

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.03.2019

CORAM
THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

C.R.P.(PD).No.1502 of 2014

and

M.P.No.1 of 2014

1.C.Vijayakumar

2.C.Jagadeesan

... Petitioners

Vs.

1.C.Yadhavamoorthy

2.T.Baskaran

... Respondents

PRAYER: Civil Revision petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order of the learned Principal District Munsif, Salem dated 19.09.2013 in I.A.No.780 of 2013 in O.S.No.47 of 2012 and to order the said I.A. as prayed for.

For Petitioners

: Mr.S.Balaganesh

for Mr.T.M.Hariharan

For Respondents

: R1 – No appearance

Mr.P.Jagadeesan for R2

ORDER

The present Civil Revision Petition has been filed against the fair and decretal order dated 19.09.2013 in I.A.No.780 of 2013 in O.S.No.47 of 2012 passed by the Principal District Munsif, Salem.

2.By the impugned order, the Court below has dismissed the application filed under Order 23 Rule 1(3) of CPC after the respondents had filed their written statement, denying the allegations contended in the plaint. The case was posted for framing the issues when the petitioners filed an application to withdraw the suit with liberty to file a fresh suit on the same cause of action.

3.The court has concluded with reasons given by the petitioners for withdrawing the suit that they wanted to additional pleadings and reliefs in support of the application were not sufficient. The Court has also observed that the suit did not suffer from any formal defect.

4.The learned counsel for the petitioners referred the decision of the Hon'ble Supreme court **V.Rajendran and Another vs Annasamy Pandian (dead) Through Legal representatives Karthyayani Natchiar** (2017) 5 Supreme Court Cases 63. In paragraph 9, the Court held as under:-

"9. Order 23 Rule 1(3) CPC lays down the following grounds on which a Court may allow withdrawal of suit. It reads as under:

"1. Withdrawal of suit or abandonment of part of claim.—(1)-(2) * * *

(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."

(emphasis supplied)

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 Rules 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."

5. The Court below there had allowed the application and the plaintiffs were permitted to withdraw the suit which was challenged. The Hon'ble Supreme Court on facts of the case concluded as follows the paragraph 13.

"13. In the facts and circumstances of the case, the trial court considered the allegation set out in the application as a ground for withdrawal. The view taken by the trial court that the suit suffered from a formal defect to allow the appellants to withdraw the suit with permission to institute a fresh suit, is correct. The High Court, in our view, was not right in interfering with the discretion exercised by the trial court, permitting the appellants to withdraw the suit with liberty to file a fresh suit. Based on the order passed by the trial court, the appellants have already filed suit before the District Munsif and the same is numbered as OS No. 11 of 2015. The High Court while passing the order on 9-3-2015 [*Annasamy Pandian v V. Rajendran*, 2015 SCC OnLine Mad 261 : (2015) 2 LW 360] does not seem to have kept in view the said suit filed by the appellants. In the facts and circumstances of the case, the impugned order passed by the High Court cannot be sustained."

6.Per contra, the learned counsel for the respondents submitted that the affidavit filed by the petitioners before the court in support of the application was very vague did not make case to withdraw the suit with liberty to file a fresh suit on the same cause of action on account of formal defects.

7.He further submitted that the petitioners had stated that they have decided to withdraw the suit with liberty to file a fresh suit on the same cause of action. The learned counsel for the respondents submitted that it was opened for the petitioners to file an application Order 6 Rule 17 of CPC for amending of the plaint instead of filing an application under Order 23 Rule 1 (3) of CPC to re-start the proceeding a fresh.

8.In this connection, the learned counsel for the respondents relied upon the decision of this Court in **Duraikannu and others vs Malayammal** (2003) 3 MLJ 551, wherein in paragraphs 8, 9, 10 and 11 held as follows:-

"8. Formal defect means a defect of form, which is prescribed by Rules or Procedure. A defect which goes to the root of the plaintiff's claim is not a formal defect. The formal defect may be omission to obtain permission of Court to file the suit, misjoinder of parties or cause of action, failure to disclose cause of action for the Plaint, erroneous valuation of the subject matter of the suit and institution of a suit in a Court which has no jurisdiction to entertain it.

9. The other sufficient ground is that the defect must not be due to plaintiff's own fault, hence the expression 'other sufficient ground' should be construed 'ejusdem generis' with formal defect. The failure of the plaintiff to prove his

own case is no ground for allowing him to withdraw his suit with liberty of suing again for the same subject matter.

10. The object of the Rule is not to enable a plaintiff, after he failed to conduct his suit with proper care and diligence and after his witnesses failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.

11. The sufficient grounds are like the evidence being not available for no fault of the plaintiff, the suit being prematured and the cause of action accruing pending the suit, the plaintiff has failed to put in evidence an important document and where the plaintiff had been misled by the absence of a specific denial by the defendant."

9. In this case, it is the case of petitioners that the suit had formal defect and there were sufficient grounds to all such application. However, in paragraph 2 of the affidavit filed in support of the application, the petitioners have averred as follows:-

"we came to know when we begin to get ready for trial, that the relief sought for in the suit is not technically correct and we are advised that we have to add pleadings and ask for additional reliefs in the above suit, otherwise we came to know that the suit would fail technically. Besides the 1st respondent was allotted with 0.15 cents of land in S.No.74/11, but he sold 0.16 to one Thangavel, and the said Thangavel gifted the same to the 2nd respondent/defendant. Therefore the said sale deed executed in favour of Thangavel by the 1st defendant is in replace of 0.01 cent of land and the gift settlement and executed in favour of Baskaran, the 2nd defendant in the suit also

invalid. In fact our father Chinnathambi purchased 0.17 cents in the year 1981. As such we have to ask further relief also.”

10. There are no formal defect for withdrawing the suit for filing a fresh suit. At the same the court petitioners are permitted to amend the plaint under Order 6 Rule 17 of CPC in which case the rights of the respondents to raise all defences that are available under law.

11. It is noticed that the suit is of the year 2012 and pending before the Principal District Munsif Court, Salem, in view of the pendency of the present Civil Revision Petition.

12. The present Civil Revision Petition is therefore disposed with following observations:-

- i. The petitioners may, if advised, amend the plaint within two weeks from the date of receipt of a copy of this order.
- ii. The respondents/defendants may thereafter file additional written statement within two week thereafter.
- iii. The learned Principal District Munsif Court, Salem shall frame additional issues thereafter within one week and thereafter take up the case for trial and complete the

proceedings within a period of nine months from the date of receipt of a copy of this Order.

13.The Civil Revision Petition stands disposed of with above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

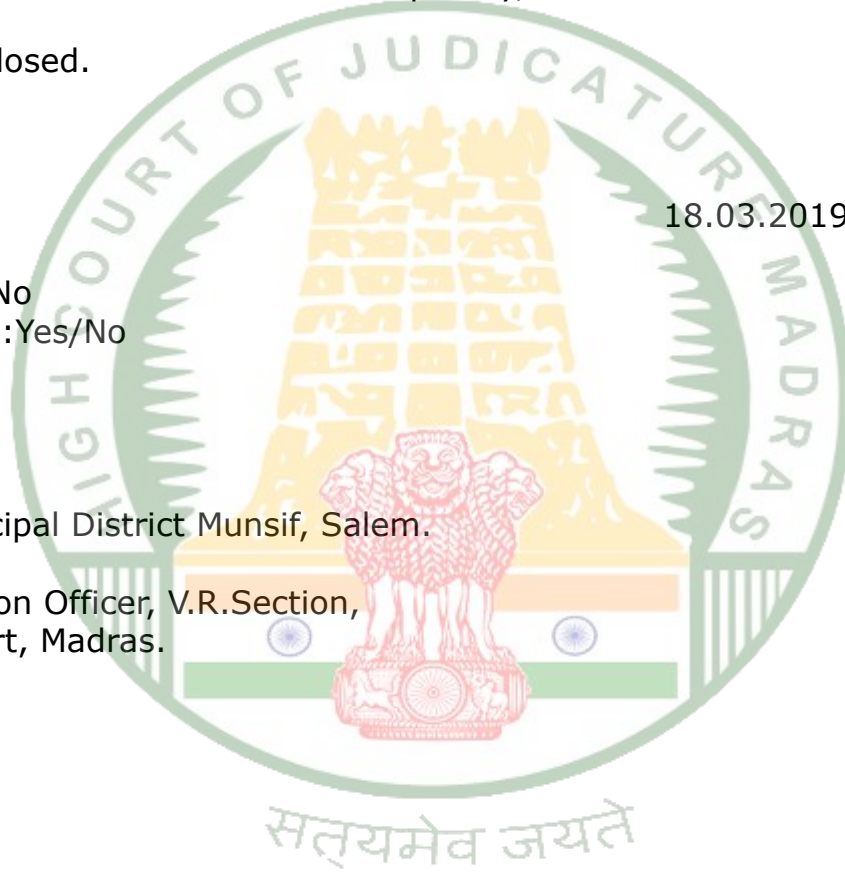
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Index:Yes/No
Internet :Yes/No
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To

1.The Principal District Munsif, Salem.

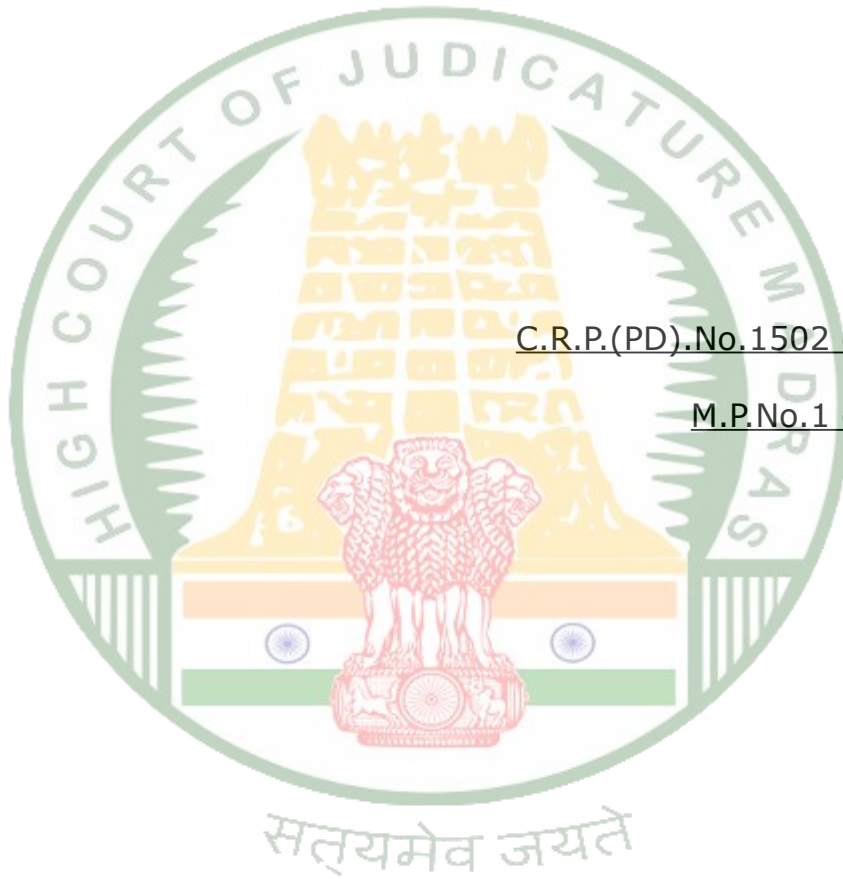
2.The Section Officer, V.R.Section,
High Court, Madras.



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C.SARAVANAN, J.

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