

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2016

CORAM

THE HONOURABLE THIRU JUSTICE M. DURAISWAMY

C.R.P.(NPD)No.346 of 2015 &

M.P.No.1 of 2015

R.Manoharan

... Petitioner

v.

1.M/s.Madras Harbour Benefit Fund Ltd.,
No.8, Nyniappan Street
Chennai -1 .

2.M/s.Balajee and Co.,
No.103, Nyniappan Street,
Chennai – 1.

3.C.Gopi

... Respondents

Civil Revision Petition filed under section 115 of the Civil Procedure Code to set aside the order passed on 24.09.2014 in C.M.P No.104 of 2012 in A.S.No.554 of 2010 on the file of the VI Additional City Civil Court, Chennai.

For Petitioner : Mr.A.S.Narasimhan

For Respondents : Mr.Manohar Prasad – for R1
Given up – R2 & R3

ORDER

Challenging the fair and final order passed in in C.M.P No.104 of 2012 in A.S.No.554 of 2010 on the file of VI Additional Judge, City Civil Court, Chennai, the appellant in A.S.No.554 of 2010, who is the plaintiff in O.S.No.3585 of 2003, on the file of VI Assistant Judge, City Civil Court, Chennai, has filed the above Civil Revision Petition.

2. The revision petitioner filed the suit in O.S.No.3585 of 2013 for permanent injunction restraining the respondents 1 and 2 from selling the property under section 69 of the Transfer of Property Act.

3. After contest, the Trial Court dismissed the suit.

4. Aggrieved over the same, the revision petitioner filed an appeal in A.S.No.554 of 2010. In the said appeal, the petitioner filed a petition in C.M.P.No.104 of 2012 under Order 23, Rule 1 & 3 of CPC to permit him withdraw the appeal and to institute a fresh suit to set aside the sale in favour of the 3rd respondent.

5. According to the petitioner, in I.A.No.13944 of 2003 in O.S.No.3585 of 2003, a conditional order was passed, which was not complied by him, therefore, the 1st respondent brought the suit property on sale through the 2nd respondent on 24.11.2003. The 3rd respondent

purchased the suit property on 26.12.2003 by a registered sale deed. Therefore, it is clear that the relief sought for in the suit has become infructuous. In these circumstances, the petitioner has filed the petition under Order 23, Rule 1 & 3 of CPC to permit to withdraw the appeal and the suit with liberty to institute a fresh suit to set aside the sale in favour of the 3rd respondent.

6. The 1st respondent filed his counter disputing the case of the petitioner. Further, the 1st respondent has stated that the petitioner may be permitted to withdraw the appeal and liberty should not be given to him to institute a fresh suit to set aside the sale.

7. The Lower Appellate Court, taking into consideration the case of both the parties, allowed the application in part by directing the petitioner to withdraw the appeal, however, did not give any liberty to the petitioner to institute a fresh suit.

8. The order passed by the Lower Appellate Court is against the settled proposition of law. An application filed under Order 23 Rule 1 of CPC should be allowed in toto or can be dismissed in toto. After an application under Order 23, Rule 1 of CPC is filed to permit the plaintiff to withdraw the suit and seeking for liberty to file a fresh suit on the same cause of action, the courts below cannot permit the plaintiff to withdraw the

suit and refuse to give liberty for instituting a fresh suit. In such case, the application filed by the plaintiff under Order 23, Rule 1 of CPC should be dismissed in toto. This proposition of law has been decided in the following judgments:-

(i) **2006(1) MLJ 164 [Rajasundari v. Gowri]** wherein this court held that the application under Order 23, Rule 1(3) of CPC is an indivisible whole and the prayer for withdraw and liberty to file a fresh suit cannot be separated. If no liberty is granted, application should be dismissed in toto.

(ii) On the same lines, the Karnataka High Court in the judgment reported in **1999 AIHC 4256 [K.Y.Sidaraju v. General Manager, Southern Railway, Madras and another]** and Gujarat High Court judgment reported in **1998 AIHC 1594 [Kantibhai D. Patel and others v. Ahmedabad Municipal Corporation]** held that the application under Order 23, Rule 1(3) of CPC is an indivisible whole.

9. The order passed by the Lower Appellate Court is against the propositions of law laid down in the above referred judgments. In these circumstances, I am of the view that the Lower appellate court should have dismissed the petition in toto. Accordingly, the fair and decreetal order

passed in C.M.P.No.104 of 2012 in A.S.No.554 of 2010 are set aside. The petition in C.M.P.No.104 of 2012 stands dismissed. The parties are at liberty to prosecute the appeal on merits and in accordance with law before the Lower appellate Court.

With these observations, the Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Index : Yes/No

21.01.2016

Rj

To

The VI Additional Judge,
City Civil Court,
Chennai.

M. DURAISWAMY,J.,

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