



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.12.2020

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

C.R.P(NPD) (MD)No.1110 of 2011

and

M.P(MD)No.1 of 2011

WEB COPY

1.Leena
2.Ayyappan ... Petitioners/Respondents 1 & 2/
Defendants 1 & 2
Vs.
1.Sudharshan Babu
2.R.Senthilkumar Respondents 1 & 2/Petitioners 1 & 2/
Plaintiffs 1 & 2

3.Krishnankumar
4.Joseph ... Respondents 3 & 4/Respondents 3 & 4/
Defendants 3 & 4
(RR 3 & 4 remained ex-parte before the trial Court)

Prayer: Civil Revision Petition filed under Article 115 of the Code of Civil Procedure, against the fair and decreetal order in I.A.No.150 of 2011 in O.S.No.86 of 2005 passed by I Additional District Munsif, Nagercoil, dated 18.02.2011.

For Petitioners : Mr.A.Balakrishnan

For RR 1 & 2 : Mr.V.Meenakshi Sundaram

O R D E R

This Civil Revision Petition has been filed by the petitioners / defendants 1 and 2, to set aside the order dated 18.02.2011, passed by the learned I Additional District Munsif, Nagercoil, in I.A.No.150 of 2011 in O.S.No.86 of 2005.

2.The respondents 1 and 2 herein / plaintiffs instituted a suit in O.S.No.86 of 2005 on the file of the I Additional District Munsif, Nagercoil, against the petitioners /defendants 1 and 2 and the respondents 3 and 4 / defendants 3 and 4, for declaration and permanent injunction, stating that they obtained the suit schedule property totalling 1 acre 32 cents comprised in R.S.No.7/3 in Chiramadam Village, Thovalai Taluk from their mother through Will dated 20.03.1996; and after the death of their mother i.e., on 12.09.2002, they have been in exclusive possession of the same. It is further stated in the plaint that adjacent to Northern side of R.S.No.7/3, the Government had given assignment of the land to an extent of 1 acre 30 cents in R.S.Nos.7/2 and 7/9 to the first plaintiff and his father and the father executed a gift deed with



respect to his share to the first plaintiff, who ever since, is in exclusive possession of the same. The plaint further proceeds as if on the southern side of 1 acre 32 cents, one Padmanabhan owned 87 cents of land in R.S.No.7/3, as per settlement deed dated 20.02.1965 and he inturn, executed a settlement deed dated 10.04.2002 in favour of the first and second defendants, who are his daughter-in-law and son, by mentioning the area covered as 1 acre 6 cents; and the defendants were trying to interfere with the plaintiffs' possession and enjoyment of the suit schedule property, which compelled the plaintiffs to file the present suit.

3.The defendants filed their written statement denying the averments made in the plaint. According to them, there was no poramboke land and all the lands were inspected by the authorities during the resurvey operation and patta was granted to the respective owners in respect of those lands based on title and possession and accordingly, the defendants' predecessors obtained patta in respect of the disputed lands. It is further stated therein that the defendants have not claimed any right over the properties owned by the plaintiffs.

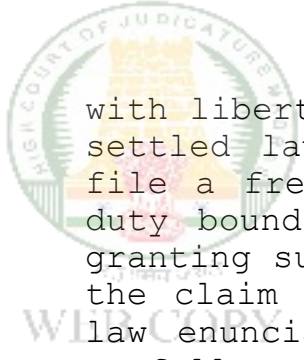
4.Pending the suit, the respondents 1 and 2 / plaintiffs filed an interlocutory application in I.A.No.150 of 2011 to withdraw the suit with liberty to file a fresh comprehensive suit on the same cause of action, for impleading the necessary parties. The trial Court by order dated 18.02.2011 allowed the said application. Hence, this Civil Revision Petition by the petitioners / defendants 1 and 2.

5.The learned counsel appearing for the revision petitioners / defendants 1 and 2 submitted that the respondents 1 and 2 / plaintiffs knew very well that on the southern side of the defendants' property, Government poramboke land is existing and they ought to have impleaded the Government as party to the proceedings, at the time of filing the suit itself and the withdrawal of the suit for non-joinder of necessary party, that too at the trial stage, is only to drag on the proceedings and hence, the same cannot be granted to the plaintiffs. Thus, according to the learned counsel, the order impugned herein is liable to be set aside.

6.On the other hand, the learned counsel appearing for the respondents 1 and 2 / plaintiffs submitted that the trial Court, after considering the pleadings averred in the application and submissions made by the parties, rightly allowed the application and hence, the same warrants no interference at the hands of this Court.

7.Heard both sides and perused the materials available on record.

8.The issue involved herein is relating to withdrawal of suit



with liberty to file a fresh suit on the same cause of action. It is settled law that permission to withdraw the suit with liberty to file a fresh suit cannot be granted mechanically and the Court is duty bound to satisfy itself that there exist proper grounds for granting such permission. Such permission cannot be resorted to when the claim set out in the original suit is weak. The principles of law enunciated in **K.S.Bhoopathy vs Kokila [(2000) 5 SCC 458]** are usefully extracted hereunder:

"13.The provision in Order XXIII, Rule 1, C.P.C. is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule(1)....No doubt, the grant of leave envisaged in sub-rule(3) of Rule 1 is at the discretion of the Court, but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided. (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and (2) the other where the Court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the Court, that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. 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), C.P.C. for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this 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."

Thus, in order to entertain leave for fresh suit on same cause of action, there shall be two conditions;

(1) the suit sought to be withdrawn in its plaint must fail by some reason of formal defect;

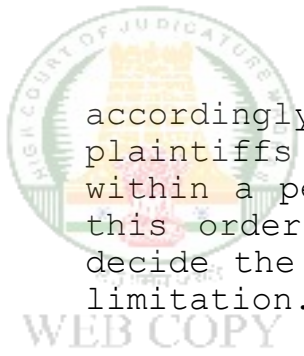
(2) There should be sufficient grounds to the satisfaction of the Court for allowing the plaintiff to institute fresh suit on same cause of action.

9. According to the plaintiffs, there is no permanent demarcation line between the properties of the plaintiffs and the defendants and they wanted to implead the necessary parties viz., wife of the fourth defendant viz., Jesuthangam, who is possessing 13 cents in R.S.No.7/3 and the Government, whose land is situated on the southern side of RS.No.7/3 and hence, they sought leave to withdraw the suit with liberty to file a fresh comprehensive suit on the same cause of action.

10. The relief so sought by the plaintiffs was mainly resisted by the petitioners / defendants 1 and 2 stating that the omission to implead the necessary parties is not a formal defect, but is a material defect and hence, the trial Court ought not to have granted permission to the plaintiffs to withdraw the suit with liberty to file a fresh suit on the same cause of action. They further stated that already, trial commenced, plaintiffs' side witnesses were examined and cross examination was also over and in such circumstances, the suit cannot be permitted to be withdrawn, as it would cause serious prejudice to the valuable and substantive right of the defendants. However, according to them, the necessary parties may be brought on record by way of impleading application.

11. Having regard to the pleadings raised in the case, it is seen that the adjacent owners viz., Government and the wife of the fourth defendant are sought to be impleaded in the suit, as they are the necessary parties, which, in the opinion of this Court, is not a formal defect, but is a material defect and the same would cause injury to the right of the defendants. Even the plaintiffs have absolute right to withdraw the suit, the same cannot be granted in a straitjacket manner. No litigant can be allowed to file suit one after another on the same cause of action and the same would, not only cause harassment/prejudice to the parties against whom it is filed, but also it is unnecessary impart on the public exchequer and unnecessary load on the Court time.

12. In such view of the matter, the order passed by the trial Court granting permission to the plaintiffs to withdraw the suit with liberty to file fresh suit, is liable to be set aside and is



accordingly, set aside. However, as agreed by both sides, the plaintiffs are at liberty to file necessary amendment application, within a period of two weeks from the date of receipt of a copy of this order. On filing of such application, the trial Court shall decide the same on merits, without raising any issue with regard to limitation.

13.This Civil Revision Petition is disposed of in the above terms. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

ps

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The I Additional District Munsif,
Nagercoil,

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai. (2 Copies)
+1 cc to Mr.D.NALLATHAMBI ,Advocate, SR No.26343
+1 cc to Mr.A.BALA KRISHNAN ,Advocate, SR No.26584

C.R.P(MD)No.1110 of 2011

17.12.2020

TP (CO)

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