

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2017

CORAM :

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

Civil Revision Petition (NPD) No.719 of 2010
and M.P.Nos.1 and 2 of 2010

1.Sondaram
2.Amirtham
3.Paratham
4.Santhakumar
5.Jeevan
6.Vales
7.Krishnan

.. Petitioners

M.Samiappan

.. Respondent

Revision filed under Article 227 of Constitution of India against the fair and decretal order dated 18.12.2009 in I.A.No.1017 of 2009 in A.S.No.111 of 2007 on the file of the Additional District Court cum Fast Track Court No.1, Erode.

For Petitioners : Mr.A.K.Kumaraswamy

For Respondent : Mr.V.Raghavachari

ORDER

This revision is directed against the order of the learned Additional District Judge, Fast Track Court No1, Erode made in I.A.No.1017 of 2009 in A.S.No.111 of 2007, dated 18.12.2009, allowing the petition filed by the respondent under Order 23, Rule 1 read with Section 151 CPC on condition to pay a sum of Rs.1000/- to the petitioners on or before 29.12.2009, failing which the petition shall stand dismissed. The petitioners herein are the respondents in the appeal.

2. I heard Mr.A.K.Kumaraswamy, learned counsel for the petitioners and Mr.V.Raghavachari, learned counsel appearing for the respondent and perused the entire records.

3. The respondent has filed the appeal against the judgment and decree dated 20.4.2007 made in O.S.No.160 of 2002 on the file of the Additional District Munsif, Erode, dismissing the suit.

4. Pending appeal, the respondent, who is the plaintiff in O.S.No.160 of 2002, filed petition being I.A.No.1017 of 2009 under

Order 23, Rule 1 CPC seeking permission of the Court to withdraw the suit in O.S.No.160 of 2002 alleging that after filing of the appeal, the respondent found that he had committed mistake in the measurement of the suit property. In order to amend the plaint, the respondent had earlier filed I.A.No.183 of 2008 to amend the description of the property in the plaint schedule and the same was dismissed. Aggrieved by the dismissal order, the respondent filed CRP.Nos.896 and 897 of 2009 and the same were also dismissed by the High Court. It is alleged that since the amendment petition was dismissed by the Court, the respondent was advised to withdraw the suit with liberty to file a fresh suit on the same cause of action. According to the respondent, due to inadvertence, the description of the plaint schedule has been wrongly given. Therefore, the respondent sought permission of the Court to withdraw the suit with liberty to file fresh suit on the same cause of action.

5. Resisting the petition, the 3rd petitioner filed the counter-affidavit stating that only after hearing the parties, the trial Court had dismissed I.A.No.183 of 2009 and the same was also confirmed by the High Court in C.R.P.No.897 of 2009. The respondent has also filed I.A.No.83 of 2008 to appoint an Advocate Commissioner to measure

the suit property and the same was also dismissed. According to the petitioners, the present petition is one more delaying tactics in order to drag on the proceedings.

6. Upon consideration of the rival submissions, the trial Court allowed the petition on condition to pay sum of Rs.1000/- by the respondent to the petitioners. Aggrieved by the said order, the petitioners have preferred the present Civil Revision Petition.

7. The learned counsel for the petitioners submitted that the trial Court failed to appreciate the scope and substance of Order 23, Rule 1 CPC, while granting permission to the respondent to withdraw the suit at the appellate stage and to file a fresh suit on the same cause of action. He submitted that the trial Court failed to note that if there is a mistake in giving the measurement in feet instead of links, the proper remedy is only to file a petition to amend the pleadings and there cannot be a new suit on the same cause of action.

8. Per contra, the learned counsel for the respondent submitted that in view of the mistake that crept in qua the description of the suit property, it has necessitated the respondent to file such application for withdrawal of the suit at the appellate stage. The learned counsel

further submitted that if the suit is withdrawn with liberty to file a fresh suit, no prejudice will be caused to the petitioners and the trial Court has rightly allowed the petition, however, subject to payment of cost.

9. On a perusal of the typed set of papers, I find that the respondent herein filed O.S.No.160 of 2002 for permanent injunction restraining the petitioners herein from interfering with the respondent's peaceful possession and enjoyment of the suit property. Similarly, the petitioners have also filed O.S.No.172 of 2002 and both the suits were tried together and a common judgment was passed. Aggrieved by the dismissal of the suit O.S.No.160 of 2002, the respondent filed the appeal suit being A.S.No.111 of 2007.

10. In the order under revision, the trial Court held that while dismissing the suit in O.S.No.160 of 2002, the trial Court observed that the description of the suit property is incorrect. Therefore, in the interest of justice, it would be appropriate to permit the respondent to withdraw the said suit and file a fresh suit on the same cause of action. Since the application seeking to withdraw the suit has been filed belatedly, it would be appropriate to allow the petition subject to payment of costs.

11. In *Konkan Trading Company v. Suresh Govind Tarkaraj*, (1986) 2 S.C.C. 424, the Hon'ble Supreme Court was confronted with an order passed under O.23, Rule 1, C.P.C. directing the plaintiff to pay the defendants cost within a reasonable time to be fixed by the Court before the second suit was filed and that if the plaintiff failed to comply with the said direction it would be open to the Court to reject the plaint. The costs were ordered to be deposited as a condition precedent before the institution of the next suit and hence as a result of the default, it was contended that the second suit was not properly instituted. On a consideration of the facts and circumstances, the Hon'ble Supreme Court held that there was no warrant for taking a hyper-technical rigid view which would result in denying the person access to justice and therefore, when it is possible to take a liberal view, which promotes the ends of justice, such a view should be adopted.

12. In the case on hand, in the interest of justice, the Court below passed the order which is under challenge and this Court finds no justification in taking a hyper-technical rigid view that would result in denying access to justice to a person. In the light of the decision referred supra, this Court finds no reason warranting interference with the order passed by the Court below. Permission to withdraw the suit

at the appellate stage would only be refused if it would have the effect of prejudicing or depriving any right which became vested in the defendants or had accrued to them by reason of the findings recorded by the trial court. In the case on hand, no reason has been adduced to show that the withdrawal would affect or prejudice the rights vested in the petitioners.

13. In the result, this revision is dismissed, confirming the order dated 18.12.2009 in I.A.No.1017 of 2009 in A.S.No.111 of 2007 on the file of the learned Additional District Court cum Fast Track Court No.1, Erode. No costs. Consequently, connected miscellaneous petitions are closed.

05.01.2017

Note: Issue order copy on 10.04.2018

vs

Index : Yes

Internet : Yes

To

The Additional District Court-cum-Fast Track Court No.I, Erode.

M.V.MURALIDARAN,J.

VS



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