

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2017

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

C.R.P.No.2111 of 2011 &
MP.No.1 of 2011

Umadevi

..Petitioner/Appellant

Vs.

1.Nagammal
2.Venkatapathi
3.Karthikeyan
4.Kowsalyadevi

..Respondents/Respondents 1 to 4

Prayer:- This Civil revision is filed under Article 227 of the Constitution of India, praying to set aside the order dated 20.01.2011 passed in I.A.No.767 of 2010 in A.S.No.12 of 2010 on the file of the Subordinate Judge, Perundurai, Erode District.

For Petitioner : Mr.I.C.Vasudevan

For Respondents : No Appearance

O R D E R

In this case, according to the learned counsel for the petitioner, operation success patient die.

2. Krishnaswamy Reddiar is the common man for both sides. The suit property is an ancestral property. The plaintiff seeking division of the said property by metes and bounds, filed O.S.No.116 of 2005 on the file of the District Munsif cum Judicial Magistrate, Perundurai, Erode District. She had lost the suit. The trial Court's reasoning for the dismissal is on the premises that the property was already sold by Krishnasamy Reddiyar to Kalaimagal Saba, Erode and Kalaimagal Saba was also not impleaded as a necessary party.

3. Aggrieved, the plaintiff has filed the appeal before the Appellate Court/Subordinate Court, Perundurai in A.S.No.12 of 2010.

4. When the appeal was pending, the plaintiff filed I.A.No. 767 of 2010 seeking permission to withdraw the suit with liberty to file fresh suit on the same cause of action, as the suit has to be dismissed for the formal defect of non joinder of necessary party. However, the learned Appellate Judge not pleased with the grounds taken by the appellant/plaintiff/petitioner, dismissed the said petition in toto on the ground that the property has already been disposed of, in favour of Kalaimagal Sabha.

5. The learned counsel for the petitioner/appellant would contend that it is almost hitting against the wall. It is turning around. One of the basis of the dismissal of the suit is non joinder of the necessary party, namely Kalaimagal Sabha.

6. I have anxiously considered the submissions of the learned counsel for the petitioner, the impugned order and the materials on record.

7. Order 23 Rule 1 (3) CPC deals with withdrawal of the suit with liberty. It is the consideration of two contingencies placed in two clauses namely (a) & (b). Clause (a) deals with a situation where the suit is dismissed for some formal defect, the Court can give liberty to the petitioner to file fresh suit on the same cause of action. Clause (b) speaks about on sufficient grounds, the Court can give similar liberty. Now, in this case, the property, with respect to which the partition is sought for, is found to be sold by late Krishnasamy Reddy to Kalaimagal Sabha, Erode. The trial Court dismissed the suit for non joinder of necessary party, namely, Kalaimagal Sabha. It means disposal of the property in favour of the said Kalaimagal Sabha. There cannot be two tongues. It is pertinent to note that the appeal suit is a continuation of the suit. The Appellate Court will have all the powers of the trial Court. It is too elementary to state that at any stage of the suit/ proceedings, withdrawal can be permitted only when the liberty is asked for, consideration of the suit being dismissed for a formal defect or for any sufficient ground being given will arise. Thus, it is a fit case for grant of liberty.

8. In view of the foregoings, it is ordered as under:-

1. The revision is allowed.
2. The order passed by the learned Sub Judge, Perundurai,

Erode district in I.A.767 of 2010 in A.S.12 of 2010 dated 21.02.2014 is set aside. I.A.No.767 of 2010 stand allowed.

3. Plaintiff is given liberty to institute fresh suit on the same cause of action.
4. No order as to costs.
5. Consequently miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

dpq

To

1. The Principal District Court,
Erode.
2. The Sub Judge,
Perundurai,
Erode District.
- 3 The Registrar (Judicial),
High Court,
Madras.

+1cc to M/s.I.C.Vasudevan, Advocate sr.16223

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ss(11/4/2017)

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