

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.3.2017

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

C.R.P.(PD) No.4092 of 2010 &
MP.No.1 of 2010

Sarangapani (died)

Kanagaraj (died)

1 Dashna

2 Selvi

3 A.Vasanth

4 T.Ambika

5 Indirani

6 Irisammal

7 Sudha

8 Rajamani

9 Sivam

.. Petitioners/Defendants

Vs.

1 Vasantha

2 Velumani

.. Respondents/Plaintiffs

This Civil revision is filed under Article 227 of the Constitution of India, against the order, dated 29.04.2010 passed in I.A.No.67 of 2010 in O.S.No.4 of 1997 on the file of the Additional District Judge, Family court, Pondicherry.

For Petitioners : M/s.P.Dinesh Kumar, J.Jayan
for Mr.D.Ravichander

For Respondents : M/s.Sai & Bharath
M/s.Sampathkumar Associates

ORDER

This is a defendant's revision.

2. The first plaintiff in O.S.No.4 of 1997 claimed that she is the wife of one Irisappan @ Kasinathan. He is a son of 1st defendant and brother of second and third defendants. The second plaintiff is the daughter of the first plaintiff. Irisasppan @ Kasinathan is no more.

3. The plaintiffs instituted the suit in O.S.No.4 of 1997 in the Family Court, Puducherry seeking declaration that they are the legal heirs of late Irisasppan @ Kasinathan, direction to the first defendant to pay Rs.500/- per month to each plaintiff, mandatory injunction directing the defendants to return her 'B' schedule movables and permanent injunction restraining them from encumbering 'C' schedule agricultural lands.

4. The defendants have filed written statement resisting the suit disputing the legal status as claimed by the plaintiffs.

5. Plaintiffs have filed I.A. No.118 of 2009 seeking leave

of the Court to amend the plaint to include the property comprised in S.No.397/1 situate in Irumbai Village, Vanur Taluk in Villupuram District, about which earlier they have no knowledge. This application was opposed to by the defendants.

6. After hearing both sides, the trial Court dismissed the amendment petition. This was also upheld by this Court in C.R.P.No.2290 of 2009 and also by the Hon'ble Supreme Court in SLP No.33862 of 2009.

7. In the circumstances, plaintiffs have filed I.A.No.67 of 2010 under Order XXIII Rule 1 C.P.C. to withdraw the suit with liberty to file a fresh suit on the same cause of action contending that if the suit is allowed to continue, it has to face dismissal for a formal defect that the suit is for partial partition.

8. After hearing both sides, the trial Court accepted the view of the plaintiffs and allowed the petition and granted them the liberty sought for.

9. Thereafter, the plaintiffs have filed O.S.No.19 of 2012 before the Family Court, Puducherry after including the property comprised in Survey No.397/1. It has become a comprehensive suit. In the new suit, the defendants are yet to file their written statement.

10. Aggrieved, the defendants have directed this revision.

11. The learned counsel for the revision petitioners contended that in I.A.No.188 of 2009 the plaintiffs have sought for leave to amend the plaint to include a left out property. This Court and the Hon'ble Supreme Court have not permitted the amendment, in the circumstances, now the respondents could not be granted the liberty. What they could not achieve through an amendment petition, now they want to achieve through a withdrawal petition under Order XXIII Rule 1(3) C.P.C.

12. In this connection, the learned counsel for the revision petitioners cited **Dr.S.Jayakumar and another vs. K.Ramasamy Gounder (2006(2) L.W. 259)** and **Velusamy and**

another vs. Chenniappan and others (2010)5 MLJ 645).

13. On the other hand, the learned counsel for the respondents contended that in I.A.No.188 of 2009, plaintiffs have sought for amendment but in I.A.No.67 of 2010, they have sought for liberty to institute a fresh suit on the same cause of action.

14. The learned counsel for the respondents also contended that on the basis of the opposition of the defendants in the amendment petition in I.A.No.188 of 2009, the plaintiffs have instituted the comprehensive suit in O.S.No.19 of 2012. Now, defendants cannot oppose it.

15. The learned counsel for the respondents also contended that there is a formal defect. In the circumstances, the trial Court had exercised its judicial discretion and gave them the liberty. The impugned order does not suffer from any irregularity or illegality.

16. In this connection, the learned counsel for the

respondents cited **V.Rajendran vs. Annasamy Pandian (2017 SCC Online SC 116)**.

17. I have anxiously considered the rival submissions, perused the impugned order, the materials on record and the decisions cited.

18. Throughout, the defendants are disputing the legal status of the plaintiffs. Actually, the defendants are more concerned with the properties left by late Irisappan @ Kasinathan.

19. The revision petitioners have no objection in plaintiffs withdrawing the suit. Their grave concern is giving them the liberty to file a fresh suit on the same cause of action and vex them.

20. Now, we shall read Order XXIII, Rule 1 C.P.C.:

“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 persons.

(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."

[emphasis supplied]

21. Re-litigation is one of the most abuse of process of the Court. Re-litigation is contrary to justice and public policy (See **Dr.S.Jayakumar and another vs. K.Kandasamy Gounder (2006-2 – L.W. 259)**). In granting liberty under XXIII Rule 1(3) (a) and (b) C.P.C., the Court must also keep these principles in its mind. The plaintiff must establish a 'formal defect' or 'sufficient grounds' to satisfy the Court to grant the liberty.

22. In **V.Rajendra and another vs. Annasamy Pandian (2017 SCC Online 116)** while dealing with a petition under Order XXXIII Rule 1(3) (a) and (b) C.P.C., the Hon'ble Supreme Court observed as under:

"10. As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit

must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a “formal defect” or “sufficient grounds”. The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

11. In ***K.S. Bhoopathy and Ors. vs. Kokila and Ors.*** (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to

permit or encourage abuse of process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

12. In terms of Order XXIII Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word “sufficient grounds”, there are two views: One view is that these grounds in clause (b) must be “*ejusdem*

generis” with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds” in clause(b) should be read independent of the words a ‘formal defect’ and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with “formal defect” envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is ”sufficient grounds”.

23. In **V.Rajendran** (supra), in the plaint, plaintiffs have mentioned survey No.192/9 with patta number. Suit became ripe for trial. Recording of evidence was over. Arguments was over. The suit has been reserved for judgment. At this juncture, the plaintiff came to know that the Survey number has become S.No.192/14 and there was execution of some settlement deed also by the defendants. The plaintiffs have filed a petition under XXIII Rule 1(3) (a) C.P.C. to

withdraw the suit with liberty to file a fresh suit on the same cause of action. The trial Court allowed the petition since the suit has to fail for a formal defect. But the High Court reversed it. However, the Hon'ble Supreme Court took a different view. The Hon'ble Supreme Court did not approve the stand of the High Court that the plaintiffs could have easily corrected the plaint by way of an application under Order VI Rule 17 C.P.C.

24. In **V.Rajendran** (supra), the Hon'ble Supreme Court set aside the High Court's order and restored the Trial Court's order, holding as under:

"13. In the present case, the appellants have filed the suit describing the suit property as Survey No.192/9 but the respondents are said to have transferred the *patta* for the suit property settling as Survey No.192/14. The defect in the survey number of the suit property goes to the very core of the subject matter of the suit and the entire proceedings would be fruitless if the decree holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a "formal defect" within the meaning of Order XXIII Rule 1(3) (a) CPC. That apart the respondents are

said to have executed an Inam Settlement Deed on 21.09.2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No.192/14. We are convinced that the case of the appellants would fall under clause (a) of Rule 1(3) CPC.

25. In the case before us, originally, in 'C schedule', the plaintiffs have included certain items of immovable properties. In their affidavit, they have stated that after filing of the suit, they came to know about the existence of a property comprised in survey No.397/1 and it is also liable for partition. The present suit is also for partition. In such circumstances, the suit is likely to fail for a formal defect, namely, it is for partial partition. In a fresh suit, if the left out properties are also included then it becomes a comprehensive suit.

26 Defendants in their counter filed in the amendment petition in I.A.No.188 of 2009, in para 17, have stated as under:

"17. The respondent further submits that the best course open to the plaintiff is to withdraw the suit and file a fresh suit if at all if

they have any right to claim against anybody much less the defendants. As such the application is liable to be rejected straight away without any consideration."

27. Taking the advise of the defendants, the plaintiffs have filed I.A.No.67 of 2010 to withdraw the suit with liberty to file a fresh suit on the same cause of action. Accordingly they have filed a comprehensive suit. Now, the defendants cannot say otherwise. It is blowing hot and cold at the same time. The revision petitioners seems to have double tongue. Further, the contention that the plaintiff could have filed an amendment petition, has been negated by the Hon'ble Supreme Court in **V.Rajendran** (supra).

28. In view of the factual matrix in the present case and in view of the decision of the Hon'ble Supreme Court in **V.Rajendran** (supra), the decision of this Court in **Velusamy and another vs. Chenniappan and others (2015) 5 MLJ 645** that after the dismissal of amendment petition by this Court which was upheld by the Hon'ble Supreme Court in an SLP liberty under Order XXIII, Rule 1(3), CPC cannot be given is not applicable to this case.

29. Plaintiffs have sought for the leave of the Court to withdraw the suit. Court will grant such leave (See Order XXII, Rule 1 C.P.C.) Defendants cannot object to this. There is no difficulty in it. The problem arises only when the plaintiffs seek liberty, leave to come back to the Court to fight against the defendants with fresh materials. In other words, liberty to institute a fresh suit on the same cause of action.

30. In the facts and circumstances of this case, the plaintiffs have demonstrated that the suit will fail because of a formal defect. They have given satisfactory reasons for seeking the liberty. The principles laid down by the Hon'ble Supreme Court in **V.Rajendran** (supra) squarely applies to the facts of this case. Thus, the impugned order of the of the trial Court cannot be faulted.

31. In view of the foregoings, ordered as under:

(i) This revision fails and it is dismissed.

(ii) The trial Court will give reasonable time to the defendants to file their written statement.

(iii) After the suit becomes ripe for trial, the trial Court shall expeditiously try and dispose of the suit. No costs.

14.3.2017

Speaking/Non Speaking order
Index : Yes / No
Internet : Yes / No
vaan

DR.P.DEVADASS, J.

vaan

To

The Judge,
Family court,
Pondicherry.

Copies to:

- 1.The Principal District Judge,
Puducherry.
- 2.The Registrar (Judicial),
High Court, Madras.
- 3.The Assistant Registrar,
(Appellate side)
High Court, Madras
- 4.The Director,
Tamilnadu State Judicial Academy,
Greenways Road,
R.A.Puram,
Chennai – 28.

C.R.P.(PD) No.4092 of 2010 &
MP.No.1 of 2010

14.3.2017

<http://www.judis.nic.in>