



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P. (PD) (MD) No.2222 of 2015

and M.P. (MD) No.1 of 2015

WEB COPY

Mangaiaammal

... Revision Petitioner/Petitioner/
Plaintiff

-Vs-

1. Maheswari Ammal

2. Subramanian

...Respondents/Respondents/Defendants

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India praying to call for records to set aside the fair and executable order dated 09.03.2015 passed in the application in I.A.No.86 of 2015 in O.S.No.2 of 2006 on the file of the Principal District Munsif, Ambasamuthiram and allow the same.

For Petitioner : Mr.T.R.Jeyapalam

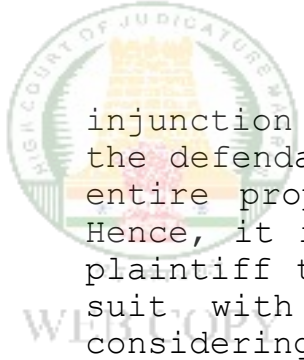
For Respondents : Mr.R.J.Karthick

ORDER

The revision petitioner is the plaintiff in O.S.No.2 of 2006 on the file of the Principal District Munsif, Ambasamuthiram and in the suit, the plaintiff sought for permanent injunction, etc. During pendency of the suit, the plaintiff filed an application in I.A.No.86 of 2015 for withdrawal of the suit with liberty to file a fresh suit for the same cause of action and the said application was dismissed, on the ground that it will cause great prejudice to the defendants. Aggrieved by such finding, the revision petitioner/plaintiff is before this Court.

2. It is the case of the revision petitioner that in addition to the present suit, she also filed yet another suit in O.S.No.80 of 2003 for declaration and injunction, in which a portion of the present suit schedule property is covered, on account of denial of the defendants with regard to her rights over the property. Since the issue involved in both suit is one and the same, she sought to amend the prayer on earlier occasion, which was dismissed by the Trial Court on the objection raised by the defendants. It is the further case of the revision petitioner that subsequent thereto, she also filed an application for appointment of Advocate Commissioner to ascertain the actual extent of area encroached by the defendants, which was also dismissed by the Trial Court.

3. The revision petitioner states that based on the rough measurement conducted by her, it came to light that the entire portion is not in possession of the petitioner and therefore, she felt that further continuance of the suit with the same prayer will not help in any way, as the present relief sought is for permanent



injunction and in the event of the suit being decreed in favour of the defendants, there would be a possibility for encroachment of the entire property with the help of Police Force by the defendants. Hence, it is stated that it has literally become imperative for the plaintiff to withdraw the suit and in its place, file a yet another suit with suitable prayer. However, the Trial Court, without considering the factual aspects involved in the case, has simply rejected the plea of the petitioner. Hence, it is prayed that the order of the Trial Court is liable to be set aside.

4. On the contrary, learned counsel for the respondents/defendants would contend that the averments made in the application were utter false, as both suits are pending in different Courts and the same cannot be tried and heard jointly. If at all there is any encroachment by the defendants, the plaintiff should have invoked the relevant provisions well within the time and having failed to do so, in order to cover up her mistake, she wanted to withdraw the suit to file a fresh suit on the same cause of action. Even if the plaintiff is allowed to file a separate suit for recovery of possession etc, the suit to be filed will definitely be barred by limitation and it is settled that in the event of any formal defect in the suit, then the same can be permitted to be withdrawn for filing a fresh suit. Contending that the petition, if seen at any angle, is not maintainable, it is prayed that the petition is liable to be set aside.

5. Heard learned counsel on either side and perused the material documents available on record.

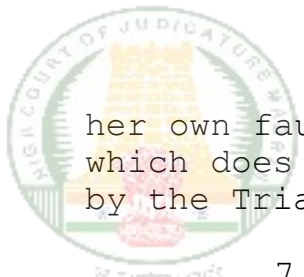
6. It is seen that the application was filed by the plaintiff under Order XXIII Rule 1 of CPC and in Rule 3(b), it has been briefly described under what circumstances, the suit can be permitted to be withdrawn so as to file a fresh one. For better appreciation, the said provision is extracted as under:

"(3) Where the Court is satisfied -

(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.

The Trial Court has held that the earlier application seeking amendment of the suit was dismissed and if the petitioner is permitted to file a fresh suit on the same cause of action, then it will amount to permitting the petitioner to carry out necessary amendment in the suit by filing a fresh one. A close scrutiny of the averments made in the plaint would disclose the fact that she had not filed it with due care and diligence and in order to cover up



her own fault, she has been filing applications one after the other, which does not come under the term "ejusdem generis" as rightly held by the Trial Court.

7. It is further seen that the trial of the suit is at the verge of conclusion and the revision petitioner, having failed to seek amendment or withdrawal of the suit, has invoked the provisions at the fag end, which will certainly cause prejudice to the respondents and the petitioner, except stating that the respondents are encroachers of a portion of the property, no other explanation is forthcoming from the side of the plaintiff to prove her case. In the application, she had stated that in the event of the suit being decreed in favour of the defendants, she would be forced to be vacated from the premises and it is quite surprising as to how she came to such a definite conclusion even during trial of the case.

8. The Trial Court has relied upon a judgment of this Court in the case of Duraikannu and others vs. Malayammal, reported in 2003 (4) LW 453 to hold that a defect, which goes to the root of the plaintiff's claim, is not a formal defect and in the case on hand, she herself had filed an amendment petition on earlier occasion, as she found that the relief sought for in the plaint is not the one she wanted. The provisions of law cannot be bent according to the whims and fancies of the plaintiff and it has to be considered in accordance with the rules and the facts of each case. Therefore, this Court is of the view that the order dated 09.03.2015 passed in I.A.No.86 of 2015 in O.S.No.2 of 2006 on the file of the Principal District Munsif, Ambasamuthiram, is perfectly valid and is sustainable.

9. In the result,

a) this civil revision petition dismissed, confirming the order dated 09.03.2015 passed in I.A.No.86 of 2015 in O.S.No.2 of 2006 on the file of the Principal District Munsif, Ambasamuthiram;

b) the Trial Court is directed to dispose of the suit within a period of two months from the date of receipt of a copy of this order by conducting the trial on day-to-day basis without giving any unnecessary adjournments to either parties and both the parties are directed to give their fullest cooperation for early disposal of the suit within the time stipulated by this Court as above.

No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar(CS-IV)



To:

1. The Principal District Munsif,
Ambasamuthiram.
2. The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. **(2 Copies)**

+1CC to Mr.R.J.Karthick, Advocate, SR.No. 66641
+1CC to Mr.T.R.Jeyapalam, Advocate, SR.No. 66742

C.R.P. (PD) (MD) No.2222 of 2015
04.06.2018

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