

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2017

CORAM

THE HONOURABLE Ms. JUSTICE V.M.VELUMANI

CRP (PD) No.1627 of 2017
and C.M.P.No.7696 of 2017

1.Syed Ahamed
2.Syed Ibrahim
3.Syed Akthar
4.Syed Mamood
5.J.Habibunnisa
6.Jamilunnisa
7.Shahitha Begum
8.Shahinas Begum
9.Rashitha Begum
10.Rhena Begum
11.Shammshad Begum
12.N.Noor Basha
13.N.Anwar Basha
14.V.J.Basheer Ahamed

.. Petitioners

Vs

1.R.Jayalakshmi
2.R.Sankaran
3.R.Sakthivel
4.R.Natarajan
5.S.Lakshmi
6.The Director,
Christian Medical College Hospital,
Vellore.
7.Syed Hussaini Basha
8.Syed Ajeez Basha
9.Ayesha Banu

.. Respondents

Prayer:- Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to set-aside order and decretal order passed in I.A.No.14 of 2016 dated 15.02.2017 in O.S.No.126 of 2015 on the file of the Additional District Judge (FTC), Vellore.

For Petitioners: Mr.K.Natarajan

ORDER

The petitioners are the plaintiffs and the respondents are the defendants in O.S.No.126 of 2015 on the file of the Additional District Judge, Fast Track Court at Vellore, Vellore District. The petitioners have filed the suit for partition to direct the respondents to divide the suit property into 16 equal shares and to allot 13 such shares to the petitioners. The respondents have filed the written statement and are contesting the suit. The issues have been framed and the suit is posted for trial. At that time, the petitioners filed an application in I.A.No.14 of 2016 under Order 23, Rule 1, r/w. Section 151 of CPC praying leave of the Court to withdraw the suit in O.S.No.126 of 2015 and to file a fresh suit for the same cause of action.

2. The case of the petitioners is that schedule mentioned property is a joint family property and their fore-father viz., Syed Mohammed Hussaini had leased out the property to one Dharmalinga Mudaliar for cultivation on 10.09.1877 and collected a rent of Rs.11/- per annum. Later, the said Dharmalinga Mudaliar without any title in respect of the schedule mentioned property had executed the Will in favour of his son Ramasamy Mudaliar on 05.11.1947. After the demise of said Ramasamy, the defendants 1 to 4, who are the legal heirs (wife

and sons) of Ramasamy Mudaliar, having no title over the property executed the registered Power of Attorney Deed in favour of the fifth defendant viz., S.Lakshmi and appointed her as the Power of Attorney to deal with the schedule mentioned property. Thereafter, the fifth respondent/fifth defendant had sold the property to the sixth respondent/sixth defendant under the registered sale deed dated 15.11.2001. The defendants 7 to 9 are also family members of the plaintiffs, who are the grandsons and grand daughters of Syed Mohammed Hussaini. Due to the family dispute and misunderstanding the arose between the petitioners/plaintiffs and respondents 7 to 9/defendants 7 to 9, the plaintiffs have added them as opposite parties and filed the suit against them.

3. According to the petitioners, they ought to have filed the suit for declaration to declare that the Will dated 05.11.1997 executed by one Dharamalinga Mudaliar in favour of his son Ramasamy Mudaliar is null and void as it is not binding on them, and also for other consequential reliefs. Without seeking the said relief to declare the Will dated 05.11.1997 as null and void, the petitioners cannot succeed in the suit for partition, as the suit for partition is not maintainable. Hence, the petitioners have filed I.A.No.14 of 2016 seeking to grant leave to withdraw the suit for partition in O.S.No.126 of 2016 and to file a fresh suit for the same cause of action.

4. The respondents 1 to 4 and respondents 5 and 6 have filed separate counters and opposed the application filed by the petitioners. It is contended by the respondents that the petitioners have filed the said application only with an intention to drag on the proceedings and to harass the respondents.

5. The learned Judge considering the averments in the affidavit, counter affidavit and the materials available on record, dismissed the application in I.A.No.14 of 2016, holding that the relief now sought by the petitioners to file a fresh suit on the same cause of action, is barred by limitation.

6. Heard the learned counsel appearing for the petitioners and perused the materials available on record.

7. The contention of the learned counsel appearing for the petitioners is that since the relief sought for in the suit for partition is not maintainable, the petitioners opted to file a suit for declaration with regard to the Will dated 05.11.1997 and for other consequential benefits. Since, the petitioners cannot file an application for amendment in the suit, and moreover without the leave of this Court, if a fresh suit is filed, it will hit by principle of res judicata, the petitioners have filed the said application.

8. Leave can be granted to withdraw the suit with liberty to file a fresh suit on the same cause of action, if only the Court is satisfied with the grounds mentioned in Order XXIII Rule 1(3) of CPC, which reads as follows:

" ORDER XXIII : Withdrawal and Adjustment of Suits :-

1. Withdrawal of suit for abandonment of part of claim :

.....

.....

.....

(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."

9. A reading of the said provision makes it clear that withdrawal of the suit is permitted only (i) if there is any formal defect in the suit filed by the plaintiff or (ii) if the Court is satisfied with the reason that there is sufficient ground for the plaintiff to institute a fresh suit on the same cause of action. However, in the present case, the

petitioners have not satisfied both the provisions in Order XXIII Rule 1(3) CPC. The learned Judge considering all the materials available on record dismissed the application holding that the relief sought for by the petitioners is barred by limitation. In the said circumstances, there is no illegality or irregularity in the order dated 15.02.2017 passed by the Additional District Judge (FTC), Vellore, warranting interference by this Court.

10. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

05.06.2017

ds/klt

To:

The Additional District Judge (FTC)
Vellore.

V.M.VELUMANI,J

ds/klt

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