

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.09.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

M.P.No.1 of 2015

&

S.A.No.798 of 2008 & M.P.No.1 of 2008

1.L.Vijay Anand
2.L.Sabarinathan

.. Appellants/Plaintiffs

-Vs-

N.Sujatha

..Respondent/Defendant

Civil Miscellaneous Petition filed under order 23 Rule1(3)r/w 151 of CPC to withdraw the Second Appeal No.798/2008 filed under section 100 of C.P.C against the judgment and decree of the District Court at Tiruvannamalai dated 13.08.2007 in A.S.No.23 of 2001 confirming the judgment and decree of the Additional Subordinate Judge Court, Tiruvannamalai dated 18.12.2000 in O.S.No.2 of 1998.

For Appellants : Mr.P.Valliappan

For Respondent : Mr.S.V.Jayaraman
Senior Counsel
for Mr.T.Dhanasekaran

JUDGMENT

The appellants in the second appeal, who lost their case in both the courts below, have now come forward with the present petition under Order 23 Rules 1(3) r/w. 151 CPC seeking the leave of the Court to withdraw the suit with liberty to institute a fresh suit in respect of the same subject matter of the suit. The respondent, who is the defendant in the original suit and who emerged successful in both the Courts below, is represented by Mr.S.V.Jayaraman, Senior Counsel. The learned senior counsel would submit that without insisting upon a formal counter, the petition can be heard and disposed of. Accordingly the arguments advanced on both side are heard.

2. The petitioners in M.P.No.1 of 2015, who are the

appellants in the second appeal, filed the original suit for

declaration of title and for recovery of possession. The said claim was made based on a Will dated 16.07.1986, alleged to have been left by Andal Ammal as her last Will and testament.

3. The respondent resisted the suit denying the genuineness of the Will propounded by the appellants/plaintiffs and at the same time propounding another Will dated 30.06.1992 to be the last Will and testament of Andal Ammal dealing with her properties. Of course, the testator being a Hindu, who resided outside the original jurisdiction of the Madras High Court, the parties did not take steps to probate the respective Wills propounded by them. Hence, the burden of proving the Wills propounded by the respective parties fell on them in the suit. However, it is brought to the notice of the parties and to the Court that when the other persons, who would have been the non-testamentary legal heirs in the absence of a Will, have not been made parties to the suit in which the question of proof of the Will has arisen, will make the suit bad for non-joinder of necessary parties for the simple reason that the persons entitled to dispute the alleged testament are not made parties and they have not even chosen to swear affidavits supporting either of the Wills. Under the said circumstances, the appellants have come forward with the present petition stating that the same is a technical flaw and on that technical flaw alone, they are bound to fail in the suit irrespective of the fact they would be able to substantiate their case in all other aspects.

4. Similar is the position of the respondent, who relies on the Will dated 30.06.1992. In view of the same, the learned senior counsel for the respondent submits that the respondents may not have any objection for granting permission to the petitioners / appellants to withdraw the suit with liberty to file a fresh suit in terms of Order 23 Rules 1(3) CPC, but she would have an objection for the averment made in paragraph 3 of the supporting affidavit. Paragraph 3 simply states that the suit was resisted frivolously and vexatiously on the basis of the Will propounded by the respondent herein. Since such an objection has been raised, Mr. Valliappan, learned counsel representing the counsel for the petitioners submits that the averment found in paragraph 3 of the supporting affidavit is withdrawn so far as the present application is concerned keeping open every option to him to raise all objections in the subsequent suit. The said representation is recorded. As it is not disputed that the suit is bound to fail on the technical ground of non-joinder of necessary parties alone, the petition M.P.No.1 of 2015 deserves to be allowed. Accordingly, the same is allowed.

5. In view of the orders passed in M.P.No.1 of 2015, the second appeal is disposed of modifying the decree of the

trial Court into one of dismissal as withdrawn with liberty to file a fresh suit in respect of the same subject matter. As the respondent has not pressed for costs, there shall be no order as to costs. Consequently, M.P.No.1 of 2008 is closed.

Sd/
ASSISTANT REGISTRAR (CS-VI)

/TRUE COPY/

SUB-ASSISTANT REGISTRAR

gpa

To

1. The District Court
Tiruvannamalai
2. The Additional Subordinate Judge Court
Tiruvannamalai

+1 CC to MR.P.Valliappan Advocate. SR.NO. 52181
+1 CC to MR.T.Dhanasekaran Advocate. SR.NO. 52262

M.P.No.1 of 2015 &
S.A.No.798 of 2008 & M.P.No.1 of 2008

CO-UG
JD 23/12/2015

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