IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.10.2019

CORAM :

THE HON'BLE MR. JUSTICE M.DURAISWAMY

C.R.P.(PD).No.4524 of 2010 and
M.P.No.1 of 2010

R. Suseela ... Petitioner

v.

1. Navaneetham
2. Kalavathi
3. Selvakumar ... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decreetal order dated 23.11.2010 in I.A.No.490 of 2010 in O.S.No.475 of 2007 on the file of the Principal District Munsif Court, Tiruvannamalai.

For Petitioner : Mr.V. Raghavachari

For Respondents : Mr.R. Rajarajan – for R1 & R2

Mr. Rajaraman
for Mr.Sathish Kumar - for R3

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ORDER

Challenging the fair and final order passed in I.A.No.490 of 2010 in O.S.No.475 of 2007 on the file of the Principal District Munsif Court, Tiruvannamalai, the plaintiff has filed the above Civil Revision Petition.

2.1 The plaintiff filed the suit in O.S.No.475 of 2007 for permanent injunction. The defendants filed their written statement and are contesting the suit.

2.2 In the written statement, the defendants disputed the title of the plaintiff and sought for dismissal of the suit. Thereafter, the plaintiff took out an application in I.A.No.490 of 2010 under Order XXIII, Rule 1 of Civil Procedure Code seeking permission to withdraw the suit in O.S.No.475 of 2007 with liberty to file a fresh suit against the defendants on the same cause of action.

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2.3 In the affidavit filed in support of the application, the plaintiff has stated that in view of the nature of defence taken by the defendants, she has to file the suit for declaration instead of mere permanent injunction. Further, in the affidavit, the plaintiff has stated that she derived title by virtue of a Will dated 07.10.2004 executed by her mother Sundrammal.

2.4 The defendants filed their counter and opposed the application stating that the application was filed at a belated stage and that without probating the Will, the plaintiff cannot rely upon the said Will.

3. The Trial Court, after taking into consideration the case of both the parties, dismissed the application finding that the plaintiff has filed the application at a belated stage after the examination of witnesses.

4. When the defendants have disputed the title of the plaintiff, the proper course would be to pray for declaration of title in respect of

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the suit property. The plaintiff could have filed an application under Order VI Rule 17 of Civil Procedure Code to amend the plaint by incorporating the prayer for declaration. Instead, the plaintiff filed the application under Order XXIII, Rule 1 of Civil Procedure Code for withdrawing the suit with liberty to file fresh suit.

5. The plaintiff can file separate suit for declaration and establish her title over the property. The cause of action for filing the suit for permanent injunction by the plaintiff was that the defendants attempted to interfere with her possession and enjoyment of the suit property. The plaintiff has stated about the execution of the Will in her favour by her mother Sundrammal in the plaint in O.S.No.475 of 2007. Therefore, it cannot be stated that the plaintiff is trying to put up a new case.

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6. Since the defendants have disputed the title of the plaintiff, the plaintiff could have filed the suit for declaration even without obtaining liberty from the Trial Court.

7. In the Judgment reported in **2006(1) CTC 700 [Rajasundari v. Gowri @ Avudai Ammal]** relied upon by the learned counsel appearing for the 3rd respondent, this Court held that application to withdraw the suit with liberty to file fresh suit must either be allowed or refused in toto. It is not open to the Court to grant prayer for withdrawal and refuse the prayer for leave to file fresh suit.

8. There cannot be any dispute with regard to the ratio laid down in the said Judgment.

9. Since the plaintiff has filed the application at a belated stage, that too, after the completion of the oral evidence on either side, the Trial Court had dismissed the application. When the suit was filed in the year 2007 and the written statement was filed in the year 2008, the plaintiff chose to file the application seeking for withdrawal of the suit with liberty to file fresh suit only on 27.07.2010, that too, after the completion of the oral evidence. The plaintiff could have filed the application at the

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earliest point of time and not at the fag end of the proceedings.

10. In these circumstances, I am not inclined to interfere with the order passed by the Trial Court, The Civil Revision Petition is dismissed. No costs. Consequently the connected Miscellaneous Petition is closed.

31.10.2019

Index : Yes / No

Speaking order / Non Speaking Order

Rj

To

The Principal District Munsif Court,
Tiruvannamalai.

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M.DURAISWAMY, J.

Rj

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