



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.01.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P (MD) No.64 of 2017 (PD)

and

C.M.P (MD) No.227 of 2017

A.Saminathan .. Revision Petitioner/ Petitioner/
Plaintiff

Vs.

A.Velu ...Respondent/ Respondent/
Defendant

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India, to allow this Civil Revision Petition and thereby to set aside the Order of the Learned Principal District Munsif, Manamadurai passed in I.A.No.283 of 2016 in O.S.No. 125 of 2015 on his file dated 24-11-2016 and allow the same.

For Petitioner : Mr. S.Parthasarathy

ORDER

This Civil Revision Petition is filed to set aside the Order of the learned Principal District Munsif, Manamadurai passed in I.A.No.283 of 2016 in O.S.No. 125 of 2015, dated 24.11.2016.

2. The petitioner is the plaintiff. The respondent is the defendant. The petitioner filed O.S.No.125 of 2015 on the file of the Principal District Munsif, Manamadurai for permanent injunction.

3. According to the petitioner, the respondent entered into an agreement of sale with the petitioner on 17.03.2000 to sell his property for total sale consideration of Rs.1,35,000/-. The petitioner paid a sum of Rs.1,34,000/- as advance. The respondent handed over the possession on the same day. Subsequently, the petitioner paid the balance sum of Rs.1,000/-. The respondent promised to execute the sale deed, but, failed to do so and interfered with the possession of the petitioner. Hence, he filed a suit for permanent injunction. After filing suit, the petitioner issued notice dated 12.10.2015. The respondent filed written statement and contesting the suit. When suit was posted for trial, the



petitioner filed I.A.No. 283 of 2016 for permission to withdraw O.S.No.125 of 2015 under Order 23 Rule 151 of CPC, with liberty to file suit for specific performance before the Sub Court, Sivagangai on the same cause of action.

4. The respondent filed counter and opposed the said application. The respondent denied the execution of agreement of sale dated 17.03.2000 and stated that petitioner has created document only for the purpose of filing of the suit. Notice dated 12.10.2015 was issued during pendency of the suit. After respondent entered appearance in the present suit, no cause of auction survives for the petitioner to file fresh suit on the same cause of action.

5. The learned Judge considering the averments in the affidavit and counter affidavit held that petitioner has not pointed out any formal defect or if there is sufficient reason for granting permission to withdraw the suit with liberty to file, on the same cause of action under Order 23 Rule 151 of CPC. The learned Judge also held that without liberty to file suit, permitted to withdraw the suit.

6. Against that order, the present Civil Revision Petition is filed.

7. The learned counsel appearing for the petitioner submitted that the learned Judge failed to consider the provisions under Order 23 Rule 151 of CPC in proper perspective and not correct in granting permission to withdraw the suit without liberty to file fresh suit for cause of action. The learned Judge either allowed or dismissed the application in toto and failed to exercise his power conferred on him in proper perspective by granting leave to withdraw the suit without liberty to file fresh suit on the same cause of action.

8. The learned counsel for the petitioner relied on the Judgment reported in 2016(1) CTC 700 (Rajasundari Vs. Gowri @ Avaduaammal), wherein paragraph No.15 it has been held as follows:-

"15. Thus, it has been consistently held an Application under Order 23, Rule 1(3) CPC is an indivisible whole and if the Plaintiff is not allowed liberty to institute a fresh suit, the pending suit should not be dismissed; but the Application should be refused altogether and that the suit should be retained for Trial. The Trial Court was not right in partly allowing the Application to an extent of permitting the Plaintiff withdrawing the suit and refusing to grant liberty to file a fresh suit. Having declined to grant



leave to file a fresh suit on the same cause of action, the Trial Court ought to have dismissed the application in entirety. The order of the learned Judge declining to grant the leave is justified since the Application has been filed when the Suit was in part-heard stage. However, learned Judge ought not to have dismissed the Suit. Hence, the Application in I.A.No.10477 of 2004 is to be dismissed in toto."

9. I have heard the learned counsel appearing for the petitioner and perused the materials available on record.

10. The plaintiff is entitled to withdraw the suit with liberty to file fresh suit on the same cause of action, if there is any formal defect in the plaint due to which, party may succeed in the suit or there are sufficient reason for granting such permission. In the present case, the petitioner has not stated that there is formal defect in the plaint. He has also not given any reason for permission to be given to withdraw the suit and file fresh suit on the same cause of action. The present suit is for permanent injunction and the same is filed on the averments that the respondent is trying to interfere with the peaceful possession of the petitioner. The cause of action for the suit for specific performance is refusal on the part of the respondent to perform his part of contract to execute the sale deed. The cause of action for both the suits are different.

11. The learned Judge has considered these facts and refused to grant permission to the petitioner to file fresh suit on the same cause of action. From the judgment referred to above it is clear that the order of the learned Judge declined to grant leave is justified and learned Judge ought to have dismissed the application in entirety. In the circumstances, the grievance of the petitioner is that the learned Judge erred in granting permission to withdraw the suit without liberty. It is open to the petitioner to withdraw or proceed with the suit.

12. With the above observation, the Civil Revision Petition is disposed of. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS II)

/True Copy/



To

The Principal District Munsif, Manamadurai

+1cc to Mr.S.Parthasarathy, Advocate sR.NO.2461

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