

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05-01-2016

(Orders reserved on 17.12.2015)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

C.R.P.(PD).No.259 of 2013
& M.P.No.1 of 2013

Poonaiyan @ Thirupathi

.. Petitioner

Vs.

1. Parvath
2. Govindaraj
3. Krishnan

.. Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 28.08.2012 in I.A.No.869 of 2012 in O.S.No.134 of 2010 on the file of the District Munsif Court, Palacode.

For petitioner : Mr.R.Selvakumar

For respondents : Mr.R.Rajaramani for R-1

Mr.I.C.Vasudevan for RR-2 & 3

ORDER

This Civil Revision Petition is filed against the order dated 28.08.2012 in I.A.No.869 of 2012 in O.S.No.134 of 2010 passed by the learned District Munsif, Palacode, in and by which, the application filed by the revision petitioner/plaintiff under Order 23 Rule 1 CPC seeking permission of the Court to withdraw the suit and liberty to file a fresh suit on the same cause of action, was dismissed.

2. Learned counsel for the revision petitioner/plaintiff contended that the

trial Court failed to consider the fact that since the amendment earlier sought in the plaint includes declaration of status of a sale deed over the suit property, the same amounts to formal defect and the suit would fail on that ground. Without appreciating the above fact, the trial Court dismissed the application. He further contended that the trial Court failed to consider the order passed by this Court in the previous Civil Revision Petition and hence, since there is only formal defect, the plaintiff may be permitted to withdraw the suit with liberty to file fresh suit on the same cause of action. Hence, he prayed that the Civil Revision Petition may be allowed.

3. Learned counsel for the first respondent/D1 and the learned counsel for the respondents 2 and 3/defendants 2 and 3 contended that the trial Court, after considering each and every facts and circumstances of the case, came to the correct conclusion that there is no formal defect by the plaintiff and prayed that the Civil Revision Petition may be dismissed. In support of his submissions, learned counsel for the first respondent/D1 relied on the following decisions of this Court:

(a) 2009 (6) CTC 800 (Thanavel Vs. Kuppanna Gounder) :

"19. It is an axiomatic fact that no withdrawal will be allowed when the defendant has acquired a certain right in the subject matter of the suit, generally speaking, the leave sought for in regard to withdrawal of suit with a liberty to file fresh suit, such right is not an absolute one. Moreover where the withdrawal of earlier suit is not in terms of ingredients of O.23 R.1 of CPC, the benefit of Section 14 of Limitation Act cannot be extended when filing a fresh suit."

(b) 2010 (5) CTC 330 (Velusamy Vs. Chenniappan):

"16.The term 'Formal Defect' in ordinary parlance refers to defects of various kinds not affecting the merits of the case. As such, 'Formal Defect' is a defect of form unrelated to the claim of plaintiff on merits as per decision *Somal Raju Vs. Samanthu Sivaji Ganesh* - AIR 2009 AP 12.

17. The provision in Order 23 Rule 1 of Civil Procedure Code is an exception to the common law principle of non suit. On principle an application by the Plaintiffs under sub-rule (3) cannot be equated on a par with an application by them in exercise of the absolute liberty given to them under sub-rule (1). As a matter of fact, the grant of leave contemplated in sub-rule (3) of Rule 1 is at the discretion of the Court. However, such a discretion must be exercised by a Court of Law with care and circumspection, in the considered opinion of this Court. A Court of Law ought to apply its mind while granting permission to withdraw the Suit with a liberty to file a fresh one. Importantly, permission under sub-rule (3) can be accorded only if the conditions specified therein are satisfied. A mere statement by the Plaintiffs that there are formal defects in the frame and form of suit are not enough, as opined by this Court. Therefore, there must be an express finding by a Court of Law that the Suit would fail by reason, of some formal defect or that there are other sufficient reasons for granting the leave to file a fresh suit as per decision *Lallu V. Board of Revenue* - AIR 1973 All. 195.

18.To put it precisely, the application should be considered by a Court of Law in entirety i.e. in both the parts as to the withdrawal and liberty to file a fresh Suit. If the Suit is withdrawn, and if no liberty has been granted, then a fresh Suit is certainly barred in the eye of law. In law, the bar in respect of the earlier Suit is by means of sub-rule (4) and not on the plea of *res judicata*."

4. Heard the learned counsel appearing for the parties and perused the materials available on record.

5. Admittedly, the suit was originally filed by the revision petitioner/plaintiff for declaration and permanent injunction. The first defendant has filed written statement denying the title of the plaintiff and alleged that the suit property is not absolutely belonging to the plaintiff and there is no such cart-track mentioned in S.No.161/1.E. and the plaintiff is entitled to decree with regard to 0.33 cents

cents alone in the suit property. Before filing the application seeking permission for withdrawal of the suit, the plaintiff already filed application for amendment of the plaint and the prayer in the plaint in column (3) is sought to be added by stating that the sale deed executed in favour of the first defendant by the defendants 2 and 3 on 06.05.2010 is null and void. The said application for amendment of the plaint, was dismissed by the trial Court on 04.01.2012, against which, Civil Revision Petition in C.R.P.(PD).No.1281 of 2012 was preferred by the revision petitioner/plaintiff, which was disposed of by this Court on 24.04.2012, by observing as follows:

"After exhaustive arguments and discussions learned counsel for the petitioner seeks permission to withdraw this revision with liberty to work out his remedy before the appropriate forum. He has also made an endorsement to that effect in the bundle.

Accordingly, this Civil Revision Petition is dismissed as withdrawn with liberty as sought for. Connected miscellaneous petition is also dismissed. There shall be no order as to costs."

6. After withdrawing the above said C.R.P., the revision petitioner/plaintiff has filed application seeking permission of the Court to withdraw the suit with liberty to file a fresh suit on the same cause of action. It is seen that the plaintiff filed the suit for declaration and permanent injunction and he wanted to amend the prayer in the suit by including the prayer to the effect that the sale deed executed by the defendants 2 and 3 in favour of the first defendant, is null and void. Though the plaintiff filed the application for amendment of the plaint, the said application was dismissed, against which, the said C.R.P. was filed before

this Court, which was dismissed as withdrawn with liberty as stated above. It is stated that there is a formal defect and hence, the plaintiff filed the subsequent application to withdraw the suit with liberty to file a fresh suit on the same cause of action.

7. In this regard, it is useful to quote Order 23 Rule 1 CPC, which reads as follows:

"Order 23: Withdrawal and adjustment of suits:

Rule 1: 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.

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the

claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

8. The argument of the learned counsel for the revision petitioner/plaintiff that since the amendment application was dismissed, it became necessary for the plaintiff to seek for declaration of title to the plaint schedule property and as there was a defect, the plaintiff filed the application seeking permission to withdraw the suit, is acceptable.

9. It is to be noted that there was omission of the prayer in the suit, to include such a declaration, and accordingly, the plaintiff earlier filed the application to amend the plaint, which was dismissed, against which, the said C.R.P. was filed by the plaintiff, which was dismissed as withdrawn with liberty as quoted above. Subsequently, the application seeking permission to withdraw the suit with liberty to file a fresh suit on the same cause of action, was dismissed by the trial Court. Hence, the citations relied on by the learned counsel for the first respondent/D1, are not applicable to the facts of the present case.

10. For the reasons stated above, the impugned order of the trial Court is liable to be set aside. Accordingly, the impugned order is set aside. The Civil Revision Petition is allowed. The revision petitioner/plaintiff is permitted to

withdraw the suit, with liberty to file a fresh suit on the same cause of action, subject to limitation. The revision petitioner/plaintiff is directed to pay the costs of the suit to the defendants within a period of two weeks from the date of decree for withdrawal of the suit. No costs in this Civil Revision Petition. The Miscellaneous Petition is closed.

05-01-2016

Index: Yes/no

Internet: Yes/no

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The District Munsif, Palacode.

G.CHOCKALINGAM, J

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Order

in

C.R.P.(PD).No.259 of 2013

