

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.10.2019

CORAM:

THE HONOURABLE MR. JUSTICE **R.PONGIAPPAN**

C.R.P.PD.No.4642 of 2014
& M.P.No.1 of 2014

C.Jagadeesan
Rep by Power Agent
Yadhavamurthi

.... Petitioner

Vs

T.Baskaran

.... Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 07.07.2014 made in I.A.No.849 of 2013 in O.S.No.248 of 2011 on the file of the I Additional District Munsif Court, Salem.

For Petitioner : Mr.K.Sivasubramanian

For Respondent : Mr.P.Jagadeesan

ORDER

Aggrieved over the order dated 07.07.2014 in I.A.No.849 of 2013 in O.S.No.248 of 2011, passed by the learned I Additional District Munsif, Salem, the petitioner, who is the plaintiff in the above referred suit, filed the present Civil Revision Petition.

2. Before the trial Court, the petitioner herein filed the above referred suit in O.S.No.248 of 2011, and sought for the relief of permanent injunction restraining the defendant and his agent from any way interfering with his possession and in enjoyment of the suit schedule property.

3. During the pendency of the suit on 19.08.2013, the petitioner filed an application under Order 23 Rules 1 and 3 of C.P.C., and sought for the relief to withdraw the said suit with liberty to file a fresh suit on the same cause of action. The said application was assigned with the case number as I.A.No.849 of 2013 and thereafter the learned I Additional District Munsif, Salem, after affording opportunity to the respondent, by an order dated 07.07.2014, dismissed the application filed by the petitioner by observing that in the report filed by the Advocate Commissioner, he has not stated anything about the existence of the cart track, which was the subject matter of the suit filed by the petitioner. Further he has observed that since the order of status-quo has already been granted, there is no necessity for granting liberty to the petitioner for filing another suit based on the same cause of action. Aggrieved over the said findings the petitioner is before this Court with this Civil Revision Petition and prayed to set aside the order dated 07.07.2014.

4. The learned counsel appearing for the petitioner would contend that since already there is an order of status-quo, in respect of the suit schedule property, it has to be presumed that the cart track is existed. But the learned I Additional District Munsif, Salem, by relying the report filed by the Advocate Commissioner came to the conclusion that there is no existing of cart track as alleged by the plaintiff. Since the report filed by the Advocate Commissioner is not a substantial piece of evidence, relying the same is not necessary. Therefore for filing fresh suit after including the prayer for declaration, liberty is necessary to the petitioner and therefore, the order passed by the learned I Additional District Munsif, Salem is liable to be set aside.

5. On the other hand, the learned counsel appearing for the respondent would contend that since the suit filed for the relief of permanent injunction, the petitioner/plaintiff has to show formal defects found in the plaint and also to give sufficient ground for withdrawal of the suit. But in this case, before the trial Court, the petitioner has not shown sufficient grounds for withdrawal of suit with liberty to file a fresh suit. So the impugned order passed by the learned I Additional District Munsif, Salem, is well and within the principles of law.

6. In this regard, the learned counsel appearing for the respondent has relied upon the judgement of this Court reported in **2003(3) M.L.J.551** in the case of **Duraikannu and others Vs. Malayammal**, which 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."

7. Now applying the said principle with the affidavit filed by the petitioner in support of the petition before the trial Court, he has stated that only during the time of trial, he came to know that further reliefs are also

necessary for settling the dispute between the petitioner and the respondent. The said reason stated by the petitioner is not within the ambit of Order 23 Rules 1 & 3 of the Civil Procedure Code. Further non asking of the relief of declaration is a fault with the plaintiff at the initial stage. In other words, this Court is not satisfied with the reason stated by the petitioner and he has not indicated sufficient grounds for interfering with the order dated 07.07.2014 passed in I.A.No.849 of 2013 in O.S.No.248 of 2011, by the learned I Additional District Munsif, Salem.

8. Hence in view of the above discussion, this Civil Revision Petition stands dismissed. Consequently, connected miscellaneous petition is closed. No costs.

01.10.2019

Internet : Yes / No
Index : Yes / No
Speaking / Non Speaking order

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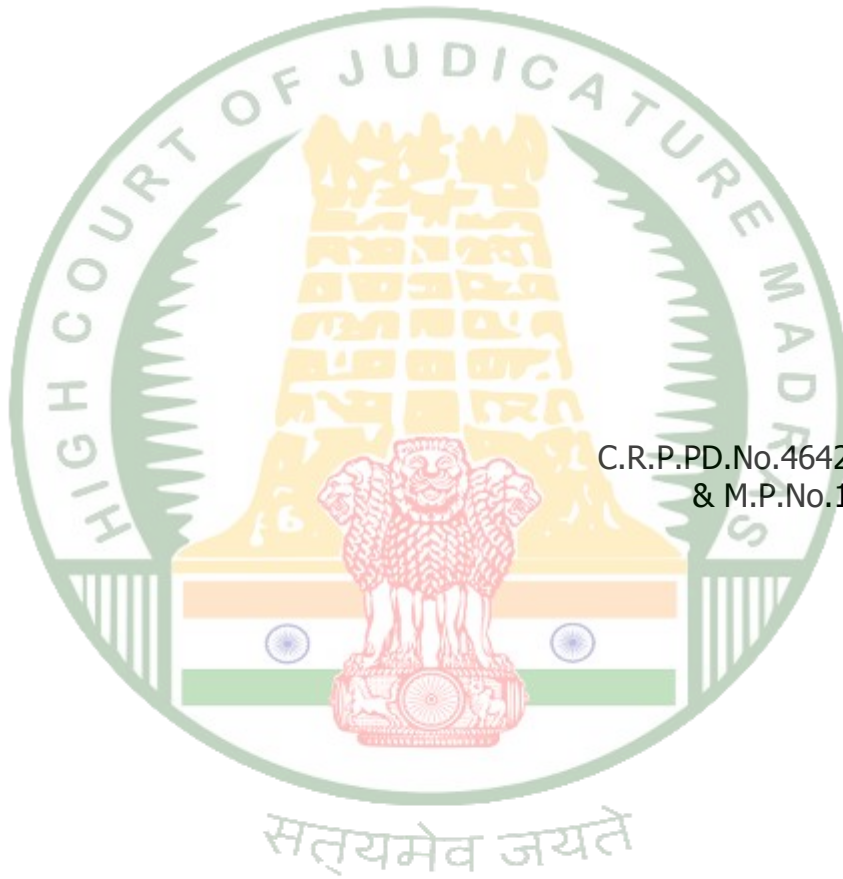
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