

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.06.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)Nos.3990 and 4021 of 2011
and M.P.Nos.1 & 1 of 2011

Arulsundaram

.. Petitioner in
both CRPs.

Vs.

1.Samiathal
2.Senthil Kumar
3.Panchavarnammal (deceased)
4.Manimekalai
5.Selvasundaram

.. Respondents
in both CRPs.

PRAYER in CRP.No.3990 of 2011: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 08.07.2011 made in I.A.No.377 of 2011 in O.S.No.108 of 2002 on the file of the Additional District Munsif Court, Erode and to permit the second petitioner to withdraw the suit in O.S.No.108 of 2002 on the file of the II Additional District Munsif Court, Erode, with liberty to file a fresh suit with respect to the same suit property.

Prayer in CRP.No.4021 of 2011:Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 14.06.2011 made in I.A.No.550 of 2011 on the file of the Additional District Munsif Court, Erode.

For Petitioner : Mr.P.J.Rishikesh
For R1 and R2 : Mr.S.Lakshmanasamy
R3 : Died
For R4 : Mr.N.Manokaran
R5 : Served. No appearance

COMMON ORDER

C.R.P.(PD)No.3990 of 2011 has been filed against the fair and decretal order dated 08.07.2011 made in I.A.No.377 of 2011 on the file of the Additional District Munsif Court, Erode and to permit the second petitioner to withdraw the suit in O.S.No.108 of 2002 on the file of the II Additional District Munsif Court, Erode, with liberty to file a fresh suit with respect to the same suit property.

2. C.R.P.(PD)No.4021 of 2011 has been filed against the fair and decretal order dated 14.06.2011 made in I.A.No.550 of 2011 in

O.S.No.108 of 2002 on the file of the Additional District Munsif Court, Erode.

3. The petitioner is the second plaintiff, respondents 1 to 4 are the defendants 1 to 4 and fifth respondent is the first plaintiff in O.S.No.108 of 2002. Originally, the fifth respondent filed the suit for permanent injunction against the respondents 1 to 4 from destroying and disturbing the peaceful possession and enjoyment of the suit property i.e., drainage water course showing 'I J K L' in the rough sketch attached to the plaint. The respondents 1 and 2 filed written statement and are contesting the suit. Subsequently, petitioner was impleaded as second plaintiff by order dated 04.10.2007. Trial commenced.

4. According to the petitioner and fifth respondent, respondents 1 to 4 started destroying the drainage channel at the place marked as 'K L' in the rough sketch on the night of 29.03.2011 by using heavy earth mover, destroyed the drainage and blocked the same. The petitioner and 5th respondent filed I.A.No.234 of 2011 for appointment of an Advocate Commissioner. Advocate Commissioner was appointed and he inspected the suit

property on 01.04.2011 and 04.04.2011 and filed his report. According to the petitioner, in the report, Advocate Commissioner has stated about the drainage and blocking of drainage channel. In the circumstance, the petitioner and fifth respondent have filed applications in I.A.No.377 of 2011 for permission to withdraw the suit in O.S.No.108 of 2002 with liberty to file a fresh suit on the same cause of action and I.A.No.550 of 2010 for appointment of Advocate Commissioner to note down the physical features of the suit property with special reference to the damage caused to the drainage along with 'K L' portion and to fix the boundary.

5. According to the petitioner and fifth respondent, respondents 1 to 4 denied the title of the petitioner and fifth respondent. Subsequent to filing of the suit and commencement of trial, respondents 1 to 4 completely destroyed the drainage and blocked the same. In view of the same, petitioner must seek the reliefs of declaration, mandatory injunction and for permanent injunction in the suit.

6. Respondents 1 to 4 filed counter affidavit opposing the said applications. They submitted that drainage marked as 'K L' in the

rough sketch runs in their property and they have not destroyed the drainage and blocked the same as alleged by the petitioner. The respondents 1 to 4 have further submitted that the petitioner has not pointed out any formal defect, therefore, the application for withdrawal is not maintainable. There is no necessity to fix the boundary line and the application for appointment of Advocate Commissioner is only to collect evidence in support of their false case, which cannot be permitted under law.

7. The learned Judge considering the averments made in the affidavit, counter affidavit and materials available on record, dismissed the applications holding that the relief of mandatory injunction and cause of action is continuous one. The respondents 1 to 4 in the written statement denied the title of the petitioner and fifth respondent and they can very well file a petition for amendment, if the law of limitation permits. The learned Judge also held that cause of action for the suit arose on 25.02.2002, the petitioner & fifth respondent cannot seek the relief of mandatory injunction and they can seek the relief only for permanent injunction. As the suit is filed only for permanent injunction, the question of fixation of boundary line does not arise.

8. Against the order of dismissal dated 08.07.2011 and 14.06.2011 made in I.A.Nos.377 of 2011 and 550 of 2010, C.R.P.(PD)Nos.3990 & 4021 of 2011 are filed by the petitioner.

9. Heard the learned counsel for the petitioner as well as the respondents 1, 2 & 4 and perused the materials available on record.

10. As far as C.R.P.(PD)No.3990 of 2011 is concerned, the learned counsel for the petitioner in support of his contention relied on the following decisions:

(i) **1998 (III) CTC 16 (Kokila and others v. K.S.Bhoopathy and five others)**, in para-4, it is held as follows:

"4. ... In such a situation, withdrawal of the suit at the appellate stage although it may amount to withdrawal or nullification of the appellate Court's order, still not hurt any party other than the withdrawing plaintiffs, because they are also having the right to use the common pathway and the decree preventing installation of the machinery is nullified. Therefore, the contention that withdrawal will prejudice the respondents, has no basis. ... "

(ii) **(1981) 4 SCC 209 (Benniram and others v. Gained and others)**, in para-1, it is held as follows:

"1. We heard Mr. Phadke, learned Counsel for the appellant for some time. After the discussion, at a certain stage, a contention was advanced by Mr. Phadke on a particular point in the case and he conceded that it was not the case pleaded in the plaint. At this stage Mr. Phadke wishes to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action. Having considered the fact that non-pleading may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, we consider it just and proper in the interests of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit as stated hereinabove. We accordingly grant the permission subject to the condition that the appellant shall pay Rs. 1,000/- by way of costs in this Court within two months from today in addition to any costs paid already under the orders of the High Court. "

11. Learned counsel appearing for the respondents 1 and 2 submitted that if averments are true, it is for the petitioner to file an application for amendment and not for filing application to seek permission to withdraw the suit. In support of his contention, he has relied on the following judgments:

(i) **2000 (III) CTC 558 (K.S.Bhoopathy and others v. Kokila and others)**, in para-17 and 18, it is held as follows:

"17. From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial court and the first appellate court it is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse to Order XXIII Rule 1(3) CPC and filed the application for withdrawal of the suit with leave to file a fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its

approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower court.

18. For the reasons discussed in the foregoing paragraphs we have no hesitation to hold that the impugned order is unsustainable. Accordingly the appeal is allowed with costs. The order of the High Court dated 21.8.1998 granting permission for withdrawal of the suit with permission to file a fresh suit is set aside. The High Court will now proceed to dispose of the second appeal in accordance with law."

(ii) **2006 (5) CTC 74 (C.Bagyalakshmi v. P.Irulappan and another)**, in para-13 and 14, it is held as follows:

"13. I have considered the arguments of the counsel for both the petitioner and the respondents. The reason that has been adduced for withdrawal of the suit by the petitioner, as it could be seen from the affidavit, is totally unacceptable and it is not well founded. If really, the survey number and the boundaries are not properly given in the plaint, the petitioner could very well approach the Court seeking amendment. Without doing so, the Application filed for withdrawal of suit cannot be permitted. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. Further, it will result in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of cases.

14. Further, as stated already, the petitioner, who could avail the benefit of filing an Application for amendment of the plaint, has failed to exercise the said right and has come forward with the

present Application only with the intention to drag on the proceedings. This cannot be permitted and the Court cannot shut its eyes in such matters.”

12. From the impugned order, it is seen that the learned Judge has not properly appreciated the provisions of **Order 23 Rule 1(3) of C.P.C.**, the said rule reads as follows:

“1(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.”

13. From the reading of the said rule, it is clear that the Court has power to permit the plaintiff to withdraw the suit, if it is satisfied that the suit must fail by reason, if some formal defect or if there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the very same subject-matter of the suit or part of the

claim. The learned Judge has failed to consider the provisions of Order 23 Rule 1(3)(b) of C.P.C. As per the said provision, if the Court is satisfied that there are sufficient grounds, permit the plaintiff to withdraw the entire suit with liberty to file the suit on the very same cause of action. In the present case, petitioner and fifth respondent have stated that the respondents 1 to 4 after commencement of trial have completely destroyed the drainage channel 'K L' marked in the rough sketch by using heavy earth mover. It has been substantiated by the report of the Advocate Commissioner. In view of the same, the petitioner has stated that he has to seek the relief of mandatory injunction as well as declaration and permanent injunction.

14. The learned Judge failed to consider that the respondents 1 to 4 have destroyed the drainage channel with heavy machinery as stated by the Commissioner in the report and blocked the drainage. The denial of title of petitioner and fifth respondent and destruction of drainage channel subsequent to commencement of trial are sufficient grounds for allowing the application for permission to withdraw the suit with liberty to file fresh suit.

15. In view of the above facts and circumstances of the case, the contention of the learned counsel for the respondents 1 and 2 that the petitioner can very well file an application for amendment is without merits. The learned Judge has not properly appreciated the provisions under Order XXIII Rule 1(3)(b) of C.P.C. and committed irregularity.

16. In the result, C.R.P.(PD)No.3990 of 2011 is allowed by setting aside the fair and decretal order dated 08.07.2011 made in I.A.No.377 of 2011. The petitioner and fifth respondent are given permission to file a fresh suit on the same cause of action.

17. As far as C.R.P.(PD)No.4021 of 2011 is concerned, it has been filed challenging the fair and decretal order dated 14.06.2011 made in I.A.No.550 of 2010.

18. Learned counsel for the respondents submitted that the suit has already been dismissed and it is for the petitioner and fifth respondent to file the application to restore the same and sought for permission to withdraw the suit. The civil revision petition was adjourned for the learned counsel for the respondents to produce

the order dismissing the suit. The learned counsel for respondents failed to produce any order substantiating the contention that the suit was dismissed. In view of the same, this order is passed on merits.

19. For the reasons stated above, C.R.P.No.3990 of 2011 is allowed setting aside the impugned order dated 08.07.2011 and I.A.No.377 of 2011 is allowed.

20. In view of the order passed in C.R.P.(PD)No.3990 of 2011, C.R.P.(PD)No.4021 of 2011 is dismissed as no order is necessary. If the petitioner and fifth respondent have filed fresh suit, it is open to them to file application for appointment of Advocate Commissioner, if they so desire or so advised. No costs. Consequently, connected Miscellaneous Petitions are closed.

22.06.2017

Index :Yes/No

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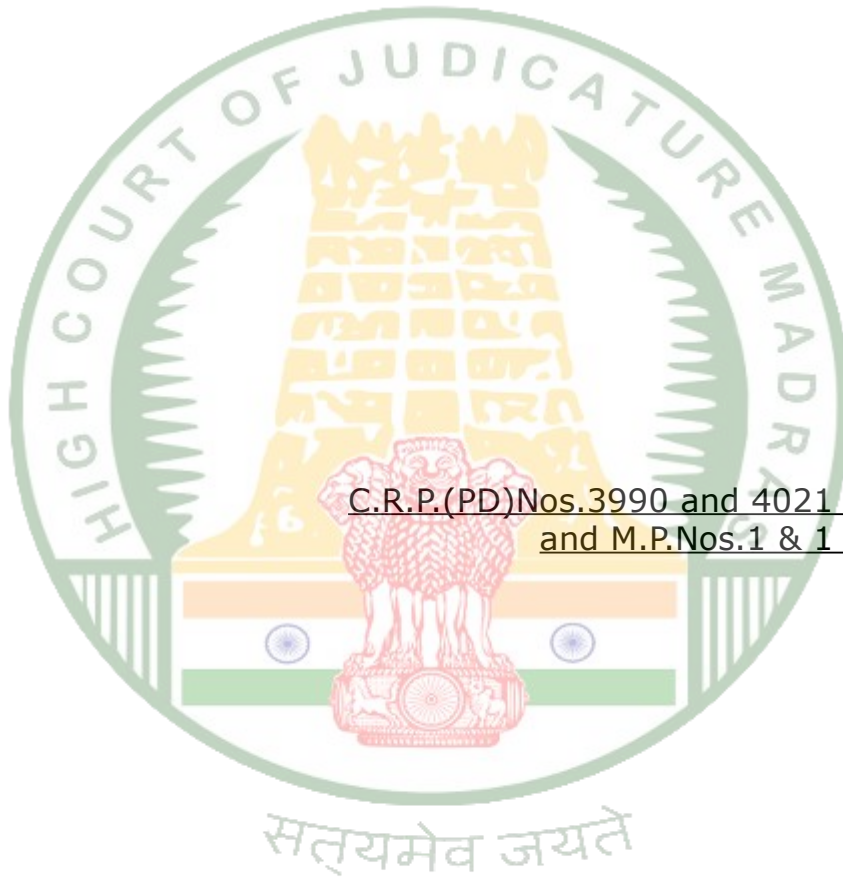
To

II Additional District Munsif Court, Erode.

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V.M.VELUMANI,J.

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