

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.01.2016

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

CRP [PD] No.30 of 2016

&

CMP.No.165 of 2016

Jacob Thomas Thumbasseril,
No.7301, Kit Creek Road,
Moriisville NC 27709, USA

.. Petitioner

Vs.

Binita Jacob
No.91, 4th Main Road,
Gandhi Nagar, Adyar,
Chennai - 600 020.

.. Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India praying to allow the Civil Revision Petition and set aside the order of the Principal District Munsif at Alandur dated 30.10.2015 in I.A.No.919 of 2015 in O.S.No.405 of 2014 and allow the application filed by petitioner in I.A.No.919 of 2015 in O.S.No.405 of 2014.

For Petitioner : Mr.V.Prakash, Senior Counsel
for Ms.Shubharanjani Ananth

For Respondent : Mr.P.B.Balaji

ORDER

The present Civil Revision Petition has been filed by the petitioner to set aside the order of the learned Principal District Munsif at Alandur dated 30.10.2015 made in I.A.No.919 of 2015 in O.S.No.405 of 2014.

2 The petitioner as a plaintiff has filed a suit in OS.No.405/2014 for injunction restraining the defendant and her men or anybody claiming under her in any manner, alienating, entering into any agreement, mortgaging or any manner encumbering the suit property. The defendant/wife of the petitioner herein filed a written statement and contested the suit. In the written statement, it was held that already the property in question was settled in favour of her mother and that she is not the owner of the suit property. Since the defendant / respondent denied her title over the property alleging that the property stands in the name of her mother, the petitioner filed IA.No.919/2015 to withdraw the suit with liberty to file a fresh suit for declaration of title or for partition and separate possession and for other consequential reliefs. After hearing both sides, the Trial Court dismissed the said interim application, against which the present revision is filed.

3 Mr.V.Prakash, learned Senior Counsel appearing for the petitioner would submit that the petitioner filed the said interim application in

IA.No.919/2015 only to withdraw the suit in OS.No.405/2014 and to file a fresh suit in respect of the suit property for appropriate reliefs by invoking Order 23 Rule 1 ; but the trial court dismissed the said application by observing that the said application is barred under Order 2 Rule 2 and the petitioner has not reserved his right to file a comprehensive suit and obtained permission from the Court. Learned Senior counsel would submit that since the respondent/defendant attempted to encumber the suit property, the petitioner has filed the suit for injunction restraining her to encumber the said property and after filing of the written statement only, the petitioner came to know about the fact of the said property being settled in favour of the defendant's/respondent's mother. Therefore, the petitioner wants to file a comprehensive suit and that there is no necessity to file an application seeking for not claiming title to the property under Order 2 Rule 2 and the trial court, without considering the same, dismissed the said application, constraining the petitioner to approach this Court by way of filing the present revision.

4 Resisting the same, the learned counsel appearing for the respondent/defendant would submit that the defendant/respondent has no objection for withdrawal of the suit by the petitioner ; but the petitioner should not be permitted to file a fresh suit for the same cause of action. Further, it is submitted that the respondent is not the owner of the property as on the date of

filing of the suit in OS.No.405/2014 and if any fresh suit is filed by the petitioner against the respondent/defendant, it is hit by Order 2 Rule 2 and the Trial Court was right in rejecting/dismissing IA.No.919/2015 and hence, the learned counsel prays for dismissal of the Civil Revision Petition.

5 This Court carefully considered the rival submissions made on either side and also perused the typed set of papers.

6 A perusal of the plaint filed in OS.No.405/2014 would reveal that the petitioner purchased the said suit property from and out of his own income and by way of Power of Attorney, he executed a Sale Deed in favour of his wife/the respondent herein/the defendant in the suit, for developing the property. Due to matrimonial discord, an exparte decree of divorce has been granted by the Hon'ble Superior Court, Country of Wake at State of North Carolina on 15.10.2012. As per the prevailing law in the Country of Wake at State of North Carolina, the spouses were entitled to a right of 50% each of the suit schedule property. So, the remedy available to the petitioner is to file either a suit for partition or a suit for declaration of title. But, the petitioner has filed the present suit in OS.No.405/2014 to protect the property. However, the suit property has already been settled in favour of his mother-in-law/defendant's mother and he came to know the said factum only after filing of the written

statement by his wife/respondent/defendant in the suit. In view of the same, the petitioner, seeking permission to withdraw the suit with liberty to file a fresh suit, filed IA.No.919/2015 and the same was dismissed on the ground that the said application is barred under Order 2 Rule 2.

7 At this juncture, it is relevant to refer Rule 1 and Rule 2 of Order 23 of the Code of Civil Procedure, which reads thus:-

"Order XXIII :-Withdrawal of suit or abandonment of part of claim:-

[1]At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

[2]An application for leave under the proviso to sub-rule [1] shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person."

8 The question whether an application filed to withdraw a suit for filing subsequent suit, is hit by Order 2 Rule 2 or by section 11 or barred by limitation, shall not be looked into by this Court and the only question to be considered by this Court is whether the liberty to be given is for filing of a fresh

suit for the same cause of action or not? In the case on hand, the petitioner has filed the present interim application in IA.No.919/2015 seeking for the following prayer:-

“ It is therefore prayed that this Hon'ble Court may be pleased to pass an order **permitting the petitioner to withdraw the suit in OS.No.405/2014 with liberty to file a suit in respect of the suit schedule property for appropriate reliefs thereon**”.

The petitioner has not sought permission for filing fresh suit for the same cause of action ; but with a liberty to file a suit in respect of the suit property for appropriate relief. Under such circumstances, the respondent/defendant has no say in the matter and the Trial Court, without considering the same, has dismissed the interim application, which, in the considered view of this Court, is illegal and unsustainable and warrants interference of this Court.

9 Accordingly, the Civil Revision Petition is allowed and order passed by the learned Principal District Munsif at Alandur in I.A.No.919 of 2015 in O.S.No.405 of 2014 dated 30.10.2015 is hereby set aside. No costs. Consequently, the connected miscellaneous petition is closed.

10 The petitioner is permitted to withdraw the suit in OS.No.405/2014

pending on the file of the learned Principal District Munsif, Alandur and he is at liberty to file a fresh suit in respect of the suit property, for appropriate relief.

12.01.2016

AP

To
The Principal District Munsif
Alandur.

R.MALA, J.

AP

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