

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2017

CORAM:

THE HON'BLE DR.JUSTICE P.DEVADASS

CRP(NPD). No.4195 of 2013 and M.P.No.1 of 2013

1.Valliammai
2.Annamalai
3.Subramani

.... Petitioners/Petitioners/Plaintiffs

Vs.

Palanimalai

.... Respondent/Respondent/Defendant

Civil Revision Petition filed under Article 227 of the Constitution of India against the Fair and Decretal Order dated 05.1.2013 made in I.A.No.386 of 2012 in O.S.No.261/2011 on the file of Principal District Munsif Court, Ulundurpet.

For Petitioner	: Mr.C.Munusamy
For R1 & R2	: Mr.K.N.Pandian

O R D E R

The plaintiffs in O.S.No.261 /2011 on the file of the Principal District Munsif, Ulunderpet, Villupuram District are the revision petitioners.

2. The plaintiffs tracing their relationship to certain persons, who are also related to the defendants sought for a declaration with their 1/4th right in 9 items of property mentioned in 'A' Scheduled property and 3 items mentioned in 'B' Scheduled property and also their right to bail water from the nearby kuttai. The properties are situate in Adanur village in Ulundurpet Taluk in Villupuram District. The defendant filed written statement resisting the suit that already based on a oral partition were partitioned and item No.10 is in the enjoyment of the defendant's side.

3. Subsequently, the plaintiffs have filed I.A.No.386 of 2012 in the suit under Order XXIII Rule 1 (3) of CPC seeking permission of the Court to withdraw the suit with liberty to file fresh suit on the same cause of action. The plaintiffs have given two reasons, namely, the boundaries of the suit properties has not been given in the plaint's schedule and three items of properties are to be included in the suit.

4. Seeking liberty is opposed by the defendant since no details of the three items of properties has been given and plaintiffs can very well amend the plaint and rectify the said defects.

5. Upon hearing both sides, the trial Court accepted the view of the defendant that the plaintiffs can go for amendment, refused liberty and also dismissed the petition.

6. Aggrieved, the plaintiffs have directed this revision.

7. The learned counsel for the revision petitioners contended that the three items of properties are required to be included and further in this property case, boundaries of suit properties need to be given otherwise it lead to complications and create confusion with regard to identity of property. Liberty to file a comprehensive suit is sought for.

8. The learned counsel for the revision petitioners in this connection cited **V.RAJENDRAN & ANOTHER VERSUS ANNASAMY PANDIAN [2017 SCC online SC 166= 2017 1 CTC 762 = 2017 1 SCALE 694=CDJ 2017 SC084]**

9. On the other hand, the learned counsel for the respondent contended that the details of three items of property to be included has not been furnished. The boundaries and the said 3 items can be

included in the suit by way of an amendment. **V.RAJENDRAN** (supra) differ in factual matrix and thus, it is not applicable to the present case.

10. I have given my anxious consideration to the rival submissions, perused the impugned order and the materials on record and the decision cited.

11. Order 23 Rule 1 speaks about withdrawal wholly and partly.

It reads as under:

"1. 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 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 person.

(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)

12. Asking permission to go away from the Court, in other words, withdrawing the suit will not pose any problem. Further the plaintiff is the *dominant litus*. He can go out of the Court. There is no point in asking him to stick on to the court proceedings. In fact defendant will be happy when the plaintiff goes away from the litigation. The problem arises only when the plaintiffs seek liberty or leave to come back to the Court to fight and vex the defendant. Courts must be cautious. Court proceedings cannot be misused or abused. It is against public time and justice. Persons cannot be permitted to engage in endless meaningless litigation. Embroingless them in a quick sand is to be avoided because it is a snake pit.

13. Seeking liberty signifies permission to file fresh suit on the same cause of action. It is a permission to file the suit again after

correcting the defects. Order XXIII Rule 3(1)(a)(b) of C.P.C contemplates two circumstances under which such liberty can be given. Firstly, if the suit is allowed, it will fail on account of certain 'formal defect'. Secondly, for 'sufficient grounds'. The petitioner must satisfy the Court that his case falls under either one of the above clause.

14. In **V.RAJENDRAN** (supra), the ambit and purport and scope of Order XXIII Rule 1(3) CPC has been explained. In Paragraph 10, 11 of **V.RAJENDRAN** (supra), the Hon'ble Supreme Court observed as under:

'10. In **K.S Bhoopathy and Ors. v. Kokila and Ors. 2000 (3) R.C.R.(Civil) 195: 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.

11. 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".'

15. In **V.RAJENDRAN** (supra), the suit was ripe for trial. Evidence was recorded. The case was fully argued. It was reserved for Judgment. At this juncture, the plaintiffs came to know that there was change in the survey number and there was creation of a settlement deed and the plaintiffs filed a petition under Order XXIII Rule 1(3) CPC seeking permission to withdraw the suit and liberty to file fresh suit on the same cause of action. The trial Court satisfied with the reasons stated and thus, allowed the petitioner. However, the High Court reversed it. The matter came to the Hon'ble Supreme Court. The Supreme Court set aside the High Court's Judgment and restored the

trial Court's order after observing as under:

“12. 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.”

16. In **V. RAJENDRAN** (supra), the Hon'ble Supreme Court also disagreed with the view of the High Court that for the defects stated, the plaintiffs could have very well filed an amendment petition and

they need not have filed the withdrawal petition.

17. Now, we will come back to our case. In this case, the plaintiffs have sought for declaration as to their 1/4th right in 'A' and 'B' schedule properties. A reading the pleadings shows that the crux of the matter is seeking partition of the share. As many as 12 items of properties are mentioned. In a civil litigation involving relief with respect to immovable properties, description of the suit properties with boundaries, mentioning the survey number, identity of the properties are very important otherwise it will lead to some complications, difficulties will arise in executing the decree. It is appropriate to note the following observations made in **V.RAJENDRAN** (supra).

“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.”

18. The plaintiffs should seek relief with respect to all the properties in which they are having a right. There are occasions where after filing of the suit, plaintiffs may come across that some more properties are also available. In such circumstances, plaintiffs cannot be asked to forget those items. In such circumstances, non inclusion of such left out items can itself be taken as a defence, the suit may be challenged as partial relief, incomplete. It will also lead to some complications. If all the items are included in the suit, suit becomes a comprehensive suit.

19. If the defects of the left out items are given in the withdrawal petition it is good. If it is not given it is not bad because when fresh suit is filed, the plaintiff is bound to furnish full description

of the said items.

20. In view of the foregoings, the plaintiffs have made out a case for granting the liberty to file fresh suit on the same cause of action.

21. Ordered as under:

(i) This revision succeeds.

(ii) The impugned order passed by the learned Principal District Magistrate, Ulundurpet in I.A. No.386/2012 is set aside.

(iii) The said I.A stands allowed.

(iv) Plaintiffs are permitted to withdraw the suit with liberty to file fresh suit on the same cause of action

(v) The plaintiffs shall institute the said fresh suit within four months from the date of receipt of a copy of this order.

(vi) Plaintiffs shall deposit a cost of Rs.10,000/- in the trial Court within four weeks from the date of receipt of a copy of this order.

Dr.P.DEVADASS,J.

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(vii) On deposit, the respondent shall be permitted to withdraw the amount.

(viii) Consequently, connected miscellaneous petition is closed.

05.04.2017

Index : Yes/No
Internet : Yes/No
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To

1. The Principal District Judge,
Villupuram.

2. The Principal District Munsif Judge,
Ulundurpet.

CRP(NPD). No.4195 of 2013