

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD) No.57 of 2006
& C.M.P.No.438 of 2006

Nagammal

.. Petitioner

Vs.

1. Saya
2. Palani
3. Kittan
4. The Commissioner,
Coimbatore Corporation,
Big Bazaar Street, Coimbatore

(Respondents 2 and 3 are given up,
vide Memo dated 12.07.2017, ordered today)

.. Respondents

PRAYER: Civil Revision Petition filed under Section 115 CPC, against the order dated 03.10.2005 in I.A.No.437 of 2000 in A.S.No.12 of 2000 on the file of First Additional District Judge, Coimbatore.

For Petitioner
For R1

: Mr.C.R.Prasanan
: Mr.Senthilkumar
for Mr.R.N.Amarnath

RR2 & 3
R4

: Given up
: Mr.Vinoth Raj
for Mr.R.Sivakumar

ORDER

The Civil Revision Petition has been filed against the order dated 03.10.2005 in I.A.No.437 of 2000 in A.S.No.12 of 2000 on the file of First Additional District Judge, Coimbatore

2. The petitioner is the plaintiff in O.S.No.1448 of 1991 filed on the file of III Additional District Court, Coimbatore and appellant in A.S.No.12 of 2000 filed on the file of I Additional District Judge, Coimbatore and the respondents are the defendants in O.S.No.1448 of 1991 and respondents in A.S.No.12 of 2000.

3. The petitioner filed the suit for permanent injunction in respect of the A schedule property and recovery of possession in respect of the B schedule property. The respondents filed written statement and contested the suit. The said suit was dismissed by the judgment and decree dated 05.10.1999. The petitioner filed an appeal in A.S.No.12 of 2000 against the judgment and decree. In the said appeal, the petitioner filed I.A.No.437 of 2005 for permission to withdraw the suit O.S.No.1448 of 1991 on the file of

III Additional District Munsif, Coimbatore and to file a fresh suit on the same cause of action under Order 23 Rule 1 of CPC.

4. According to the petitioner, the learned Trial Judge dismissed the suit for non-joinder of necessary and proper party. In view of the same, the petitioner is seeking liberty to file a fresh suit for declaration on the same cause of action, by impleading all the parties and to include relief of declaration.

5. The respondent filed counter affidavit and opposed the said application on the ground that the Trial Court dismissed the suit not only on the ground of non-joinder of necessary and proper party, but also considering the facts that there are other legal heirs for her father-in-law and also she failed to prove that she was in possession in respect of the A-schedule property and title in respect of the B-schedule property.

6. The learned judge considering the averments in the affidavit, counter affidavit, materials on record, judgment of the trial court in O.S.No.1448 of 1991, judgment relied on by the counsel for the petitioner and the arguments of the parties, dismissed the application.

7. Against the order of dismissal dated 03.10.2005 made in I.A.No.437 of 2005 in A.S.No.12 of 2000 on the file of I Additional District Judge, Coimbatore, the present CRP is filed.

8. The learned counsel for the petitioner contended that the petitioner has made out a case for withdrawal of the suit with liberty to file fresh suit on the same cause of action, as the suit has been dismissed for non-joinder of proper and necessary parties. In the interest of justice, liberty ought to have been given to file fresh suit for declaration by impleading the necessary and proper party. The learned first appellate Judge failed to see that the respondents have admitted that the petitioner has a share in the suit property. The learned first appellate judge did not appropriately appreciate the decision relied on by the petitioner and dismissed the application. If a fresh suit is filed and an Advocate Commissioner is appointed to measure the property and if he files a report, the entire issue will be resolved. Learned counsel for the petitioner relied on the following judgments in support of his contentions:

- (i) T.K.Prahawati v. C.P.Kunhathabi Umma (AIR 1981 Kerala 170)
- (ii) Baniram and others v. Gaiind and others (AIR 1982 SC 789)

(iii) Kokila and another v. K.S.Bhoopathy and five others (1998 (III) CTC 16)

(iv) Ammini Kutty v. George Abraham (AIR 1987 Kerala 246)

(v) Rajamanickam v. P.Dhandapani and others (2013 (5) CTC 385)

9. The learned counsel appearing for the respondents 1 and 4 has submitted that the petitioner has not made out any case for permission to withdraw the suit with liberty to file a fresh suit. The petitioner did not approach the Court with clean hands, but has made false averments. The petitioner has not proved that she is in possession of the A-schedule property and title in respect of the B-schedule property. If liberty is given to the petitioner to withdraw the suit O.S.No.1448 of 1991 with liberty to file fresh suit with same cause of action, the respondents will be deprived of their valuable right accrued to them as per the judgment passed in the said suit.

10. Heard learned counsel appearing for both sides and perused the materials available on record.

11. The petitioner had filed I.A.No.437 of 2005 in A.S.No.12 of 2000

to withdraw the suit O.S.No.1448 of 1991 with liberty to file fresh suit with same cause of action. According to the petitioner, the suit was dismissed for non-joinder of necessary and proper party. In view of the same, the petitioner is entitled to withdraw the suit with liberty to file fresh suit by including the prayer for declaration. The contention of the petitioner is without any merits.

12. Order 23 Rule 1(3) of Civil Procedure Code reads as follows:

"(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. As per the above Rule, the Court has power to give permission to the plaintiff to withdraw the suit, if there is any technical defect, if the Court is satisfied that there is sufficient ground for granting such permission. In the present case, the petitioner has come up with a case that

her husband is the legal heir of her father-in-law, her husband has inherited the property, they are in possession and enjoyment of the A-schedule property and after his death, the petitioner is in possession of A-schedule property and she is seeking recovery of possession of B-schedule property. It is proved in the Trial Court that there are other legal heirs to her father-in-law. The petitioner is not in possession of A-schedule property and she failed to prove title to B-schedule property. In view of the above findings, it cannot be stated that the suit was dismissed only on the ground of non-joinder of necessary and proper party and the same is only a formal defect.

14. The learned first Appellate Judge, considering all the above materials on record and the judgment relied on by the parties, has held that the petitioner is not entitled to get permission to withdraw the suit in O.S.No.1448 of 1991, with liberty to file fresh suit on the same cause of action. The contention of the learned counsel for the respondents 1 and 4 is that if liberty is given to the petitioner, it will amount to re-agitating the entire issue afresh and respondents would be deprived of their valuable right accrued to them in O.S.No.1448 of 1991.

15. The judgments relied on by the learned counsel for the petitioner

are distinguishable on facts and the same will not apply to the facts of the present case.

16. On considering the above facts, it is clear that there is no formal defect in the suit and there is no sufficient ground for grant of relief to the petitioner to withdraw the suit O.S.No.1448 of 1991 with liberty to file fresh suit. Hence, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed. As the appeal is of the year 2000, the learned Judge is directed to dispose the appeal within three months from the date of receipt of a copy of this order, without undue influence of the order passed in this Civil Revision Petition.

12.07.2017

Speaking Order/Non-speaking Order

Index :Yes/No

pvs

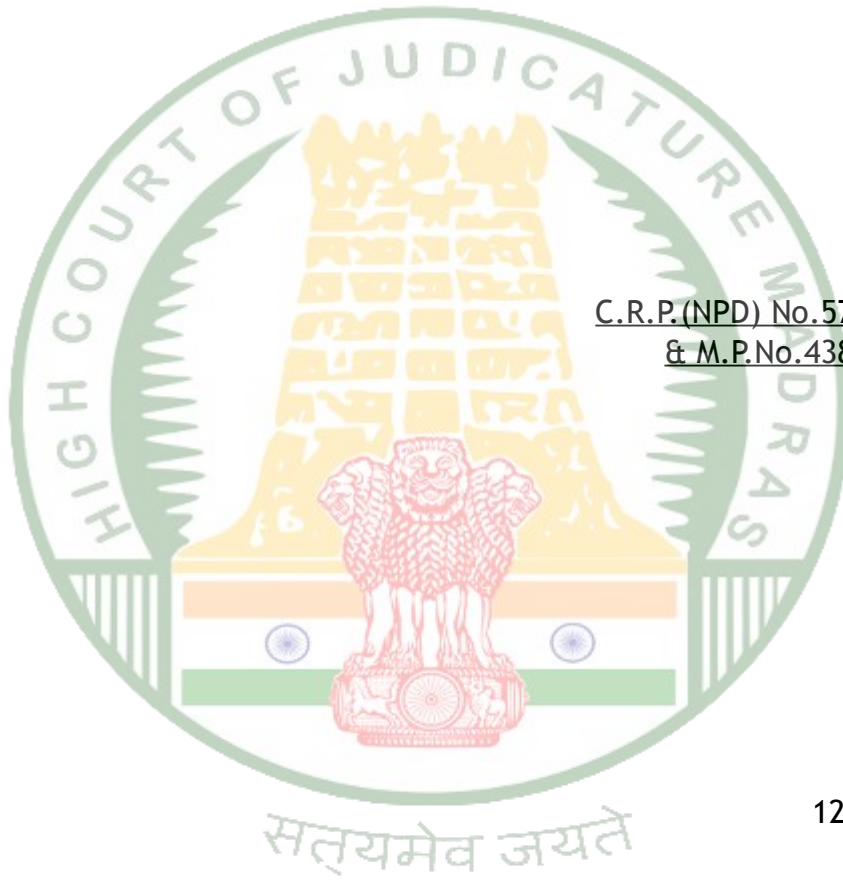
To

The Commissioner,
Coimbatore Corporation,
Big Bazaar Street, Coimbatore

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V.M.VELUMANI, J.

pvs



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