

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.2920 of 2015
and M.P.No.1 of 2015

1.M.Sai

2.Durai Sathish

.. Petitioners

Vs.

Shree Dharmaraja Kovil Trust

Rep by its Trustees

1.Ekambara Chettiyar

2.Sivasena Chettiyar

3.Sankar Chettiyar

No.27/59, Rajaji First Street,

Stuartpet,

Arakkonam - 1

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India to set aside the fair and decretal order dated 10.06.2015 made in I.A.No.45 of 2015 in O.S.No.183 of 2014 on the file of the Subordinate Court, Arakkonam.

For Petitioners : Mr.P.Krishnan

For Respondents : Mr.R.Karthikeyan

ORDER

This Civil Revision Petition is filed to set aside the fair and decretal order dated 10.06.2015 made in I.A.No.45 of 2015 in

O.S.No.183 of 2014 on the file of the Subordinate Court, Arakkonam.

2.The petitioners are defendants and respondents are the plaintiffs in O.S.No.183 of 2014 on the file of the Subordinate Court, Arakkonam. The respondents filed the said suit for declaration and permanent injunction. According to the respondents, one R.A.Murugesha Chettiyar died intestate on 06.04.1984. They are the trustees of the temple and are entitled to the management of the temple. The petitioners and others do not have any right over the management of the temple or interfere with the management by the respondents. The petitioners and others filed written statement and are contesting the suit.

3.After framing issues, when the suit was listed for trial, the respondents filed I.A.No.45 of 2015 under Order XXIII Rule 1(3) of C.P.C for withdrawal of the suit in O.S.No.183 of 2014 with leave of the Court to file a fresh suit on the same cause of action. According to the respondents, earlier proceedings initiated by R.A.Murugesha Chettiyar with third parties were not mentioned in the plaint averments. The judgments in the three suits viz., O.S.Nos.170, 171 and 180 of 1968 on the file of the Subordinate Court, Vellore,

A.S.No.227 of 1997 on the file of the District Court, Vellore and judgments of the S.A.No.2348 of 1997 and judgment in the suit against the Commissioner, HR & CE department and certain private parties in O.S.No.218 of 1975, in which the erstwhile trustee, R.A.Murugesu Chettiyar was declared to be the hereditary trustee of the suit temple and the suit temple was declared as a private temple belonging to the family members of R.A.Murugesu Chettiyar were not available with them when they filed the suit. In view of the same, the formal defect has crept in and they may be permitted to withdraw the present suit with liberty to file fresh suit on the same cause of action.

4.The petitioners filed counter affidavit and contended that the respondents have already filed I.A.No.563 of 2014 under Order VI, Rule 17 of C.P.C for amendment of the plaint. While the said application is pending, the present application is not maintainable. The 1st petitioner has also filed counter affidavit in the said application. The respondents are mentioning new cause of action and as per the averments made in the affidavit, the defects are not formal defects and prayed for dismissal of the application.

5.The learned Judge considering the averments in the affidavit, counter affidavit, judgments, provisions of Order VI Rule 17 and Order XXIII Rule 1(3) of C.P.C, allowed the application and imposed cost of Rs.5,000/- to be paid by the respondents on the ground that the respondents have come out with the present application belatedly.

6.Against the said order dated 10.06.2015 made in I.A.No.45 of 2015 in O.S.No.183 of 2014, the present Civil Revision Petition is filed by the petitioners.

7.The learned counsel for the petitioners, reiterated the averments made in the counter affidavit and contentions raised in the grounds of revision and contended that the learned Judge failed to see that the defects mentioned by the respondents are not formal defects. The learned Judge failed to consider the judgments relied on by the counsel for the petitioners. The learned counsel for the petitioners referred to decision of this Court reported in **2006 (5) CTC 43 (N.Thiyagarajan and another Vs. Veerattanathan)** and contended that the facts of the said case are squarely applicable to the facts of the present case. The learned Judge is not correct in allowing the application when the application for amendment was

pending. The application filed under Order XXIII Rule 1(3) is not maintainable. The learned counsel for the petitioners in support of his contentions relied on the following judgments reported in:

(i) 2006 (5) CTC 74 (C. Bagyalakshmi Vs. P. Irulappan and another) and submitted that grant of permission for withdrawal of the suit with leave to file a fresh suit may also result in annulment of a right vested with the defendant or even a third party. Further, it will result in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of cases.

(ii) 1992 1 LW 100 (A.P.S. Bahurudeen and another V. Antony and others):

"28. An analysis of the above judgments shows that it has been generally accepted by the courts that permission to withdraw a suit with liberty to file a fresh suit can be granted if the suit has to fail by reason of a formal defect or a ground analogous thereto. But, courts are uniform in holding that a plaintiff who has failed to establish his case on merits, is not entitled to as right to withdraw the suit and file a fresh suit. On a reading of the two clauses in Sub-rule (3) of Order 23, Rule 1 of the Code of Civil Procedure, it is clear that the legislature has advisedly used a distinctly different language. While

Clause (a) refers to the pending suit which must fail by reason of some formal defect, Clause (b) refers to the suit it is instituted with the leave of the court. If a matter falls under Clause (a), the court is concerned only with the question whether the suit must fail by reason of a formal defect. On the other hand, if Clause (b) is invoked by a party, then the court must address itself to the question whether there are sufficient grounds for allowing the party to institute a fresh suit for the same subject matter or part thereof. Hence, in my view, it is not correct to say that 'sufficient grounds' should be read ejusdem generis with 'formal defect' or that they should be analogous thereto. 'Sufficient grounds' would cover a wider field and not restricted to a 'formal defect' or a similar defect. However, when the question arises before an appellate court after the adjudication of the matter on merits by one court or two courts, the test will be whether the court is justified in depriving the defendant of the benefit of a finding rendered in his favour after a full trial. It is well known that when a court grants leave to file a fresh suit on the identical cause of action, the withdrawn suit has no existence in the eye of law. It is not available for any purpose and the parties are relegated to the same position which they occupied before the suit was brought. Hence, the court has to consider in each case when an application is filed in the appellate stage for withdrawing the suit with liberty to file a fresh suit, whether the defendant should be driven back to original position in which he was prior to the

filing of the suit, even though he has come out successful after a full trial."

(iii)2014 (1) MWN (Civil) 493 (Chinnasamy and another Vs.

Manickam and another):

"21.In the affidavit filed in support of the petition, he has merely stated that 3rd item of the suit has been mistakenly included and the extent of the 1st item has also been wrongly mentioned and it has also been stated that the framing of the suit and the averments in the plaint are also not as per their instruction to the petitioners previous counsel. All these facts were brought to their knowledge by the present counsel and even after several amendments the defects would not be rectified. Hence, the present Petition has been filed seeking permission of the Court for the withdrawal of the suit with liberty to file a fresh suit.

22.In this connection, this Court would like to place reliance upon the decision of this Court in C.Bagyalakshmi V. P.Irulappan and another, 2006 (5) CTC 74, wherein, the learned Single Judge of this Court, namely, K.Venkatraman, J., has observed that,

"....The reason that has been adduced for withdrawal of the suit by the petitioner, as it could be seen from the affidavit, is totally unacceptable and it is not well founded. If really, the Survey Number and the boundaries

are not properly given in the plaint, the petitioner could very well approach the Court seeking amendment. Without doing so, the application filed for withdrawal of suit cannot be permitted. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant of a even a third party. Further, it will result in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of cases."

23. In paragraph 14, he has also observed that, -

"Further, as stated already, who could avail the benefit of filing an application for amendment of the plaint, has failed to exercise the said right and has come forward with the present application only with the intention to drag on the proceedings. This cannot be permitted and the Court cannot shut its eyes in such matters."

24. In the light of the observation made by the learned Single Judge in the aforesaid decision, this Court is also of the view that the revision petitioners/plaintiffs could very well approach the Trial Court seeking permission to amend the plaint, but they have not done so. But in the absence of formal defect and sufficient

grounds for allowing the plaintiffs to withdraw the suit with a liberty to institute a fresh suit, the petition filed by the revision petitioners/plaintiffs cannot be allowed to exist and therefore, the revision petitioners/plaintiffs' petition is liable to be dismissed as devoid of any merits."

(iv) 2015 (1) MLJ 564 (Manivannan and others V. P.Ambal

Devi):

"9. The Order passed by the Court below do not indicate that the suit must fail because of those defects indicated under Order 23 Rule 1 of CPC. The reasons stated for allowing the plaintiff to withdraw the suit and to institute a fresh suit will not amount to proof of sufficient grounds for allowing the plaintiff to institute a fresh suit on the same cause of action. As indicated already, allowing the petition to withdraw the suit after the case was posted for arguments and after the dismissal of the amendment application, would amount to abuse of process of law, more specially when the grounds under Order 23 Rule 1 CPC is not satisfied. Therefore, the order passed by the Court below is liable to be set-aside.

10. Further, it is not as if the application for withdrawal was filed at the earliest point of time. It has been filed after the dismissal of the amendment application, which was challenged up to this Court. The

intention in filing the withdrawal petition is to by-pass the order passed by this Court, dismissing the application for amendment. What cannot be achieved directly cannot be permitted to be achieved indirectly. Therefore, the application for withdrawal ought not to have been allowed by the Court. The contentions raised challenging the order passed by the Court below are well placed and the order passed by the Court below is set-aside."

(v)2010 (5) MLJ 645 (Velusamy and another V. Chenniappan and others) and contended that mere statement by the plaintiffs that there are formal defects in the suit is not a sufficient ground for the Court to order withdrawal of the suit with a liberty to file a fresh suit.

8.Per contra, the learned counsel for the respondents contended that the respondents were not in possession of the details of the earlier proceedings initiated by R.A.Muruges Chettiyar when the present suit was filed and those particulars are necessary to establish their case. The averments which the respondents want to include in the plaint cannot be done by way of amendment. The learned Judge has given valid reason for allowing the application and relied on the judgment reported in **2017 (1) CTC**

762 (V.Rajendran and others V. Annasamy Pandian (D) thr. L.R.s Karthyayani Natchiar):

"8.The High Court vide impugned Order held that the defect mentioned by the appellants in the application seeking withdrawal of suit, is not a "formal defect" and that the provision of withdrawal of the suit contemplated under Order 23, Rule 1(3) C.P.C cannot be allowed to be misused by the parties. The High Court took note of the fact that the appellants participated in the trial of the suit for about a decade and when the suit was listed for framing additional issues and for examining the additional witnesses, the appellants moved abruptly and application seeking withdrawal of the suit on an inapposite ground which could have been easily addressed by way of an application under Order 6, Rule 17 C.P.C for amendment of pleadings and that the appellants failed to establish either a "formal defect" or "sufficient grounds" for withdrawal of the suit.

9.Order 23, Rule 1(3), C.P.C lays down following grounds on which a Court may allow withdrawal of suit. It reads as under:

"Rule 1. Withdrawal of suit or abandonment of part of claim -

(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.

As per Order 23, Rule 1(3), C.P.C, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23, Rule 1(3)(a) or (b), C.P.C and must ask for leave. The Court can allow the application filed under Order 23, Rule 1(3), C.P.C for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a "formal defect" or "sufficient grounds". The principle under Order 23, Rule 1(3), C.P.C is founded on public policy to prevent institution of suit again and again on the same cause of action.

10.In K.S.Bhoopathy and others V. Kokila and others 2000 (3) CTC 558 (SC): 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 23, Rule 1(3), C.P.C, 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, C.P.C, 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 23, 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".

9. Heard the learned counsel for the petitioners as well as the respondents and perused the materials available on record.

10. As per Order XXIII Rule 1(3) of C.P.C, the Court has power to permit the plaintiff to withdraw the suit and file fresh suit on the same cause of action if there is any formal defect or if there are any sufficient grounds for allowing the plaintiff to institute a fresh suit.

The said rule reads as follows:

**ORDER XXIII- WITHDRAWAL AND
ADJUSTMENT OF SUITS**

"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 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court."

11. In the present case, the respondents are claiming right to manage the temple based on the Will executed by R.A. Muruges Chettiyar. According to the respondents, the earlier proceedings initiated by the said R.A. Muruges Chettiyar with third parties were not mentioned in the plaint. Those documents were not available with the respondents at the time of filing of the suit. In view of the same, they have sought for permission to withdraw the suit with liberty to file fresh suit on the same cause of action. The contention of the learned counsel for the petitioners is that the claim of the respondents is not a formal defect and it cannot be cured as per the decisions relied on in the above judgments. The said judgments are not applicable to the facts of the present case. From the materials on record, it cannot be said that the respondents have approached the Court belatedly or filed the application only to drag on the proceedings. The petitioners have not contended that they have acquired certain rights and by liberty being given to the respondents, their valuable accrued right is taken away.

12. From the materials available on record, it is seen that the

respondents want to include earlier proceedings initiated by R.A.Murugesu Chettiyar. Through him, the respondents are claiming right to manage the temple based on the Will. Including all, the said averments will not amount to introducing a new case or new cause of action. The contention of the respondents that failure to include the said averments is only a formal defect has considerable force. Further the Court has power to permit the plaintiff to file a fresh suit on the same cause of action, not only for any formal defect, but also if plaintiff shows sufficient grounds. In the present case, the learned Judge has held that all the averments sought to be incorporated cannot be done by way of amendments under Order VI Rule 17 of C.P.C and only certain amendments can be allowed. There is no irregularity or illegality warranting interference by this Court with the order of the learned Judge dated 10.06.2015 made in I.A.No.45 of 2015 in O.S.No.183 of 2014.

13.In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

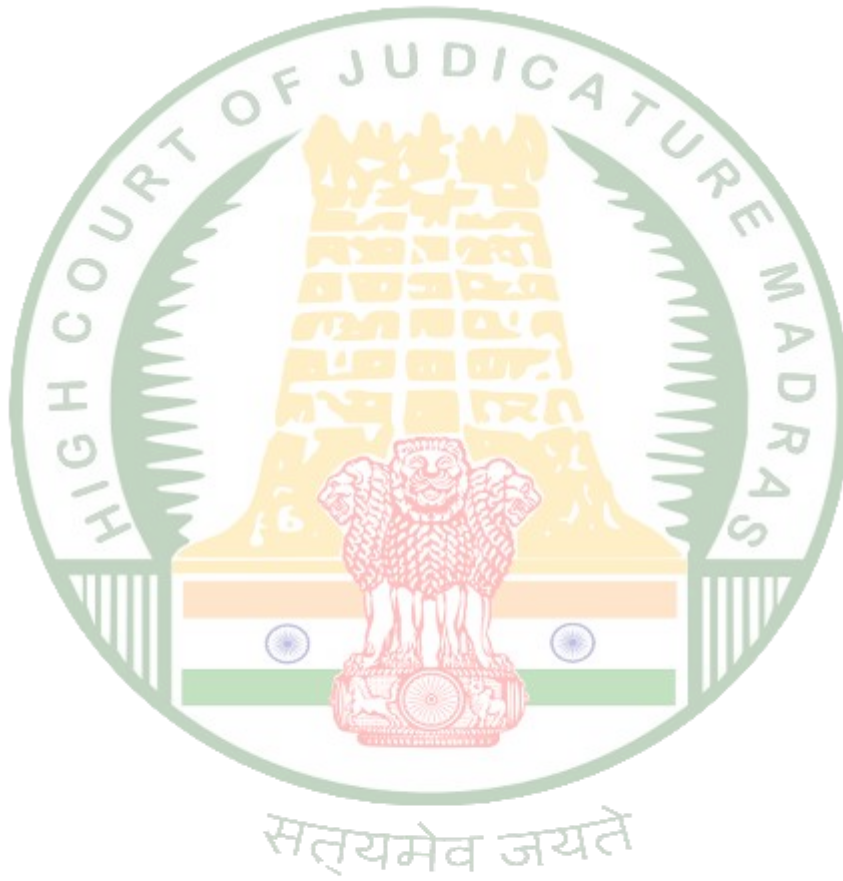
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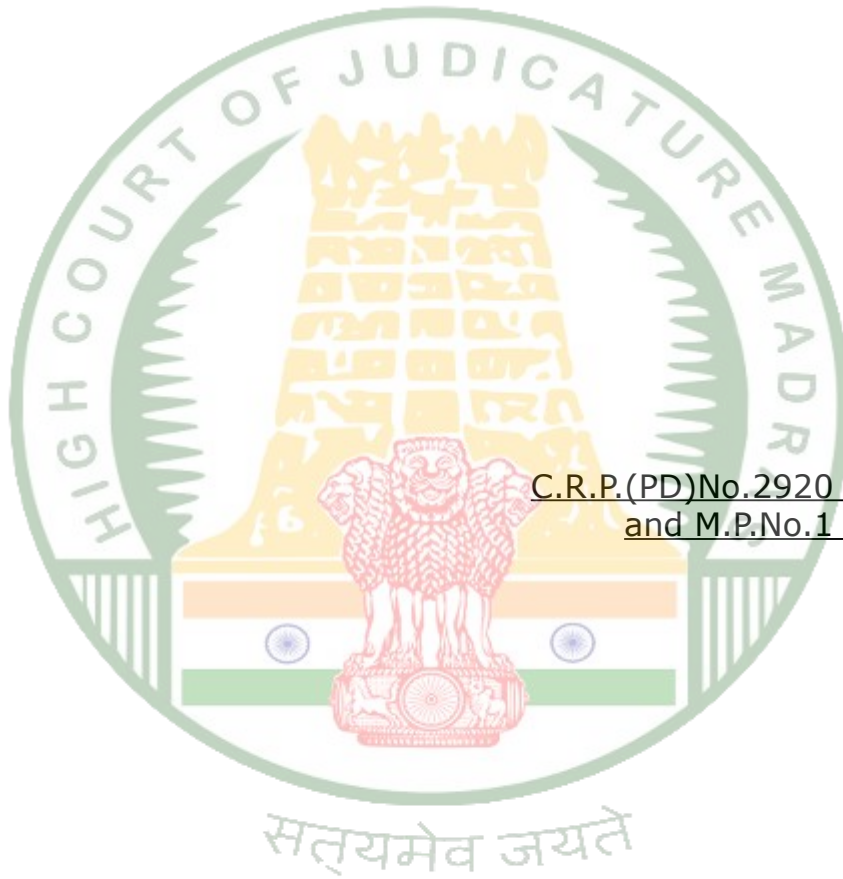
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