

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.10.2018

CORAM

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE S.BASKARAN

O.S.A.No.408 of 2018

B.Rajasekar

..Appellant

vs

1. K.Pandurangan
2. P.Vijayakumar
3. R.Karunakaran
4. S.Govind

..Respondents

Memorandum of Grounds of Original Side Appeal filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 03.08.2018 made in Application No.7240 of 2017 in C.S.No.322 of 2012.

For Appellant: Mr.P.Subba Reddy

For Respondents: Mr.P.R.Balasubramanian for R1/Caveator

JUDGMENT

(Judgment of the Court was delivered by N.KIRUBAKARAN, J.)

The appeal has been filed against the dismissal of the application taken out by the appellant/plaintiff seeking permission to incorporate the words in the earlier order dated 14th September 2016 in C.S.No.322 of 2012 "permit to withdraw the suit C.S.No.322 of 2012 and file a fresh suit before appropriate forum in order to entertain the new suit bearing CS.D.No.34335 of 2017."

2. The appellant/plaintiff originally filed C.S.No.322 of 2012 against the respondents/defendants seeking the following reliefs:-

"(a) declaring that the Power of Attorney bearing Document No.384 of 1997 dated 24.3.1997 obtained by first defendant by impersonation as if it is executed by Mrs.B.Perundevi is null and void, as the first defendant obtained

fraudulently by impersonation;
(b) declaring that sale deed executed by the first defendant claiming to be the Power of Attorney of Mrs.Perundevi, which he obtained by impersonation in favour of second defendant bearing Document No.731 of 1997 dated 31.3.1997 for schedule property is null and void;
(c) declaring that the plaintiff is the absolute owner for the property being legal heir of Mrs.Perundevi and sought for delivery of possession of the suit schedule property from the defendants 1 and 2;
(d) directing the defendants jointly and severally to pay a sum of Rs.1,10,000/- per month from March 2012 till date of possession for mental agony and for creating fraudulent documents, cheating, impersonation, breach of trust etc.,
(e) for a permanent injunction restraining the defendants, their agents, servants or any one acting under them to deal with the property;
(f) for costs of the suit."

3. After service of summons on the respondents/defendants, to avoid any technical objections, the appellant/plaintiff wanted to withdraw the suit with liberty to file a fresh suit and an endorsement was also made to that effect before the Court. Accordingly, by order dated 14.9.2016, noting the endorsement made by the learned counsel for the appellant on the plaint, this Court passed an order dismissing the suit as withdrawn.

4. The appellant was under the impression that liberty was given, therefore, subsequently, he presented a plaint in September, 2017 seeking a similar prayer against the respondents. However, the plaint could not be numbered, as the Registry objected that no liberty was given while withdrawing the suit on 14.9.2016 and therefore the appellant filed another application in A.No.7240 of 2017 seeking to incorporate the endorsement made by the appellant's counsel in the plaint, in the earlier order dated 14.9.2016. The said application was dismissed by the learned single Judge of this Court stating that the counsel should have been vigilant enough to make appropriate endorsement before withdrawing the suit and it is not possible to incorporate such endorsement after the passing of one year, as the order was passed in the year 2016. The said order is being challenged before this Court.

5. Heard Mr.P.Subba Reddy, learned counsel for the appellant and Mr.P.R.Balasubramanian, learned counsel for the first respondent/Caveator.

6. This Court also perused the records. A perusal of the endorsement found to be made in the plaint, namely, "the plaintiff may be permitted to withdraw the suit with liberty to file before appropriate forum," itself would reveal that the learned counsel for the appellant has rightly made the endorsement, however, that was not incorporated in the order dated 14.9.2016 while dismissing the suit as withdrawn.

7. When the endorsement made by the learned counsel is crystal clear and that was not taken note of by this Court, prejudice would be caused to the appellant if he is not permitted to prosecute the new suit, as the Registry refuses to number the suit on the ground that no liberty was given.

8. In view of the above facts, taking note of the endorsement and setting aside the order dated 3.8.2018 passed by the learned single Judge, this Court directs the Registry to number the suit in C.S.D.No.34335 of 2017 filed by the appellant/plaintiff, if it is otherwise in order. With this direction, the Original Side Appeal stands allowed. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

ss
To

1. The Sub Assistant Registrar (O.S.)
High Court, Madras

+2cc to Mr.P.R.Balasubramanian, Advocate, S.R.No.74215

+1cc to Mr.P.Subba Reddy, Advocate, S.R.No.74430

O.S.A.No.408 of 2018

GSP(30/11/2018)

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