to fill up the lacuna in the evidence because, when PW1 was in the witness box, a question has been posed by the plaintiff in

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respect of filing of OS.No.141/2012 and filing of documents, viz., parent document dated 01.12.1960 and the Release Deed dated 10.07.1972, which were marked in the earlier suit. Therefore, the Trial Court has rightly considered the aspect in proper perspective and came to the right conclusion.

11 Hence, I find no reason to interfere in the findings of the Trial Court. Accordingly, the Civil Revision Petitions are dismissed and the order passed by the Trial Court in IA.Nos. 835 & 836/2014 in OS.No.172/2012 dated 03.02.2015 is hereby affirmed. No costs. Consequently, the connected miscellaneous petition is dismissed.

10.12.2015

AP
To
The Principal District Munsif
Rasipuram.

CRP [PD] No.1014 & 1015/2015