

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.06.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P(NPD) No.2354 of 2014

1.A.Dilshath Begum

2.Nowshath Begum

((cause title accepted vide order
dated 20.06.2014 made in M.P.No.1/2013
in CRP.SR.No.58112 of 2013)

.. Petitioners

VS

A.P.Babu (Died)

1.N.Hemamalini

2.Minor.Trisha

3.Minor.Sureka

(Minor Respondents 2 and 3 herein
represented by their mother/Guardian
Hemamalini - 1st respondent)

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order dated 25.06.2012 passed in I.A.No.1654 of 2011 in O.S.No.216 of 2011 on the file of District Munsif Court, Avinashi.

For Petitioners : Mr.C.R.Prasanan

For Respondents : M/s.Sai Krishnan for
M/s.Sai Barath & Ilan

ORDER

This civil revision petition arises out of fair and decretal order passed in I.A.No.1654 of 2011 in O.S.No.216 of 2001 passed by the District Munsif Court, Avinasi.

2. The petitioners are the plaintiffs in O.S.No.216 of 2011. The said suit was filed for a permanent injunction to restrain the respondents from interfering with their peaceful possession and enjoyment of the suit properties. It was alleged that the respondents were constructing a wall to the petitioners' Eastern side space available for them on the east of the wall.

3. In respect of the very same subject property the respondents have filed O.S.No.260 of 2011 against the petitioners which was also pending before the same Court.

4. In O.S.No.216 of 2011, the respondents had earlier filed I.A.No.1616 of 2011 under Order 11 Rule 14 r/w Section 151 of C.P.C.to produce the original uddanpadikkai (Agreement) dated 29.10.2000 entered between the respondents and the petitioners' vendor before the Court in the custody of the respondents.

5. I.A.No.1616 of 2011 was allowed on 25.06.2012 which has been impugned in C.R.P.(NPD) No.2355 of 2014, while I.A.No.1654 of 2011 which was filed later by the petitioners under Section 23 Rule 1 of C.P.C on 23.09.2011 to withdraw the suit with a liberty to file a fresh suit on the same cause of action, the same was dismissed, which has been impugned in the present civil revision petition i.e. CRP.PD.No.2354 of 2014.

6. In the affidavit filed in support of I.A.No.1654 of 2011 filed under Order 23 Rule 11 of C.P.C, the petitioners have averred as follows:-

"3. We submit that the respondents are attempting to construct on the east of our property. The respondents had and have no right on the property on the eastern side. We submit that we had only intended and to file a suit for injunction in respect of the property situate on the east which belong to our mother their co-sharers. The respondents taking advantage of the fact that they belong to majority common unity, have colluded with possession with no title to create

bogus documents over the property situate on the east.

4. We submit that we also pointed out an attempt to encroach not only on the eastern side property but also into a portion of over property. However, we assumed bonafide that the suit has been filed for both eastern side property which is entrusted to our care and custody on behalf of our mother, the suit has been filed by mistake only to our property.

5. This is a mistake unless we are permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action. We will be put to loss."

7. The respondents/defendants opposed the petition. In para 6 of the counter, the respondents have stated as follows:

"The respondents submit that the petitioners have filed the above suit for permanent injunction that not to put up any constructions east of the north south common well in which the petitioners admit that the respondents are the adjacent owners and their properties lies east of the respondents properties and the dispute is the north south wall which is common for the petitioners and the respondents and the respondents have also filed a counter claim to this effect in the above suit. The petitioners are now falsely claiming right over the respondents properties and made over that their mother has only right over the suit properties and infact the petitioners mother is not the plaintiff in the above suit. The suit cannot be withdrawn as a matter of right and there is no mistake in the suit as alleged by the petitioners. The respondents submit that there is no formal defect in the above suit of any sufficient reasons stated in the affidavit to withdraw the suit. The petition is to be dismissed in limine on this ground alone.

8. In I.A.No.1616 of 2011, the respondents have articulated their objection to the above suit as follows:-

2. I submit that the respondents have filed a false suit against us claiming that North south wall is their exclusive wall and the space left to the said north south wall also belongs to the respondents. I submit that the north south wall is common wall of the petitioners and the respondents and when there was a dispute on 29.10.2000 there was Panchayat held between the petitioners vendor and the respondents family in presence of well wishers, panchayatadars and relatives from both sides in which the north south wall was kept in common between petitioners vendors and respondents and the hallow block wall on the southern side was kept as exclusive wall of my vendors and it was reduced in writing and an Panchayat udanpadakai (g“;rha;j;J cld;gof;if) was written between the parties on 29.10.2000. The stamp paper was purchased in the name of 1sr respondent Dilshath begaum in document paper Number 5660 dated 27.10.2000. It was also agreed that the original of the said panchayat udanpadikai has to be in the custody of respondents and true copy of the said document in the hands of our vendors. We have purchased the properties from one Jaffar along exclusive right in the hallow block wall. Our vendors have handed over the notarized copy of the said panchayat udanpadikai to us at the time of sale deed. By suppressing the above said facts the respondents have filed a false suit against us by claiming that the north south wall belongs to the respondents exclusively. We submit that the original udanpadikai dated 29.10.2000 is in the custody of the respondents. It is just and necessary that this hon’ble court shall order the respondents to produce the above said udanpadikai dated

29.10.2000 which is in the custody of the respondents before this hon'ble court. The said document is very much material to prove my case and it will clearly reveal the true facts of the case.

9. Learned Counsel for the petitioners submits that the Court erred in rejecting the application as not only there are formal defects but also there were sufficient grounds for granting liberty to the petitioners under Order 23 Rule 1 (3) of CPC.

10. Per contra, the learned counsel for the respondents submitted that a litigant, who has not been responsible in approaching the Court and has dragged the other side to Court cannot be granted liberty to institute the fresh suit on the same cause of action to the prejudice of other party.

11. The learned counsel for the respondents further submitted that the respondents had already filed a counter claim and the counter claim requires to be decided under Order VIII Rule 6 D of C.P.C. and therefore, withdrawal of the suit with liberty to file fresh suit cannot be justified.

12. The learned counsel appearing for the respondents would further submit that the dismissal of the application was correct. The petitioners are not entitled to invoke the jurisdiction of the Court as under Order 23 Rule 1 of

C.P.C.

13. The learned counsel for the respondents further submitted that the petitioners cannot be permitted to withdraw the suit with a liberty to file a fresh suit on the same cause of action as it is not a matter of right.

14. It is further submitted that the respondents had already filed another suit in O.S.No.260 of 2011 before the same trial Court for permanent injunction to restrain the petitioners herein and the petitioners have also entered appearance and there is an interim injunction subsisting against them.

15. In support of the present civil revision petition, the learned counsel for the petitioners has relied upon the following decisions:-

1. **Beniram and others vs. Gaind and Others** (1961) 4 SCC 209: In the said case, the Court granted liberty to file a fresh suit.
2. **Rajasundari vs. Gowri @ Avaduai Ammal**, 2006 (1) CTC 700: It was held that it was not open to the Court to grant leave to withdraw the suit and refuse prayer for fresh leave.
3. **Rajamanickam vs. P.Dhandapani and others**,

2013(5) CTC 385. The Court found that there were both formal defects as well as other defects and therefore the Court granted leave. The Court held that the an injunction suit cannot be converted into a suit for declaration and therefore permission can be granted to file a comprehensive suit.

4. **Balasundara Achari vs. Shanmugam and another**, 2014-4 L.W.713. The Court had given liberty on account of the age of the petitioner/plaintiff and on account of the fact that he was illiterate and had not given correct details to his counsel and therefore instead of allowing the plaint to be amended repeatedly, application to withdraw the suit with liberty to institute a fresh suit was allowed.
5. **DuraiKannu and Others Vs Malayammal** (2003) MLJ 551 wherein the Court held that a defect which goes to the root of the plaintiffs case is not a formal defect. A formal defect which be an omission to obtain permission of the Court to file a suit, misjoinder of parties, or cause of action, failure to disclose cause of action in the plaint, erroneous valuation, of the subject matter of the suit and institution of the suit in a court which has no jurisdiction.
6. The Court also held that failure to prove the case is not a sufficient cause.
7. **M.Sai and another vs. Shree Dharmaraja Kovil Street Rep. By its Trustees 1.Ekambara Chettiyar and two others** , 2018-3 LW.156. The Court held that under Order 23 Rule 1(3), a suit may be withdrawn with the permission of the Court to bring as fresh suit if the Court is

satisfied that the suit must fail for reason of some formal defect or there are sufficient cause to institute a fresh suit and the principle is founded on the public policy to prevent fresh suit to be instituted again and again on the same cause of action.

8. **V.Rajendaran vs Annasamy Pandian** (2017) 5 SCC 63. The appellants filed a suit describing the suit property as Survey No. 192/9 but the respondents had transferred the patta for the suit property settling as Survey No. 192/14. The Court held that the defect in the survey number of the suit property goes to the very core of the subject-matter of the suit and the entire proceedings would be fruitless if the decree-holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a "formal defect" within the meaning of Order 23 Rule 1(3)(a) CPC. That apart, the respondents are said to have executed an Inam settlement deed on 21-9-2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No. 192/14 and therefore the case would fall under clause (a) of Rule 1(3) of Order 23 CPC.

16. Per contra, the learned Counsel for the respondents relied on the decision of the Hon'ble Supreme Court in **K.S.Bhoopathy Vs Kokila and Others** (2000) 5 SCC 458 wherein while considering an application under Order 23 Rule 1(3) of the Code at an appellate stage the Hon'ble Supreme Court held that "*The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including*

the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases.

17. I have considered the rival submissions on behalf of either sides. Order 23 Rule 1 (3) of CPC allows the plaintiffs to withdraw a suit either on account of formal defects or where the plaintiffs makes out a case on the ground of "sufficient cause".

18. It is not as if there were any formal defects in the plaint. The petitioners have filed a suit for a permanent injunction to restrain the respondents from interfering with peaceful possession the suit property by putting up construction close to their property.

19. The short point that arises for consideration in this Civil Revision Petition is whether the petitioners had made out the case for withdrawing the suit either on the ground of formal defects or whether there are sufficient cause for allowing the petitioners to institute a fresh suit in respect of the subject matter of such suit or such part of the claim under Order 23 Rule 1(3) of C.P.C.

20. The respondents have managed to introduce a document vide I.A.No.1616 of 2011 which may have diminished the rights of the petitioners in

the suit and therefore, perhaps an attempt has been made to file a fresh suit for declaration which has been quelled in the impugned order.

21. The fact that the respondents have also filed another suit in O.S.No.260 of 2011, shows that the petitioners may have a right to file a counter claim subject to limitation there instead of withdrawing O.S.No.216 of 2011 after it was listed for framing issues.

22. From the averments in the affidavit filed in support of I.A.No.1654 of 2011 it is clear that the petitioners have not made out a case for withdrawal of the suit either on account of "formal defects" in the suit or has made out "sufficient grounds" as contemplated under Order 23 Rule 1(3)(a)(b) of C.P.C.

23. In fact, the decision of this Court cited by the learned Counsel for the petitioners in **DuraiKannu and Others Vs Malayammal** (2003) MLJ 551 clearly answers the issue against the petitioners though as per the decision in **V.Rajendran vs Annasamy Pandian** (2017) 5 SCC 63 defect in the survey number of the suit property was held went into the very core of the subject-matter of the suit and the entire proceedings would be fruitless, if the decree-

holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a “formal defect” within the meaning of Order 23 Rule 1(3)(a) CPC.

24. From the averments in the affidavit filed in support of I.A.No.1654 of 2011, it is clear that an attempt has been made to drag on the litigation even though already another suit is pending in respect of same subject matter in O.S.No.260 of 2011 against the petitioners in respect of the suit schedule property.

25. I am of the view, the lower court was justified in dismissing the application as there was neither formal defect nor sufficient grounds made out for permitting the petitioners to institute a fresh suit on the subject matter.

26. Further to permit the petitioners for filing a fresh suit at this distant point of time would cause further delay and waste of judicial time. Therefore, I am of the view, that the both the suits i.e. O.S.No.216 of 2011 and O.S.No.260 of 2011 pending before the District Munsif Court, Avinashi should be tried jointly while giving liberty to the petitioners to file a counter

claim if any in O.S.No.260 of 2011 and reply statement to the respondents. Such counter claim and reply should be filed within a period 30 days each from the date of receipt of a copy of this Order. Needless to state that the counter claim will be subject to limitation.

27. The Court shall thereafter draft issues and additional issues if any within a period of 90 days from the date of receipt of a copy of this order. The Court shall endeavour to complete the trial and pass final judgment and decree in both the suits within a period of nine months from the date of receipt of a copy of this order..

28. The Civil Revision Petition is dismissed with the above observation.

No costs.

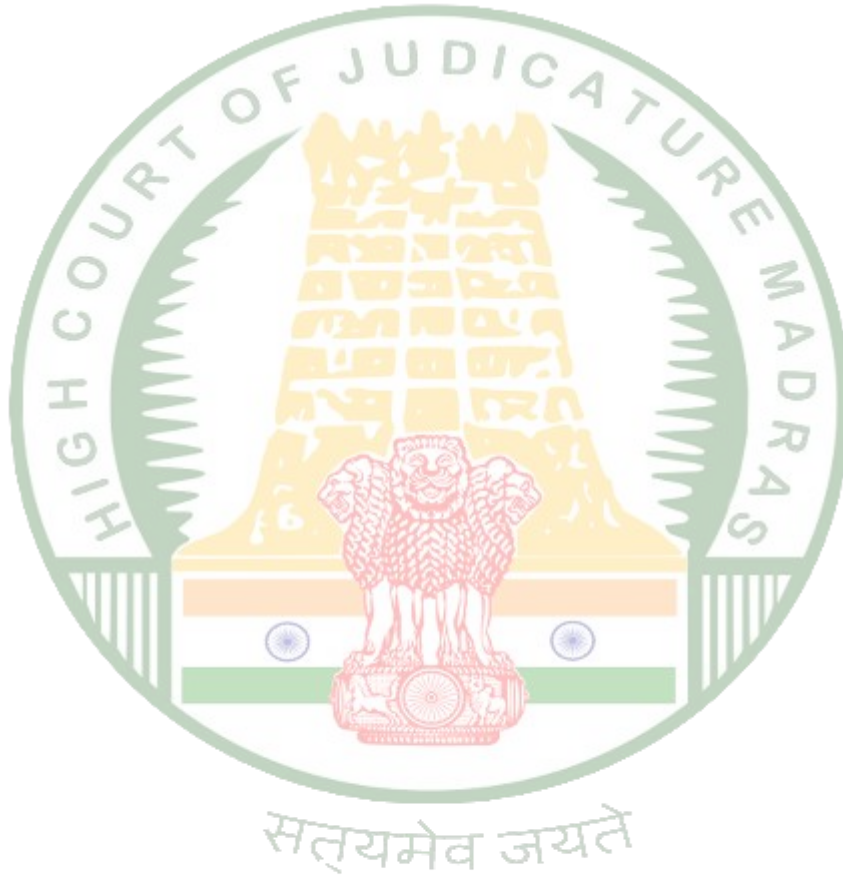
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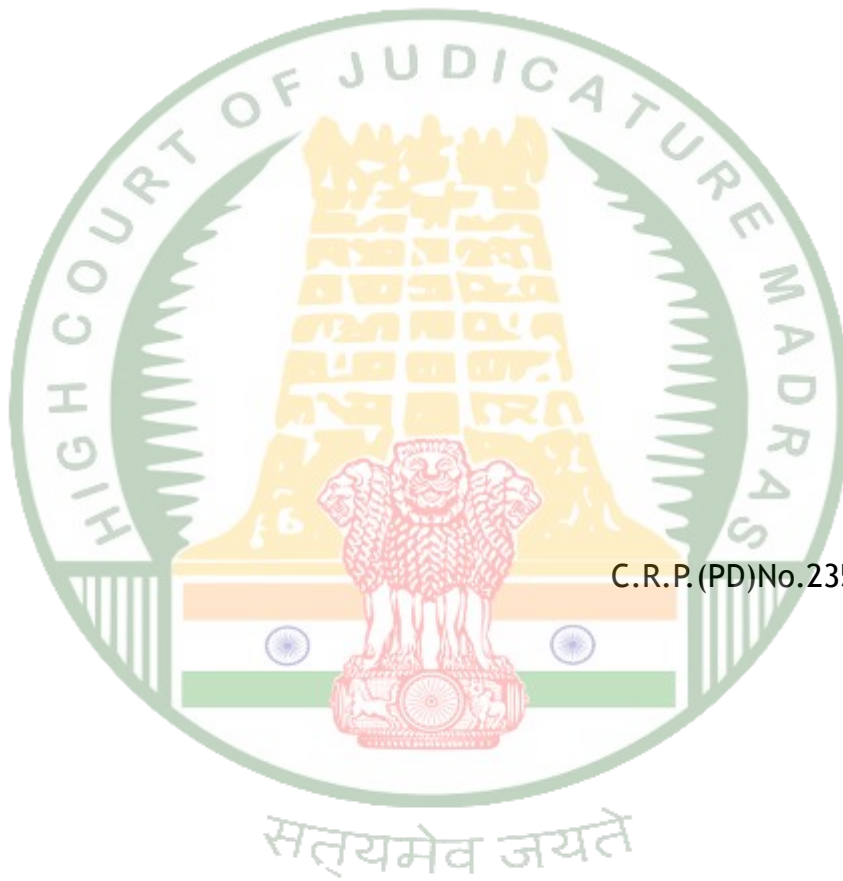
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