



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Monday, the Eleventh day of March Two Thousand Nineteen

PRESENT

The Hon`ble Mr Justice B.PUGALENDHI

CMP(MD) No.11268 of 2016

IN

SA(MD) No.101 of 2011

AL.PARVATHI

... PETITIONER/APPELLANT

Vs

1.PL.SUBRAMANIAN

2 PL.VISALATCHI

3 P.PALANIVELU

... RESPONDENTS/RESPONDENTS

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to permit the petitioner/appellant to withdraw the above second appeal with the liberty to file fresh suit for recovery possession over the hotel business and suit premises from the 3rd respondent / 3rd defendant.

Prayer in SA(MD). 101/ 2011 :

To prefer the memorandum of grounds of second appeal as against the judgment and decree dated 18/10/2010 in AS.No.32/2010 on the file of the Subordinate Judge, Devakottai confirming the judgment and decree dated 08/06/2010 in OS.No.147/2008 on the file of the Additional District Munsif, Karaikudi.

ORDER : This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr.VR.SHANMUGANATHAN, Advocate for the petitioner the court made the following order:-

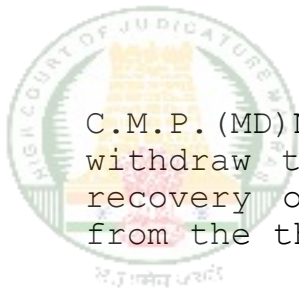
Reserved on : 12.12.2018

Pronounced on : 11.03.2019

This Second Appeal is filed against the judgment and decree passed by the learned Subordinate Judge, Devakottai, in A.S.No.32 of 2010 dated 18.10.2010, confirming the judgment and decree passed by the learned Additional District Munsif, Karaikudi, in O.S.No.147 of 2008 dated 08.06.2010.

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2. Pending second appeal, the petitioner/appellant has filed



C.M.P.(MD)No.11268 of 2016, seeking permission of this Court to withdraw the second appeal with liberty to file a fresh suit for recovery of possession over the hotel business and suit premises from the third respondent.

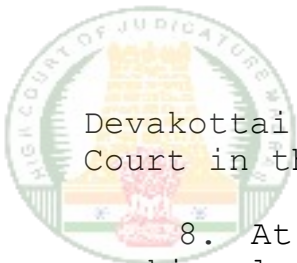
3. Learned Counsel for the petitioner would submit that the suit properties belong to respondents 1 & 2 and the petitioner, who was a tenant, was permitted to carry out a Hotel business, in the name and style of "Friends Family Restaurant". She appointed the third respondent to supervise the Restaurant and went abroad. When she returned, the third respondent claimed that the Hotel business exclusively belongs to him and has also made an attempt to transfer the lease agreement. Therefore, the petitioner has filed the suit for declaration declaring herself as the lawful lessee and for permanent injunction, however the same was dismissed. Since the Restaurant belongs to the petitioner and pending suit, she was dispossessed by the third respondent, she has filed the present civil miscellaneous petition seeking leave of this Court to withdraw the second appeal with liberty to file a fresh suit seeking recovery of possession.

4. Learned Counsel for the respondents, on the other hand, has filed a counter affidavit stating that originally a lease was entered into between the petitioner and respondents 1 & 2 in respect of a vacant site. The petitioner, in turn, has sub-let the same to the third respondent, where, the third respondent has put up structures and running a Hotel. After the expiry of the petitioner's lease period with respondents 1 & 2, the third respondent has become a direct tenant under respondents 1 & 2. It is further alleged that the suit was dismissed on merits and a finding has been rendered by the Courts below in favour of the third respondent. Both the Courts below have found that the petitioner was not in possession at the time of filing of the suit itself, as such, the ground raised by the petitioner for recovery of possession lacks merits and therefore, the learned Counsel prays for dismissal.

5. Heard the learned Counsel appearing for the respective parties and perused the documents placed on record.

6. The contention of the petitioner appears to be that she was dispossessed from the property, pending the suit for declaration and injunction. Therefore, she is entitled to file a fresh suit for recovery of possession. However, the respondents contended that the Courts below have given a finding that the petitioner was not in possession at the time of institution of suit itself and moreover, the suit was dismissed on merits. Therefore, he prays for dismissal.

7. Be that as it may, it is seen that the suit was filed for permanent injunction as well as for a declaration that the petitioner is the lawful lessee. The said suit suffered a dismissal at the hands of the learned Additional District Munsif, Karaikudi and the same was upheld by the learned Subordinate Judge,



Devakottai. The legality of this judgment is questioned before this Court in the second appeal and the same is pending.

8. At this juncture, the petitioner has filed this petition seeking leave to withdraw the second appeal and to file a fresh suit seeking recovery of possession. The reasoning assigned by the petitioner is that she is the person who started the Hotel business and therefore, she is entitled for recovery of possession. This Court is of the view that such a liberty cannot be granted inasmuch as the relief of declaration that she is the lawful lessee has already been sought for in the suit itself. Therefore, this Court is of the view that the petitioner is now attempting to sought for a relief, which has already been sought for in the form of a declaration.

9. In such a view of the matter, this Court is not inclined to grant liberty to the petitioner to institute a fresh suit. Now, the question to be decided is whether the petitioner should be permitted to withdraw the present second appeal. This Court is of the view that if the petitioner is not granted liberty to institute a fresh suit, then the pending proceedings should not be dismissed as withdrawn. The application should either be allowed in *toto* or refused altogether and the pending proceedings should be retained to continue, protecting the rights of the petitioner to contest the case at her best.

10. In similar circumstances, this Court in the decision reported in **2006 (1) CTC 700**, in the case of **Rajasundari v. Gowri @ Avaduai Ammal**, has held as follows:

"12. An application to withdraw the Suit with liberty to file a fresh suit must either be allowed or refused in toto. It is not open to the Court to grant a prayer for withdrawal and refuse the leave. If liberty is refused, the Suit should not be dismissed, but must be retained in the file for Trial / continuation of Trial. If an application is made for withdrawal of the Suit with liberty to file a fresh suit, it is not open to the Court to grant only permission for withdrawal, without liberty to file a fresh suit. If the Court simply allows withdrawal but refuses liberty, the Court would be acting without jurisdiction in dividing the petition into two parts. It is to be noted that the Application under Order 23 Rule 1(3) of C.P.C. is indivisible whole. The Trial Court was not right in separating the prayer for withdrawal and the leave to file a fresh suit. When the Court has declined to grant leave to file a fresh suit, the Trial Court ought to have dismissed the Application in toto."

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11. Under the above circumstances, this Court is not inclined to entertain this civil miscellaneous petition and the same is dismissed in *toto*. Registry is directed to post the main second



appeal before the concerned Portfolio Judge. It is open to the petitioner to withdraw the second appeal, if she so desires.

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11/03/2019

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Sub-Assistant Registrar (C.S.I)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1.THE ADDITIONAL DISTRICT MUNSIF,
KARAIKUDI.

2.THE SUBORDINATE JUDGE,
DEVAKOTTAI.

1 CC to Mr.R.SUNDAR SRINIVASAN, Advocate (SR-4658[I] dated
12/03/2019)

+1 CC to M/s.VR.SHANMUGANATHAN, Advocate (SR-4715[I] dated
12/03/2019)

ORDER
IN
CMP (MD) No.11268 of 2016
IN
SA (MD) No.101 of 2011
Date :11/03/2019

AE/PN/SAR-II/13.03.2019/4P/5C