

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Civil Appellate Jurisdiction)

Tuesday, the Twenty Second day of January Two Thousand Nineteen

PRESENT

THE HON`BLE MS.JUSTICE P.T.ASHA

CMP No.442 of 2019

in SA.No.453 of 2018

SUNDARARAJAN (DIED) [PETITIONERS]
PULIVANAM VILLAGE,
WALAJAH TALUK,
VELLORE DISTRICT.

1 VIJAYA
2 S.SARAVANAN
3 S.MAHESH
4 S.RAMACHANDRAN
5 KOMATHI
6 VARALAKSHMI

Vs

ETHIRAJ MUDALIAR (DIED) [RESPONDENTS]
SAROJA (DIED)

1 MANI
2 KOTHANDAM
3 RAMAMOORTHY
4 BABU
5 JAGADEESAN
6 RANI
7 LAKSHMI
8 RAMANI

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioners to withdraw the suit namely O.S.No.20 of 2001 DMC Sholinghur permit the petitioners to file a fresh suit and the same cause of action and pass such other or futher order or orders as this Hon`ble court may deem fit and proper in the circumstances of the case(in CMP.No.442/2019)

Order : This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.S.V.JAYARAMAN, Senior Counsel for M/S.K.V.SHANMUGANATHAN, Advocate for the petitioner and of M/S.M.STALIN, Advocate for the 1 to 8 respondents the court made the following order:-

The above petition has been filed by the appellant under the provision of Order 23 Rule 1 of Civil Procedure Code, seeking leave of the court to withdraw the suit in O.S.No.20/2001 on the file of the learned District Munsif, Sholinghur and grant liberty to the petitioner to file a fresh suit.

2. The brief facts that are necessary for disposing of the above petition is that the plaintiff/appellant herein had filed a suit O.S.No.70/2001 on the file of the learned District Munsif, Sholinghur, seeking declaration of title and an injunction restraining the defendants/respondents herein from interfering with their peaceful possession and enjoyment of the suit property. The petitioner/appellant had originally filed the suit only for a bare injunction and later had amended the same to include the prayer of declaration of title. The respondent /defendant had filed a written statement inter-alia contending, besides other defences, that the suit is barred on the ground of non-joinder of necessary parties since even according to the plaintiff the brothers and a deceased brother's legal heirs of the plaintiff had not been impleaded in the suit. The parties had gone to trial and the trial court was pleased to dismiss the suit and one of the issues that had been framed was whether the suit was hit by non-joinder of necessary parties. The sole plaintiff has died and his legal heirs, plaintiff 2 to 5, have been brought on record in the said appeal. This issue has been held against him.

3. Challenging the Judgment and Decree of the learned District Munsif, Sholinghur, appeal in A.S.No.86 of 2014 was filed by the plaintiffs on the file of the Subordinate Judge, Arakkonam.

4. The learned Subordinate Judge confirmed the Judgment and Decree of the Trial court and with reference to the issue of non-joinder the learned Subordinate Judge has held as follows:

"16. Therefore, it is clear that the plaintiff has not only failed to implead the necessary parties to the suit, but has not also proved his title over the suit property along with his possession over the same. Contra the defendant had proved his possession. Hence in such circumstances this court is of the view that the lower court rightly held that the plaintiff is not entitled for the relief claimed and answered the issues against the plaintiffs. This court feels that there is no necessity to interfere in the judgment and decree of the lower court as it is well found based on the evidence and the available records."

Pending the above second appeal the petitioner has come forward with the present application seeking leave to withdraw the suit O.S.No.20/2001 on the file of the learned District Munsif, Sholinghur, and to permit the petitioners to file a fresh suit. In the said petition the petitioners have given the following reasons

:

"6.....Our counsel informed us that our suit case has been dismissed on technical ground of non joinder of parties and therefore unless all the parties are impleaded the frame of the suit itself may not be correct and proper.

7. I submit that we are not conversant with legal aspects and in the lower court we were not advised as has been done by the senior counsel here. Otherwise we would have filed the petition itself or short permission to implead other parties also. Though according to us we have a good case regarding title we were not able to succeed because of the technical defect. Further we were advised to submit that when once it is found that the suit is not properly framed the court should not have decided the case on merits."

5. The respondents have filed their counter affidavit inter-alia contending that the suit has been dismissed not only on the ground of non joinder of parties but also on the ground that the plaintiff had not proved possession of the suit property. The respondents would also contend that the submission that the suit was dismissed only on the technical ground of non joinder is totally false since the judgment was also rendered on merits based on other issues. Further granting of leave at this stage of the proceedings would result in irreparable hardship to the defendants/respondents.

6. The respondents have further stated that in the suit in O.S.406/74, the 5th respondent has got the sale deed executed in his favour by the court itself. The learned counsel has also relied upon the orders passed by this court on **1982 2 MLJ page 400 [K. Chinna Vaira Thevar vs. S. Vaira Thevar]** and has referred to the finding rendered by this court in Paragraph 11 which reads as follows:

" 11.....The expression, "sufficient grounds" occurring in the aforesaid rule will not take in, dismissal of a suit on the ground that the plaintiff has not established his case. If it is otherwise, in all cases where a suit or appeal is dismissed on merits, the plaintiff or appellant, as the case may be, may come forward with an application under the said rule to have the suit withdrawn, with liberty to file a fresh suit later on, the same cause of action, if such a thing is permitted, there will be no end to any litigation. Therefore the Legislature would not have contemplated " dismissal of a suit on merits" as being a sufficient ground for permitting the plaintiff to withdraw the suit with liberty file afresh suit. The failure of the plaintiff to prove his case is no ground for allowing him to withdraw the suit under Rule 1(3) (b) of Order 23. The object of

the rule is not to enable the plaintiff after he has failed to establish his case by adducing requisite evidence to have a further opportunity to file a fresh suit to reagitate the matter so as to prejudice the other side."

7. Heard the parties and perused the papers. The provisions of Order 23 Rule 1(3) (b) provides for a withdrawal of a suit if there would exist sufficient grounds for instituting a fresh suit with reference to the subject matter of the suit or a part claimed the court can on such terms may permit the plaintiff to withdraw the suit with a liberty to institute a fresh suit. The provisions of Order 23 R (1) (3) reads as follows:

"¹[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.

(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."

8. From a perusal of the above it is clear that the court can permit the plaintiff to withdraw his earlier suit and institute a new suit if the suit suffers by reason of a formal defect and where there are sufficient grounds for allowing the suit for instituting a fresh suit. In the instant case it is seen that though the petitioners have contended that their suit had been dismissed by both court below on the technical ground of non joinder alone, a reading of the judgment clearly indicates that non joinder was one of the issues that was tried by the courts below and the suit has been dismissed and the appeal also dismissed on other issues as well. Therefore the petition under consideration does not come within the ambit of the Order 23 Rule 1(3) (a) and (b).

9. Further in the judgment cited on the side of the respondent, this court has clearly held that the expression sufficient ground will not take within itself a ground that has not been established by the plaintiff particularly when the dismissal by the courts below have dealt with other issues as well. The petitioner cannot be allowed to fill up the lacuna in the garb of withdrawing the suit with liberty to institute a fresh one. I do not find any merits in the petition and the petition is accordingly dismissed.

10. Post the Second Appeal No.453 of 2018 on 11.02.2019, under the caption 'for arguments'.

-sd/-

22/01/2019

/ TRUE COPY /

Sub-Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 THE DISTRICT MUNSIF
SHOLINGHUR.

2 THE SUBORDINATE JUDGE
ARAKKONAM.

C.C. to M/S.K.V.SHANMUGANATHAN Advocate Sr.No.911

C.C. to M/S.M.STALIN, Advocate on payment of necessary charges

Order

in

CMP.442/2019

in SA.No.453 of 2018

Date :22/01/2019

From 26.2.2001 the Registry is issuing certified
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KP(06/02/2019)