



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.05.2017
(Reserved on 27.04.2017)

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CORAM :

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CRP(PD) (MD) No.960 of 2017

and

CMP(MD) No.4232 of 2017

Mohammed Moosa

... Petitioner

vs.

1)Muthaiah

2)Nagarathinam

3)Raja Mohamed

4)Ramjan Beevi

... Respondents

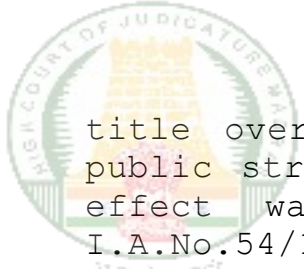
Petition filed under Article 227 of the Constitution of India, challenging the fair and executable order dated 23.03.2017 passed in I.A.No.289 of 2017 in O.S.No.70 of 2003 on the file of the District Munsif Court, Thirumangalam.

For Petitioner : Mr.T.R.Jeyapalam

ORDER

The revision petitioner herein is the plaintiff. In his suit O.S.No.70/2003, on the file of the District Munsif, Thirumangalam, the relief sought is declaration of title and consequential mandatory injunction regarding the suit scheduled property and removal of superstructure put up in the suit property. After contesting the suit for 13 years, after examination of DW4 and when the trial is about to be completed, the plaintiff realised certain defect in his suit. Realising that if the defect is not cured, it will lead to dismissal of the suit has filed I.A.No.289/17 under Order 23 Rule 1(3) CPC to withdraw the suit with liberty to institute fresh suit.

2.The Trial Court considering the nature of the relief sought and the fresh facts put forth for seeking liberty to withdraw and institute fresh suit has held that the defect in the plaint is not a formal defect which could be cured by permitting to withdraw and file fresh suit. While in the plaint, the plaintiff has averred that he is the owner of the suit property upon which the defendants have encroached and put up construction illegally which warrants declaration of title and mandatory injunction to remove the superstructure, contrary to that plea, he now concedes his



title over the property and averred that the suit property is public street. His earlier attempt to amend the plaint to that effect was dismissed. Suppressing the dismissal of his I.A.No.54/14 to amend the plaint, the present I.A.No.289/17 is filed to withdraw the plaint and file fresh suit.

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3. Aggrieved by the dismissal of the interlocutory application, the present revision petition is filed by the plaintiff on the ground that the impugned order is contrary to the law and the dictum of the High Court. Liberty to file fresh suit withdrawing the present suit can be granted at any stage including the appellate stage if the present suit suffers from formal defect. In this case, the cause of action is same. Due to technical impediment, the plaintiff may lose his case. Hence, leave to withdraw and file fresh suit is just and necessary.

4. In support of his submission, the learned counsel for the revision petitioner relied upon the following judgments:-

(i) In **V. Balan alias V. Balasubramanian vs. R.S. Rajan and A.D. Ramasamy**, reported in **1991 (2) LW 193**, the Madras High Court has held as under:-

"The relief prayed for by the petitioner in the suit is one of specific performance of an oral agreement for reconveyance of the property entered into on 26.1.1978 and 1.4.1982. Admittedly, in the plaint, the petitioner did not aver his readiness and willingness to perform his part of the contract and under S. 16(c) of the Specific Relief Act, under those circumstances, specific performance of a contract cannot be enforced in favour of the petitioner. It is also not in dispute that the petitioner filed an application seeking an amendment of the plaint to include an averment relating to readiness and willingness; but that application was dismissed and this dismissal was affirmed by this Court as well as the Supreme Court. In other words, the attempt made by the petitioner to cure a formal defect had left the defect more formal than what it had been to begin with. In the absence, therefore, of an averment in the plaint about the willingness of the petitioner to perform the terms of the contract or even an averment to the effect that he has been ready and willing to perform and terms of the contract, the suit has necessarily to fail owing to this defect, which as pointed out earlier, really had later become more formal than when the institution of the proceedings started. The court below has embarked upon a consideration of the later suit being out of time, if the present suit is permitted to be withdrawn on the ground of a formal defect. That, however, does not arise at this stage. When once the attempt of the petitioner who sought an amendment of the plaint had failed, in view of S. 16(c) of the Specific Relief Act, the suit has necessarily to



fail owing to the formal defect in the plaint of the absence of an averment of readiness and willingness and that would certainly justify the petitioner to seek a withdrawal of the suit already instituted with liberty to institute another suit on the same cause of action. The civil revision petition is allowed and the order of the court below is, therefore, set aside.''

(ii) In **Executive Officer, Arthanareswarar Temple vs R. Sathyamoorthy and others**, reported in **1999 (3) SCC 115**, the Hon'ble Supreme Court held as under:-

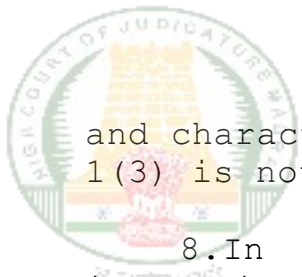
'It is true that in a large number of cases decided by the High Courts, it was held while dealing with applications under Order 23, Rule 1, CPC, that if an appeal was preferred by an unsuccessful plaintiff against the judgment of the trial Court dismissing the suit and if the plaintiff appellant wanted to withdraw not only the appeal but also the suit unconditionally, then such a permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial being nullified by such withdrawal. On the other hand, if any such findings by the trial court in favour of the defendant would get nullified, such permission for withdrawal of the suit should not be granted.''

5. The facts of the present case are not akin to the facts of the cases cited above. Under Order 23 Rule (1)(3) CPC, leave to withdraw a suit with liberty to institute a fresh suit can be granted under the following circumstances,

- a) the suit will fail by reason of some formal defect or;
- b) if there is sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of the claim.

6. The plaintiff's case as of now is that the suit property is his own property and he is using it as private street, hence, he seeks declaration of title and removal of encroachment. After 13 years, he now concedes that the suit property is public street and for that purpose, he has initially sought for amendment of the plaint by filing I.A.No.54/14. Having failed to get his pleadings amended, he has now sought the leave of the Court to withdraw the suit and file a fresh suit.

7. If the suit property is a public street and if there is any illegal encroachment by the defendants or any other person, it is open for the public who use the pathway to seek redressal before appropriate forum. It is needless to grant leave to the revision petitioner who has laid the present suit on the premise that the suit property is his personal property. The change in his stand is not a formal defect but a substantial change in the very nature



and character of the suit. Hence, the first limb of Order 23 Rule 1(3) is not satisfied in this case.

8. In so far as the second limb of the said Rule, it is imperative that the subject matter in the suit sought to be withdrawn shall be the same for the fresh suit to be filed. In the light of the pleadings, the nature of the suit property which is so far claimed to be a private street is now conceded to be a public street. Thus, when the nature of the subject matter is not the same, granting leave under Order 23 Rule 1(3)(b) CPC to institute fresh suit does not arise. As a consequence, the impediment under Rule 1(4) of Order 23 CPC does not attract.

9. Therefore, there is no merit in this Civil Revision Petition, hence, it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Protocol)

/True copy/

Sub Assistant Registrar

To:

The District Munsif,
Thirumangalam.

NBI

PSM/JC/SAR4/07.06.2017/4P/2C

Order made in
CRP (PD) (MD) No. 960 of 2017
11.05.2017