

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.09.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.450 of 2007

and

M.P.No.1 of 2015

Nachiappan

... Appellant/Plaintiff

Vs

Marasamy

... Respondent/Defendnat

Second Appeal under Section 100 of the Civil Procedure Code against the judgement and decree of the Additional District Court/Fast Track Court No.IV, Bhavani dated 22.11.2006 made in A.S.No.62 of 2006 reversing the judgment and decree of the First Additional District Munsif, Bhavani dated 11.01.2005 made in O.S.No.812 of 2004.

For Appellant : Mr.N.Manokaran

For Respondents : Mr.S.Lakshmanasamy

J U D G M E N T

The appellant in the second appeal has chosen to file this petition under Order 23 Rule 1(a) and (b) of the Code of Civil Procedure praying for an order of this court permitting the petitioner (appellant in the second appeal) to withdraw the suit O.S.No.812 of 2004 on the file of the First Additional District Munsif, Bhavani, from which the second appeal has arisen, with liberty to file a fresh suit on the same cause of action.

2. Order XXIII Rule 1 of the Code of Civil Procedure deals with the abandonment or withdrawal of a claim or part of a claim made in the suit and the effects of such abandonment or withdrawal. Sub clause (4) says that the abandonment of the suit or part of the claim without the permission of the court to institute a fresh suit for the subject matter of the suit or part of the claim under sub clause (3) of Rule 1, will preclude the plaintiff from instituting any fresh suit in respect of the subject matter of the suit or part of the claim made in the suit. Rule 1(3) is to the effect that when the

court is satisfied that the suit is bound to fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of the suit or part of the suit claim, it may grant permission to withdraw the suit or part of the claim, with liberty to institute a fresh suit in respect of the subject matter of the suit or such part of the claim.

3. Order XXXIII Rule 1 of the Code of Civil Procedure deals with the abandonment or withdrawal of the suit or part of a claim and institution of a fresh suit in respect of the same subject-matter or part of the claim. It is to be distinguished from Order II Rule 2 which deals with the failure to include whole of the claim in respect of the cause of action. Order II Rule 2 deals with the cause of action, whereas Order XXIII Rule 1 deals with the subject-matter/claim made in the suit.

4. The appellant who has chosen to file the present petition seeking leave to file a fresh suit in respect of the same cause of action on which the present suit has been filed and not in respect of the same subject-matter of the suit, after withdrawing the present suit. The present suit came to be filed for a mandatory injunction directing the defendants to produce the original Will sought to be relied on by the appellant herein/plaintiff.

5. As ascertained from the submissions made on behalf of the appellant, a fresh suit to be filed is in respect of the property, which is said to have been bequeathed on the appellant/plaintiff. Hence the subject-matter of the present suit and the proposed suit cannot be said to be one and the same. Therefore, there could be no impediment for the appellant, after withdrawal of the present suit, to file a suit to establish his title and seek consequential reliefs based on the Will relied on by him. Hence the second part of the petition seeking permission is bound to be rejected as unnecessary.

6. So far as the first part is concerned, the plaintiff, at any stage, shall be free to withdraw the suit and the defendant cannot contend that the plaintiff should not be permitted to withdraw the suit. When the leave contemplated under Order XXIII Rule 1(3) of the CPC is not granted, at the best, the defendant can pray for award of cost. Learned counsel for the respondent has made only an objection for the grant of leave sought for in the petition and has not advanced any arguments regarding the cost. Hence this court is of the view that the petition, namely M.P.No.1 of 2015, has got to be allowed in part and the suit has to be dismissed as withdrawn, after setting aside the decree passed by the lower appellate

court. So far as the second limb of the prayer, namely plea for permission to file a fresh suit is concerned, the said prayer is bound to be rejected for the reasons stated supra.

Accordingly, the petition is allowed in part. The appellant is permitted to withdraw the suit. The decree of the lower appellate court is set aside and O.S.No.812/2004 is dismissed as withdrawn. The second appeal is disposed of in accordance with the order passed in M.P.No.1 of 2015. No cost.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

asr/-

To

1) The Additional District Judge/
Fast Track Court IV, Bhavani.

2) The First Additional District Munsif, Bhavani.

Copy to: The Section Officer,
VR.Section, High Court, Madras.

+ 1 cc to Mr.N. Manokaran, Advocate SR.49947

S.A.No.450 of 2007

KSJ(CO)
Eu 29.10.15

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