

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.11.2016

Delivered on: 18.11.2016

CORAM

THE HONOURABLE THIRU JUSTICE **V. PARTHIBAN**

C.R.P.(PD) Nos.202 & 203 of 2012 &
M.P.No.1 & 1 of 2013

1. Alfred
2. Sukumar

.... Petitioners in both
Petitions

vs

1. Andi
2. Vellimaniyan
3. S.Balraj
4. The District Collector,
Salem.
5. The Tahsildar,
Yercaud taluk,
Salem District

.. Respondents in CRPPD
202 of 2012

1. Chinnaraj
2. Velliyammal
3. Chinnasamy
4. Ramar
5. Ramu
6. Subramani
7. Venkatan
8. Chandran
9. Kandan
10. Villiyan
11. The District Collector,
Salem.

12. The Tahsildar,
Yercaud taluk,
Salem District

.. Respondents in CRPPD
203 of 2012

Civil Revision Petitions filed under Article 227 of the Constitution of India against the orders 8.11.11 of the learned II Additional District Munsif, Salem in I.A.Nos.149 & 182 of 2011 in O.S.No.1143 & 1141 of 2009 respectively.

For petitioners : Mr.K.Selvaraj

For respondents : Mr.S.Kalyanaraman

COMMON ORDER

The present Revision Petitions have been filed against the orders 8.11.11 of the learned II Additional District Munsif, Salem in I.A.Nos.149 & 182 of 2011 in O.S.No.1143 & 1141 of 2009 respectively, dismissing the applications filed under Section 11 CPC r/w Order 2 Rule 2 and Section 151 CPC for striking off the plaint and not to try the suit.

2. Heard the learned counsel for the petitioner and the learned counsel for respondents 1 to 3. No representation for other respondents.

3. Since the issue and the subject matter is one and the same

and further, the outcome of one revision will have same bearing on another, these revision petitions are taken up together for final disposal and therefore, it would be appropriate to deal with the civil revision petition in CRP NPD No.202 of 2012.

4. The petitioners in the above revision petition are the defendants 1 and 2 in the suit and the respondents 1 to 3 herein are the plaintiffs in the suit. Originally a suit being O.S.No.389 of 2002 was filed by the first respondent/plaintiff, seeking for permanent injunction against the petitioners herein and one N.S.Saminathan, with consequential prayer. In the said suit, a written statement was filed on behalf of the second defendant therein/first petitioner herein, resisting the prayer of the plaintiff therein.

5. After hearing the parties, the above said suit was dismissed and as against dismissal of the suit, the first respondent filed an appeal in A.S. No. 9 of 2007 before the Sub Court, Salem and the said appeal also came to be dismissed vide judgment dated 18.2.2008. After dismissal of the appeal suit, the first respondent herein along with two others, preferred another suit in O.S.No.1143 of 2009, for declaration, seeking to declare the title of the plaintiffs to the suit property with

consequential prayer in respect of very same property which was the subject matter of the earlier original suit in O.S.No.389 of 2002.

6. Pending the suit in O.S.1143 of 2009, the revision petitioners who are the defendants 1 and 2 therein, moved an interlocutory application in I.A.No.149 of 2011, praying for dismissal of the suit as being barred by *res judicata* and also hit under Order 2 Rule 2 CPC and therefore, liable to be struck off from the file and no further proceedings to be made in the suit.

7. The petitioners/defendants 1 and 2 had also filed their written statement in the suit raising the issue of maintainability of the suit apart from resisting the suit on merits.

8. Opposing the interlocutory application, a counter was filed by the respondents/plaintiffs stating that there was no specific issue framed in O.S.No.389 of 2002 to decide the title of the plaintiff to the suit property. It is further stated that since the suit in O.S.No.389 of 2002 and the present suit had been filed on different causes of action and some other defendants also have been added in the present suit, the question of applying the principles of *res judicata* would not arise

and it was settled principle of law that a comprehensive suit can be filed for the relief of declaration even though the suit for bare injunction had been dismissed. The plaintiffs prayed for dismissal of the interlocutory application.

9. The learned trial Court, after hearing the arguments of the rival parties, passed an order on 8.11.2011 in I.A.No.149 of 2011 in O.S.No.1143 of 2009, dismissing the application.

10. The learned trial Court, after considering the case laws cited both on behalf of the plaintiffs and defendants, accepted the contentions of the plaintiffs that there was no bar in filing the suit for declaration although earlier suit for permanent injunction was dismissed. The trial Court clearly distinguished the decisions cited by the petitioners herein as well as the respondents and held that since the facts of those decisions would not be applicable to the factual matrix of the case on hand. On the other hand, the judgment relied upon by the plaintiffs reported in AIR 2005 Karnataka 70 was the identical case and observation made by the Hon'ble Court therein, was squarely applicable to the case on hand.

11. The trial Court, further held that the issue of title in the injunction suit filed earlier was only incidentally tried and that would not preclude the plaintiffs to lay the present suit for declaration of title and the appeal (A.S.No.9 of 2007) which was dismissed inter alia on the ground of non-joinder of necessary parties and mis-joinder of unnecessary parties and thereafter the present suit was filed with many other defendants as parties leaving out some of them who were parties in the earlier original suit. In such case, the trial Court was of the clear view that the principle of *res judicata* will not be applicable to the present case. The finding given by the trial Court in O.S.No.389 of 2002 with regard to the title was only incidental, not fully supported by the evidence and no issue was framed to that effect and in which event, the present suit cannot be held to be barred by principles of *res judicata* and invocation of Section 11 r/w Order 2 Rule 2 CPC would not help the petitioners to get the relief of striking off the plaint, in the circumstances, the trial Court reasoned.

12. The learned counsel appearing for the petitioners after reiterating the submissions made before the lower Court, also drawn the attention of this Court to three decisions which were filed in compilation at the time of arguments.

13. The decisions cited by the petitioners are as follows, viz., 2010(5) CTC 423 (***Bafna Developers, rep. by its Partner Ashok G.Bafna versus D.K.Natarajan and others***); 2011(2) CTC 177 (***Joseph Arokiados, rep. by Power Agent, T.Kasi versus P.Pradeep***); 2013 (1) CTC 180 (***N.Babu versus S.shanmugam and others***). All the above decisions are in respect of Order 2 Rule 2 CPC, which clearly expostulate that earlier suit was founded on the same cause of action on which the subsequent suit is based and if in the earlier suit, the plaintiff has omitted to sue in respect of or intentionally relinquished any portion of his claim, he will not be subsequently entitled to sue in respect of the portion of his claim so omitted or relinquished. In the present suit, as stated supra, that the cause of action was different and the prayer was also different and also the defendants.

14. As regards the contention raised by the learned counsel for the petitioners that the Court should struck off the plaint at the earliest instance, as decided in the decision in reported in 2013(1) CTC 180 (cited supra) of this Court, it should be noted that only in case of a re-litigation, such drastic interference was needed and particularly, if the subsequent suit was a clear abuse of process of Court, that should not

be encouraged. In the instant case, it could not be inferred or noted that there was such abuse of process of Court in filing the second suit for declaration based on the different cause of action against many other defendants and it cannot also said to be a re-litigation with the same prayer.

15. In the light of the discussion made above, this Court is of the view that there is no infirmity in the order passed by the learned trial Court dismissing I.A.No.149 of 2011 in O.S.No.1143 of 2009 for striking off the plaint.

16. Accordingly, the Civil Revision Petition 202 of 2012 is dismissed as devoid of merits.

17. For the same reasons, the Civil Revision Petition 203 of 2012 which has been filed against the order, dated 8.11.2011 in I.A.No.182 of 2011 in O.S.No.1141 of 2009 which is akin to the order, dated 8.11.2011 in I.A.No.149 of 2011 in O.S.No.1143 of 2009, is also dismissed.

18. Consequently, connected MPs are closed and there shall be no order as to costs.

Internet: yes/no
Index: Yes/no
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18-11-2016

V.PARTHIBAN, J.
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Pre delivery Order in
CRP PD Nos.202 & 203 of 2012

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