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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.03.2016

CORAM:

THE HONOURABLE MS. JUSTICE V.M. VELUMANI

CRP(PD) (MD) .No.551 of 2016 and

CMP(MD) .No.2390 of 2016

1. B. Vallimail
2. A. Vilvakkani

: Revision Petitioners

Vs.

1. Ramalingam
2. Ponnaiah
3. N. Kaliammal
4. Boomani

: Respondents

Civil Revision Petition is filed under Article 227 of the constitution of India against the fair and decreetal order dated 08.02.2016 passed in I.A.No.879 of 2015 in O.S.No.71 of 2008 on the file of the learned District Munsif Court, Muthukulathur.

For Petitioners : M/s.K.C.Ramalingam

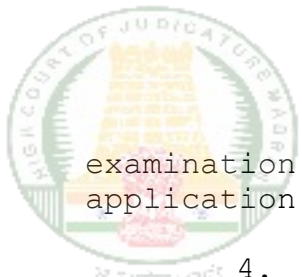
For Respondents : Mr.R.Velucchamy

O R D E R

This Civil Revision Petition is filed against the fair and decreetal order dated 08.02.2016 passed in I.A.No.879 of 2015 in O.S.No.71 of 2008 on the file of the learned District Munsif, Muthukulathur.

2. The revision petitioners are petitioners in I.A.No.879 of 2015 in O.S.No.71 of 2008 on the file of the learned District Munsif, Muthukulathur. The petitioners filed said Interlocutory Application under Order 23 Rule 1(3) of CPC for permission to withdraw the said suit with liberty to file fresh suit on the same cause of action. According to the petitioners, they were not aware of sub division of the properties and issue of patta. They are illiterate people and they did not give proper instructions with regard to documents of Revenue Department to their Advocate. Due to such mistake of the petitioners, the Advocate has mentioned wrong boundaries in the suit. In view of this mistake, even if petitioners succeed in the suit they will not be in a position to execute the decree and there will be further litigation.

3. The respondents filed counter and submitted that second respondent is well educated and he signed the affidavit in English and therefore, the contention that they did not give proper instructions due to lack of education is not correct. The petitioners have filed number of applications for amendment of the plaint, for impleading respondents 3 and 4 as defendants 3 and 4 and also for amendment of prayer in the plaint. The petitioners have sought permission to withdraw the suit on the ground that they came to know about the mistake of the boundaries of the suit schedule property only when they cross examined DW.1. It is not correct statement. The Chief Examination of DW.1 only was completed and suit is posted for cross



examination of DW.1. Therefore, prayed for dismissal of said application.

4. The learned Judge considered the materials on record and dismissed the application holding that reasons given by petitioners are not acceptable reasons and that I.A.No.253 of 2015 filed by petitioners for amendment of plaint was dismissed with cost and that petitioners have not filed any revision against the said order of dismissal. The learned Judge also held that the Judgments of this Court relied on by the counsel for petitioners is not applicable to the facts of the present case.

5. Against the said order of dismissal dated 08.02.2016, the petitioners have filed present Civil Revision Petition.

6. The learned counsel for petitioners submitted that due to ignorance the petitioners have not given correct instructions to their counsel and a mistake has crept in with regard to length and breadth of the properties and survey numbers. The said mistake is a formal defect and even if the petitioners succeed in the suit there will be further litigation. The petitioners have given sufficient reason for withdrawal of the suit with liberty to file a fresh suit under same cause of action. The learned Judge erred in holding that the Judgment of this Court reported in **2014(5) CTC 713 (Balasundara Achari Vs. Shanmugam and another)** is not applicable to the facts of the present case. On the other hand, the learned Judge ought to have seen the ratio in the said Judgment is squarely applicable to the facts of the present case. The learned Judge erred in dismissing the application on the ground that I.A.No.253 of 2015 filed by petitioners for amendment of the plaint was dismissed and the petitioners have not filed any revision challenging the said order. The learned Judge failed to see that respondents have not stated that they will be prejudiced if permission is granted to withdraw the suit with liberty to file fresh suit on the same cause of action. The learned counsel referred to Para 6 of the Judgment of this Court reported in 2014(5) CTC 713 **2014(5) CTC 713 (Balasundara Achari Vs. Shanmugam and another)** and prayed for allowing the Civil Revision Petition. The relevant Para 6 reads as follows:-

6. In this case, the petitioner has filed the Suit originally for bare injunction and thereafter, amended the plaint by seeking relief of declaration and consequential injunction. No doubt, the petitioner has filed the Application seeking permission to withdraw the suit with liberty to file fresh suit after examination of PW.1 in chief and cross. But, at the same time it is seen from the affidavit filed in support of the Application that the petitioner being 75 years old person and also illiterate, has not given the correct details to his counsel for drafting the pleadings, more particularly, with regard to the measurement of the Suit property and also the nature of enjoyment and the length and breadth of the Suit Survey Number. Already, an Amendment Petition was filed and allowed whereby the relief of declaration was included. Therefore, instead of filing one more Amendment Petition,



the petitioner thought fit to withdraw the Suit and file a fresh one by narrating all the material facts and details. In my considered view, granting such permission is not going to prejudice the other side in view of the fact that the petitioner is seeking only the relief of declaration and injunction in respect of the suit property."

7. Per contra, the learned counsel for the respondents contended that the petitioners had filed number of applications for amendment of plaint, impleading respondents 3 and 4 as defendants 3 and 4 and those applications were allowed at different stage on payment of cost. The petitions filed I.A.No.253 of 2015 to amend the prayer portion to include another prayer. The said application was dismissed with cost of Rs.1,500/-. Till date, the petitioners have not paid the cost. The reasons given by the petitioners for withdrawal of suit with liberty to file a fresh suit is not a valid reason.

8. I have heard the learned counsel appearing on either side and perused the materials available on record.

9. The petitioners have filed I.A.No.879 of 2015 for permission to withdraw the suit in O.S.No.71 of 2008 with liberty to file a fresh suit on same cause of action. Order 23 Rule 1 of CPC reads as follows:-

" 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 extent, 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 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 part of the claim."

As per Order 23 Rule 1(3) of CPC, Court can grant permission to withdraw the suit with liberty to file fresh suit either if any one of the condition mentioned therein is satisfied. In the present case, the



petitioners have pointed out the defects in the schedule of the property with regard to boundaries and Survey Number. They have also stated that as they are illiterate people they did not properly instruct their Advocate for preparing the plaint. The respondents have not stated that they would be prejudiced if said application is allowed. The learned Judge has not considered these aspects in proper perspective. The reason given by the learned Judge for dismissing the application that petitioners have not filed any Civil Revision Petition against the dismissal of application for amendment of prayer in the suit is not a valid reason. The Judgment of this Court relied on by the learned counsel for the petitioner is applicable to the facts of the present case. The learned Judge has not properly applied the ratio of the said Judgment while considering the materials on record. The petitioners have satisfied both the conditions contemplated in Order 23 Rule 1(3) (a) and (b) of CPC.

10. In the result, the Civil Revision Petition is allowed setting aside the fair and decreetal order dated 08.02.2016 passed in I.A.No.879 of 2015 in O.S.No.71 of 2008 on the file of the learned District Munsif, Muthukulathur and I.A.No.879 of 2015 is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/
Assistant Registrar(AE)

/TRUE COPY/

Sub Assistant Registrar

To:

The District Munsif, Muthukulathur,
Ramanathapuram District.

+1cc to M/S.K.C.Ramalingam, Advocate in SR.No.16233
+1cc to M/S.K.Veluchamy, Advocate in SR.No.16555

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CMP(MD).No.2390 of 2016
23.03.2016

trp
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