

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT****DATED : 19.01.2018****CORAM :****WEB COPY****THE HONOURABLE MRS.JUSTICE J.NISHA BANU****CRP(PD) (MD)No.19 of 2018****and****CMP(MD)No.82 of 2018**

1)K.V.Lakshmi Ammal
K.K.Viswanathan(Died)
2)Ramesh
3)Suresh
4)Ananthi
5)Santhi
6)Rani

... Petitioners / Petitioners 1,3 to 7 /
Plaintiffs 1,3 to 7

vs.

Arulmigu Thirupparankundram Subramaniaswamy Thirukoil,
Devasthanam
Represented by its Executive Officer,
Thirupparankundram,
Madurai-625 005.

... Respondent / Respondent /
Defendant

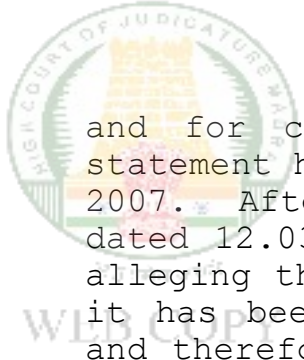
Petition filed under Article 227 of the Constitution of India, against the fair and executable order dated 26.10.2017 passed in I.A.No.3 of 2017 in O.S.No.1 of 2017 by the Subordinate Court, Thirumangalam (I.A.No.289 of 2016 in O.S.No.135 of 2007 on the file of the Subordinate Court, Thirumangalam.

For Petitioners : Mr.T.R.Jeyapalam

ORDER

This Civil Revision Petition has been filed against the fair and executable order dated 26.10.2017 passed in I.A.No.3 of 2017 in O.S.No.1 of 2017 by the Subordinate Court, Thirumangalam (Old No.I.A.No.289 of 2016 in O.S.No.135 of 2007 on the file of the Second Additional Subordinate Court, Madurai).

2.According to the petitioners, the suit property belongs to them. The respondent/defendant issued a notice to them claiming that the suit property belongs to the defendant temple and demanded to hand over possession of the suit property to the temple. Hence, the petitioners filed the above suit for the relief of declaration to declare that the notice sent by the Executive Officer of the temple dated 14.02.2007 is null and void and not binding on the petitioners



and for consequential order for permanent injunction. Written statement has been filed by the respondent. The suit is of the year 2007. After filing of the suit, the petitioners received a notice dated 12.03.2009 from the Joint Commissioner of HR & CE Department alleging that the suit property belongs to the defendant temple and it has been encroached and occupied by the deceased 2nd plaintiff and therefore, action will be taken under Section 78(4) of HR & CE Act.

3. Learned counsel for the petitioner contended that as the suit has been filed against the earlier notice issued by the Executive Officer of the temple and since now the HR & CE Department has issued notice under the Act, any enquiry in the suit regarding title to the suit property will only be unnecessary and also premature and therefore prayed for withdrawal of the suit with liberty to file a fresh suit if necessary. The learned Judge by impugned order dated 26.10.2017 has permitted withdrawal of the suit, but has refused to grant liberty for filing fresh suit, against which, the present revision petition has been filed.

4. The respondent filed counter contending that even in the notice dated 14.02.2007, it was specifically mentioned that the suit property belonged to the respondent temple and the petitioners are enjoying the same as encroachers. It was further contended that proceedings were initiated under Sections 78 and 79 of the Act even before the suit and therefore, the suit is not maintainable. Further, despite receipt of notice, without handing over possession of the suit property to the temple, the petitioners are dragging the suit for 9 years.

5. Learned counsel for the respondent further contended that the evidence on the side of the petitioners was closed and proof affidavit was also filed on the side of the defendant on 28.09.2016. While so, at the verge of trial, the petitioners have come forward with the present application to withdraw the suit and to file fresh suit on the same cause of action which is a clear abuse of process of the court. It was also contended that once notice under Section 78 of the Act is issued, the Civil Court cannot take cognizance of the suit and no injunction can be granted.

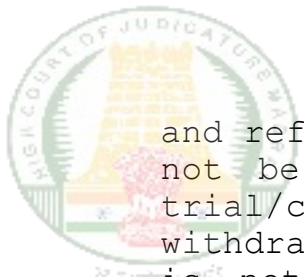
6. Heard the learned counsel for the petitioners and perused the materials available on record.

7. The only issue before this Court is whether the learned Judge was right in allowing the application in part.

8. Learned counsel for the petitioner relied on the judgment reported in (2006) 1 MLJ 164 in Rajasundari, Velacherry, Chennai, vs. Gowri alias Avaduai Ammal and others [CRP(PD) No. 292 of 2015, decided on 09.12.2015], wherein, it has been observed in paragraph 12 as follows:-

''An application to withdraw the suit with liberty to file a fresh suit must either be allowed or refused in toto. It is not open to the Court to grant a prayer for withdrawal

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and refuse the leave. If liberty is refused, the suit should not be dismissed, but must be retained in the file for trial/continuation of trial. If an application is made for withdrawal of the suit with liberty to file a fresh suit, it is not open to the Court to grant only permission for withdrawal, without liberty to file a fresh suit. If the Court simply allows withdrawal but refuses liberty, the Court would be acting without jurisdiction in dividing the petition into two parts. It is to be noted that the application under O.23 Rule 1(3) C.P.C is indivisible whole. The Trial Court was not right in separating the prayer for withdrawal and the leave to file a fresh suit. When the Court has declined to grant leave to file a fresh suit, the Trial Court ought to have dismissed the application in toto.''

9. Learned counsel for the petitioner also relied on the judgment reported in AIR 1971 Madras 477 in T.W.Ranganathan vs. T.K.Subramaniam and others [CRP.No.903 of 1969, decided on 02.03.1971], wherein, it is observed that if the Court rejects the withdrawal of the suit with liberty to file a fresh suit on the same cause of action, the Court cannot direct the withdrawal of the suit without giving the liberty sought for. If the Court disallows the liberty sought for, it should dismiss the application and allow the suit to proceed.

10. In my considered opinion, the above judgments are squarely applicable to the present case on hand and the learned Judge ought to have either dismissed the application in toto or should have allowed the application in toto. Therefore, the impugned order dated 26.10.2017 passed in I.A.No.3 of 2017 in O.S.No.1 of 2017 by the learned Sub Judge, Thirumangalam, is set aside and the matter is remanded to the learned Sub Judge, Thirumangalam, for passing fresh order within a period of four weeks from the date of receipt of a copy of this order.

With the above direction, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar

To

The Sub Judge, Thirumangalam.

CRP (PD) (MD) No.19 of 2018
19.01.2018