

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.08.2016

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Revision Petition (PD) No.2508 of 2016

and

C.M.P.No.12942 of 2016

S.Amutha
W/o.Subendren

... Petitioner

vs

1.K.Nagarathinamma
W/o.K.Srinivasan

2.Veeram Muralidhar
S/o.Narayanaiah

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order of learned VIII Assistant Judge, City Civil Court, Chennai, passed in I.A.No.17099 of 2013 in O.S.No.1813 of 2007 on 04.07.2016.

For Petitioner : Mr.Siva Suyambu

ORDER

This revision arises against the order of learned VIII Assistant Judge, City Civil Court, Chennai, passed in I.A.No.17099 of 2013 in O.S.No.1813 of 2007 on 04.07.2016.

2. Petitioner/plaintiff filed O.S.No.1813 of 2007 on the file of learned VIII Assistant Judge, City Civil Court, Chennai, seeking declaration and other consequential reliefs. Respondents/defendants filed I.A.No.17099 of 2013 seeking appointment of an Advocate Commissioner towards obtaining expert opinion on a disputed document. The Court below, under the impugned order, allowed such application. Aggrieved, petitioner/plaintiff filed this application.

3. Heard learned counsel for petitioner.

4. This revision must be informed to be much ado about nothing. Respondents/defendants moved I.A.No.13 of 2009 seeking forwarding of Ex.A5, an alleged agreement for sale dated 18.02.2004, for forensic examination and expert opinion. Realising that they had not moved an application for appointment of an Advocate Commissioner to carry out the purpose, they have

moved I.A.No.17099 of 2013. Though he had moved C.M.P.No.34 of 2011 seeking the relief similar to that sought in I.A.No.13 of 2009, such petition has been dismissed as withdrawn. The withdrawal came about in circumstance where no order had been passed in I.A.No.13 of 2009 but informing the attendant factual circumstances. This Court would record the relevant portion of the order of the Court below:

“On careful perusal of the records and submissions made by both the counsel admitted the petitioner/defendant filed I.A.13/2009 for sending the document for comparison of the signature of Nagarathnamma that admitted document with the forensic department. In this petition there is no advocate commissioner appointment is accepted for and hence the petitioner filed I.A.17099/2013 for the relief of appointing an advocate commissioner through the disputed documents may be sent to forensic department for comparison and no separate order was passed in I.A.13/2009 the order is passed only in order to in I.A.17099/2013 dated 17.01.2014 and in the order dated 17.01.2014 of page 9 the learned predecessor also stated that in I.A.No.13/2009 the petitioner/1st defendant was not prayed for appointment an advocate commissioner sending the document A5 for the Forensic Science Laboratory and getting the expert opinion therefore the petitioner/1st defendant filed this petition in I.A.17099/2013 to appoint an advocate commissioner for the purpose of taking this document Ex.A5 to the Forensic

Laboratory and on perusal of the I.A.13/2009 the petition was not withdrawn or dismissed and the order passed in I.A.17099/2013 dated 17.01.2014 is carried out in I.A.13/2009 no separate order is passed in I.A.13/2009 in the circumstances if the I.A.13/2009 is dismissed the second application is barred by Res-judicata for the same relief. But there is no dismissal of I.A.13/2009. Hence the plea of Res-judicata will not arise already this court allowed to appoint an advocate commissioner for sending the document to the forensic department and hence this petition is allowed and the same Advocate Commissioner one Mr.M.J.Gunasekaran was already appointed as Advocate Commissioner and already his remuneration is fixed at Rs.5,000/- and he has ordered to take the original Sale Agreement Ex.A5 dated 18.02.2004 and the sale deed dated 27.11.2004 for the forensic Laboratory found in sale agreement dated 18.02.2004 with the signature of Nagarathinamma found in Sale dated 27.11.2004 and filed his report. The petitioner is directed to pay the remuneration to the advocate commissioner directly if not paid already. Report by 4.8.2016.”

It is in the said circumstances, I.A.No.17099 of 2013 has been allowed.

5. Learned counsel for petitioner raised the same contention as was raised before the Court below viz., *res judicata*. Learned counsel relied on

decision of this Court in *Gangabai Ammal v. S.Kalyanasundaram* [1999 (2) LW 781] wherein the following observations stand made:

“21. On a reading of Section 47 application as well as present application, contents and relief sought for are same. Merely because it is stated as application under Section 47 and in the present application it is stated as Order 21 Rule 58, subject matter cannot be changed nor there is change in the reliefs. The argument that the application under Section 47 was withdrawn with liberty to file separate application has no substance.

22. Memo filed by respondent before executing Court read thus,

“It is submitted that since the petition has not derived any title under the Judgment debtors, the petitioner is withdrawing the petition under S.47 CPC as reported by the petitioner in CRP No.2238 of 1998 High Court and filing separate petition under Order 21. Rule 58, CPC to work out his rights and hence it is prayed that this Hon'ble Court may be pleased to dismiss the E.A.No.200 of 1998 and render justice.”

23. No liberty is given to petitioner by court to file an application under Order 21, Rule 58. Petitioner reserved in himself a right to file another application and he wanted to dismiss E.A.200 of 1998. I do not find that any permission was granted by executing Court permitting petitioner to file separate application.

24. It is true that provisions of Order 23 Rule 1 of Code of Civil Procedure are not made applicable to execution

proceedings. Under Order 23, Rule 4, it is said that the provisions of that order will not apply to proceedings in execution. According to me, even without resorting to Order 23, present application is barred. Purpose of Order 23 is that the litigant must be prevented from abusing process of Court by instituting suits again and again on the same cause of action. That principle is found on public policy and therefore dehors order 23 public policy prevents reagitating same matter.

25. In 1989 (1) S.C.C.5 (Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and others), their Lordships of Supreme Court held that if a writ petition is withdrawn and without permission to file a separate application, subsequent application on the same cause of action is barred. In that case, their Lordships said thus,

“The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article. On this point the decision in Daryao case is of no assistance. But we are of the view that the principle underlying Rule 1 of Order 23 of the Code should be extended in the interest of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics” (Emphasis supplied).

Dehors Order 23, on the ground of public policy and for

administration of justice, such repeated attempts by litigant to thwart execution of decree and attempt to reagitate the same matter should be prevented.”

In the attendant facts and circumstances of the case, this Court finds reliance on the above cited decision of this Court is most inappropriate and misplaced.

The Civil Revision Petition shall stand dismissed. No costs. Consequently, connected miscellaneous petition is closed.

19.08.2016

Index:yes/no
Internet:yes
gm

To

The VIII Assistant Judge,
City Civil Court,
Chennai.

C.T.SELVAM, J

gm

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