



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 02.08.2018

DELIVERED ON : 11.12.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.2142 of 2015

C.Periyannan

.. Petitioner

vs

1.Y.Amirtha Doss  
2.Pichai Arokkia Mary  
3.Manickam  
4.Philominal

.. Respondents

Civil Revision Petition filed under Article 227 of Constitution of India against the order dated 17.03.2015 made in I.A.No.173 of 2015 in O.S.No.124 of 2010 on the file of the District Munsif Court, Devakottai.

For Petitioner : Mr.B.Muruganandam

For Respondents : Mr.J.Anand Kumar (for R1)

### ORDER

This revision is directed against the order of the learned District Munsif, Devakottai dated 17.03.2015 made in I.A.No.173 of 2015 in O.S.No.124 of 2010, allowing the petition filed by the first respondent under Order 23, Rule 3 read with Section 151 of CPC.

2. The petitioner is the first defendant, first respondent is the plaintiff and respondents 2 to 4 are defendants 2 to 4 in the suit.

3. The first respondent herein filed the suit O.S.No.124 of 2010 for declaration that the suit property in S.No.A/7/530 measuring an extent of 45 cents in Sirumaruthoor Group, Thanicha Oorani Village, Devakottai Taluk is belonging to him and for permanent injunction restraining the petitioner herein from interfering with the peaceful possession and enjoyment of the same.

4. The petitioner resisted the suit by filing written statement and he had also filed petition in I.A.No.136 of 2013



under Order 7, Rule 11 of CPC to reject the plaint stating that the description of the suit property is wrong and varied in respect of village, survey number, boundary and measurement and also no cause of action arisen. By an order dated 21.11.2013, the trial Court dismissed I.A.No.136 of 2013 as premature stating that all issues relating to cause of action, misjoinder or non-joinder can be decided only during the trial and cannot be decided at the preliminary stage. Subsequently, the first respondent had filed I.A.No.800 of 2013 seeking to amend the description of the suit property, which was dismissed by the trial Court on 9.6.2014.

5. Thereafter, the first respondent has filed I.A.No.173 of 2015 praying to withdraw the suit with liberty to file fresh suit on the same cause of action alleging that the respondents 2 to 4 are his brothers and they were not contesting the suit and the petitioner alone contesting the suit. Due to urgency and the petitioner's forcible action through police, he had given a wrong description to his counsel at the time of filing the suit. The said fact was came to know only when the petitioner filed petition to reject the plaint. Since the description of the property has been changed, if the suit is proceeded, it will affect the first respondent. Moreover the said mistake is not wilful. Therefore, the first respondent may be permitted to withdraw the suit and file a fresh suit on the same cause of action.

6. Resisting the petition, the petitioner filed counter stating that the petition in I.A.No.800 of 2013 seeking to amend the description of the suit property filed by the first respondent was dismissed by the Court on 9.6.2014 and without preferring any appeal, the first respondent had filed the present petition, which is not maintainable. Moreover, the petitioner had filed petition before the Revenue Divisional Officer, Devakottai to cancel the patta, which was wrongly issued. Since the suit filed by the first respondent was pending, the Revenue Divisional Officer dismissed the petition of the first respondent. Challenging the order of the Revenue Divisional Officer, the first respondent preferred W.P.(MD) No.609 of 2013, wherein this Court directed the trial Court to dispose of the suit within a period of four months. The present petition filed contrary to the direction issued in W.P.(MD) No.609 of 2013 is liable to be dismissed. The allegation that only after filing of the petition by the petitioner to reject the plaint, the first respondent came to know the wrong description of the property is absolutely false and thus, prayed for dismissal of the petition.

7. The trial Court, upon consideration of the rival submissions, allowed the amendment petition on payment of cost of Rs.5,000/- payable by the first respondent to the petitioner on or before 23.3.2015 and directed the petition to be listed on 24.3.2015. Aggrieved by the said order, the petitioner has filed the present Civil Revision Petition.



8. I heard Mr.B.Muruganandam, learned counsel for the petitioner and Mr.J.Anand Kumar, learned counsel for the first respondent.

9. Assailing the order of the trial Court, the learned counsel for the petitioner submitted that the entire description of the suit property is wrong and varied in respect of village, survey number, boundary and measurement. There is also total contradiction between the pleadings and the description of property and hence, the suit is liable to be rejected. He would submit that the application for withdrawal of the suit filed by the first respondent and the finding and conclusion of the trial Court allowing withdrawal of suit are contradictory to the stand taken by the first respondent. Thus, the trial Court committed a serious error by contradicting its own earlier findings and decisions. The learned counsel further submitted that the trial Court ought to have dismissed the application after having found that allowing application for withdrawal of the suit after six years would cause serious prejudice to the petitioner instead of ordering compensation of Rs.5,000/- to the petitioner. Since the trial Court committed serious error in allowing the petition on payment of costs, the learned counsel prayed for setting aside the order of the trial Court.

10. On the other hand, the learned counsel for the first respondent contended that at the time of filing the suit, the first respondent has given wrong description and the said defect came to the knowledge of the first respondent only when the petitioner sought for rejection of plaint. Since the description of the property changed, it is not possible for the first respondent to continue the suit and therefore, the first respondent filed the petition and the trial Court upon appreciation of facts, rightly allowed the petition subject to payment of cost. The learned counsel further submitted that there is no perversity in the order of the trial Court and prayed for dismissal of the revision.

11. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

12. The point that arises for consideration is whether the trial Court was right in allowing the petition.

13. The grievance of the first respondent before the trial Court is that since there was mistake in the description of the suit property, he may be permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action.

14. The trial Court allowed the petition holding that by permitting the first respondent to withdraw the suit with liberty to file a fresh suit on the same cause of action, no prejudice would be caused to the petitioner. On the other hand, it would



very helpful to the parties to resolve their legal issue.

15. It is settled that it is possible to withdraw an existing suit with liberty to file a fresh suit, subject to certain conditions. The relevant legal provision is contained in sub-rule (3) of Rule 1 of Order 23 of CPC, which is reproduced below:

*"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."*

16. Thus, it is clear that a suit would fail due to some "formal defect" or if the Court is satisfied that there are "sufficient grounds", the Court may allow the plaintiff to withdraw the suit with liberty to file a fresh suit.

17. In the case on hand, earlier, the petitioner had filed I.A.No.136 of 2013 under Order 7, Rule 11 of CPC to reject the plaint stating that there is mis-description of the suit property.

18. It is pertinent to point out that in the case of *V.Rajendran v. Annasamy Pandian*, reported in (2017) 5 SCC 63, the Hon'ble Supreme Court held that:

*"As per Order 23 Rule 1(3) CPC, 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 Ruls 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC 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) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action."*



19. In the above case, it was further held that "formal defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 of CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action etc. It was held that "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.

20. It is settled that the defect in the survey number, village, boundaries and measurement of the suit property went to the very core of the subject matter of the suit and the entire proceedings would be fruitless if the plaintiff was not able to get the decree executed successfully and thus, the said defect would constitute to be a "formal defect" within the meaning of Order 23 Rule 1(3) (a) of CPC.

21. It appears that the facts of the present case are somewhat similar to the facts of the above cited case decided by the Hon'ble Supreme Court, and it may perhaps be covered within the expression "confusion regarding identification of the suit property".

22. Therefore, keeping in view the above legal provision and also considering the given facts and circumstances of the instant case, the trial Court has allowed the petition filed by the first respondent permitting him to withdraw the suit with liberty to file a fresh suit on the same cause of action subject to payment of cost of Rs.5,000/- to the defendant. This Court finds no error and/or infirmity in the said finding of the trial Court. Pursuant to the impugned order, the first respondent has also deposited the cost and the trial Court allowed the petition on 24.3.2015.

23. In view of the above discussion, this Court is of the view that no valid grounds have been made out to interfere with the order of the trial Court and therefore, the Civil Revision Petition fails and is liable to be dismissed.

24. In the result, the Civil Revision Petition is dismissed by confirming the order passed in I.A.No.173 of 2015 in O.S.No.124 of 2010 dated 17.03.2015 on the file of the learned District Munsif Court, Devakottai. No costs.

Sd/-

Assistant Registrar ( )

// True Copy //



To

The District Munsif,  
Devakottai.

WEB COPY

+1CC TO MR.J.ANANDKUMAR, Advocate Sr. No.99717  
+1CC TO MR.B.MURUGANANDAM, Advocate Sr. No.99960

order made in  
C.R.P. (MD) (PD) No.2142 of 2015  
11.12.2018

MA (CO)

TR (30.04.2019) 6P 4C