

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P (NPD).No.1856 of 2014

and

M.P.No.1 of 2014

1.Gunasekaran

2.Nirmala

.. Petitioners/defendants

vs

B.Babu

.. Respondent/plaintiff

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order and decretal order dated 21.08.2012 made in I.A.No.1247 of 2011 in O.S.No.386 of 1999 on the file of the District Munsif Court, Poonamallee, so far as it relates to granting liberty to the respondent to file fresh suit on the same cause of action is concerned, dismiss the same by allowing the revision petition.

For Petitioners : M/s.Anandagomathy

For Respondent : No appearance

ORDER

The present Civil Revision Petition is directed against the order dated 21.08.2012 in I.A.No.1247 of 2011 in O.S.No.386 of 1999 passed by the District Munsif Court, Poonamallee.

2. By the impugned order, the Court has permitted the respondent-plaintiff to withdraw the above suit with a liberty to file a fresh suit under Order 23 Rule 3 (a) of the Civil Procedure Code.

3. Originally, the suit was filed for permanent injunction and for a mandatory injunction. The said suit was filed against the first petitioner alone. The first petitioner therefore filed written statement on 25.07.2001.

4. In the written statement, the first petitioner had stated that he was not the owner of the land and that the land in question was registered in the name of first petitioner's wife namely the second petitioner who was subsequently impleaded by an order dated 03.12.2010 in I. A. No.989 of 2009.

5. Thereafter, the respondent-plaintiff filed I.A.No.81 of 2010 under Order VI Rule 17 of C.P.C seeking to amend the relief for a declaration. During the interregnum, the respondent- plaintiff had filed I.A.No. 446 of 2010 in I.A.No.81 of 2010 Order 6 Rule 17 of CPC to amend the averments in I.A.No.81 of 2010. I.A. No.446 of 2010 was allowed by an order dated 10.8.2010 with the observation that the amendments proposed did not alter the cause of action even though the application was filed belatedly.

6. I.A.No.31 of 2010 was later allowed on 03.12.2010 which was challenged by the petitioner in CRP(NPD) No.438 of 2011.

7. At the time of arguments in C.R.P.(PD) No. 438 of 2011, the respondent-plaintiff sought permission of the court to withdraw the above suit with a liberty to file a fresh suit. Recording the same, this court by its order dated 27.01.2011 closed the said civil revision petition with the observation that if the respondent plaintiff chooses to file such an application, the court may decide the same on its merits.

8. After the order was passed on 27.01.2011 in C.R.P.(PD) No. 438 of 2011, the respondent-plaintiff filed I.A.No.1247 of 2011 and sought leave of the court under Order XXIII Rule 3 (a) and (b) of CPC. The petitioners-defendants opposed the above application. The court however by its order dated 21.08.2012 allowed I.A.No.1247 of 2011. Thereafter, O.S.No.386 of 1999 was also dismissed as withdrawn with a liberty to file a fresh suit.

9. The Court below after recording the facts has concluded that after considering the over all circumstances it was a fit case for granting leave to the respondent/plaintiff to withdraw the suit for filing of a fresh suit.

10. Though notices has been served on the respondent/plaintiff and the name of the respondent/plaintiff has printed in the cause list, there is no representation on his behalf. Therefore the case is taken up without in the presence/appearance of the respondent/plaintiff. The learned counsel for the petitioners/defendants submitted that the respondent/plaintiff was not indilgent in filing of the above suit and application.

11. The petitioners applied for a certified copy of the impugned order dated 12.8.2012 within 10 days. Certified copy of the order was delivered to the petitioner on 27.03.2013. The present civil revision petition has been filed challenging the impugned order of the Additional District Munsif Court allowing I.A.No.1247 of 2011 giving leave and liberty under Order XXIII Rule 3 (a) and (b) of CPC only on 01.04.2014.

12. However, the present Civil Revision Petition has been filed almost after a lapse of 13 months after the certified copy of the impugned order was received on 27.03.2013. Perhaps the present Civil Revision Petition has been filed after the respondent-plaintiff has instituted a fresh suit and after O.S.No.386 of 1999 itself was dismissed on 21.12.2012. However, the learned counsel for the petitioners is unable to confirm the same.

13. The respondent-plaintiff had filed in all four different applications including I.A.No.1347 of 2011. All of them were allowed by the Additional District Munsif Court O.S.No 386 of 1999 has also been dismissed on 21.12.2012.

14. The only point for consideration is whether the Court had exercised the discretion properly in the facts and circumstances of the case withdrawal of the suit with the leave of the Court to file a fresh suit is governed by an Order 23 Rule (3) (a) which reads as under :

“14. The object of Order 23 Rule 1 of C.P.C is to give power to the Court to allow the plaintiff at any time to withdraw his suit unconditionally or to withdraw from the suit on the fulfillment of conditions:

- (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. The object of the rule is only to prevent the defeat of justice on technical grounds.

Sub-rule (3) contemplates, withdrawal from the suit with liberty to bring a fresh suit. Plaintiff who asks/seek for leave to withdraw the suit must make out a case within Order 23, Rule 1 (3) (a) or (b) C.P.C., Order 23, Rule 1 and Sub-rule (2) and Sub-rule (3) all are to be read together. Application seeking permission of the Court to withdraw the suit and bar under Order 23, Rule 1 (4) C.P.C., to file a fresh suit pre-supposes the institution of the suit.....”

15. It is clear that such leave can be granted by the Court only where the suit would fail by the reason of formal defect or where there are sufficient

Court/ground for allowing to institute the fresh case. It is evident that the respondent/plaintiff has not diligent in pursuing the suit property. The order granting leave is not reasoned and requires interference.

16. Therefore, I am of the view the impugned order passed by the Additional District Munsif Court, Poonamallee is liable to be set aside and the present Civil Revision Petition deserves to be allowed subject to a limitation i.e. no fresh suit has been filed by the respondent-plaintiff as pursuant to the impugned order as the petitioner is guilty of delay in approaching this Court. The petitioner was waited for 13 long months before approaching this Court under Article 227 of the Constitution of India to set aside the order passed by the said Court.

17. The Additional District Munsif Court, Poonamallee is directed to restore O.S.No.386 of 1999 to the file of the Court and take up the case and dispose the aforesaid suit on merits based on the available pleadings and records within a period of nine months from the date of communication of this order. Provided the respondent-plaintiff has not filed a fresh suit on the same cause of action. Since the respondent/plaintiff is not present before this Court, fresh notice shall be issued by the Additional District Munsif Court, Poonamallee before proceeding further.

18. The present civil revision petition is allowed with the following observations:-

- i) O.S.No.386 of 1999 shall stand restored to the file of the the District Munsif Court, Poonamallee. Priveded the respondent has not filed a fresh suit on the same cause of action.
- ii) The impugned order passed in I.A.No.1247 of 2011 in O.S.No.386 of 1999 shall stand set aside if no fresh suit has been filed by the respondent-plaintiff pursuant to the impugned order.
- iii) If the suit is restored as above, the District Munsif Court, Poonamallee is directed to dispose the suit in O.S.No.386 of 1999 within a period of nine months from the date of communication of this order after ensuring proper notice is served on the respondent-plaintiff.

19. With the above directions, the Civil Revision Petition is allowed.

No costs. Consequently, the connected Miscellaneous Petition is also closed.

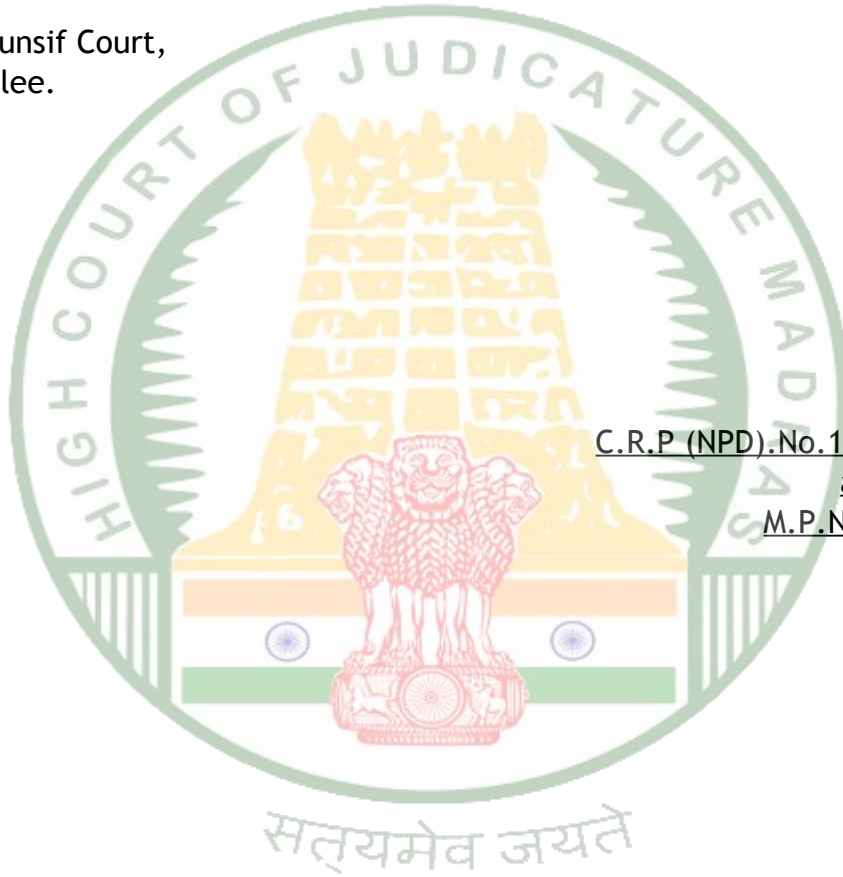
26.04.2019

Index : Yes/No
Internet : Yes/No
Speaking : Non-speaking order
arb/kkd

C.SARAVANAN,J.
Arb/kkd

To

District Munsif Court,
Poonamallee.



C.R.P (NPD).No.1856 of 2014
and
M.P.No.1 of 2014

WEB COPY

26.04.2019