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C.R.P. (PD) .No.2430 of 2016



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD).No.2430 of 2016

and

C.M.P.No.12560 of 2016

M.Parvathamani

.. Petitioner

Vs.

1.M.Palanisamy

2.P.Senthilkumar

3.Nallasivam

4.Manoranjitham

.. Respondents

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decretal order dated 15.03.2016 made in I.A.No.27 of 2016 in O.S.No.99 of 2013 on the file of the Sub Court, Perundurai.

For Petitioner : Mr.C.Prabakaran
for Mr.C.S.Saravanan

For R1 : Mr.V.Ragunathan

For RR 2 to 4 : No appearance

**ORDER**

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(The matter is heard through “Video Conferencing/Hybrid Mode”).

This Civil Revision Petition is filed against the fair and decretal order dated 15.03.2016 made in I.A.No.27 of 2016 in O.S.No.99 of 2013 on the file of the Sub Court, Perundurai.

2.The petitioner is plaintiff in O.S.No.99 of 2013 on the file of the Sub Court, Perundurai. She filed the said suit for partition as against the respondents. The 1st respondent filed written statement on 29.10.2013 and the respondents are contesting the suit. Trial commenced. When the suit was posted for cross examination of D.W.1, the petitioner filed I.A.No.27 of 2016 under Order XXIII Rule 1 (3) (a) & (b) and Section 151 of the Code of Civil Procedure to permit the petitioner to withdraw the suit and file a comprehensive suit. According to the petitioner, the suit properties are ancestral properties. The 1st respondent is her father and 2nd respondent is her brother. The respondents 3 & 4 are her father's brother's son and daughter. The petitioner issued a notice dated 14.06.2013 to the respondents 1 & 2 to partition the ancestral property. On 15.07.2013, the 1st respondent sent a



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reply to the notice sent by the Advocate of the petitioner stating that 1st respondent did not mention that his father purchased the property and partition took place between them. But, in the written statement, the 1st respondent has stated that the suit properties are not ancestral properties and it is self acquired properties of Mosimooan @ Karuppamooan, who purchased the same by sale deed dated 26.09.1969 and 02.02.1980 and there was partition between his father, 1st respondent and his brother Lakshmanan as per the partition deed dated 12.04.1989. The petitioner came to know about the sale deeds and partition deed only during trial at the time of cross examination of D.W.1. She has to verify the genuineness of the two sale deeds and partition deed. The 1st respondent has stated that Mother of the respondents 3 & 4 and other 15 co-sharers in Survey No.727 measuring 9 acre 39 cents have to be impleaded as parties to the suit. If all the parties are to be added, it will take time. Due to the above formal defects, the petitioner may be permitted to withdraw the suit and file a fresh comprehensive suit.

3.The 1st respondent filed counter affidavit and denied all the averments and submitted that 1st respondent filed written statement on 29.10.2013 and pointed out that petitioner has not impleaded necessary parties and not



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included all the purchasers. Inspite of the same, the petitioner has not taken any steps to implead all the parties and to include all the properties. Only when the suit was posted for evidence of respondents after filing proof affidavit and at the time of cross examination of D.W.1, the petitioner has filed the present application. The petitioner has filed Ex.P8 along with plaint. The petitioner knowing fully well that all the properties in Ex.P8 to be included in the suit, she has failed to include those properties in the suit. The petitioner has not sought for permission to withdraw the suit and to file a suit on the same cause of action. The petitioner has not satisfied the ingredients of Order XXIII Rule 1 & 3 of the Code of Civil Procedure and prayed for dismissal of I.A.No.27 of 2016.

4.The learned Judge considering the averments in the affidavit and counter affidavit, dismissed the I.A.

5.Against the said order of dismissal dated 15.03.2016 made in I.A.No.27 of 2016, the petitioner has come out with the present Civil Revision Petition.



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6. Heard the learned counsel appearing for the petitioner as well as the learned counsel appearing for the 1st respondent and perused the entire materials on record. Though notice has been served on the respondents 2 to 4 and their names are printed in the cause list, there is no representation for them, either in person or through counsel.

7. From the materials on record, it is seen that the petitioner filed suit for partition against the respondents stating that the suit properties are ancestral properties and she is entitled to a share in the suit properties. On the other hand, it is the case of the respondents that suit properties are not ancestral properties and it is self acquired properties of Mosimooan @ Karuppamooan. The said Mosimooan @ Karuppamooan purchased the same by two sale deeds dated 26.09.1969 and 02.02.1980. The 1st respondent along with his father and brother, by the deed of partition dated 12.04.1989 partitioned the same among themselves. Further, the 1st respondent has stated in the written statement that mother of respondents 3 & 4 is a necessary party to the suit. It is the further case of the 1st respondent that certain other properties are not included in the suit for partition even though the petitioner was aware of the same. The written statement was filed by the 1st respondent



on 29.10.2013. The petitioner has not taken any steps immediately before commencement of trial. According to the petitioner, she came to know about two sale deeds and partition deed only when those documents were produced during chief examination of D.W.1. The said contention is contrary to the facts referred to above. The petitioner has not stated as to why she did not seek genuineness of said documents even though the 1st respondent has mentioned the same in the written statement.

8.Further, the formal defect mentioned by the petitioner is that she has to implead the mother of the respondents 3 & 4 and 15 other co-sharers of the properties in Survey No.727. As per Order XXIII Rule (1) & (3) of the Code of Civil Procedure, permission can be granted by the Court to withdraw the suit and file a fresh suit on the same cause of action when there is a formal defect and that suit will fail due to the said formal defect. Leave can be granted only when Court satisfies that ingredients of Order XXIII Rule (1) & (3) of the Code of Civil Procedure are complied with. In the judgment relied on by the learned counsel appearing for the 1st respondent before the Trial Court reported in **2003 (4) L.W. 453, (Duraikannu and others Vs. Malayammal)**, a formal defect as contemplated in Order XXIII Rule (1) & (3)



of the Code of Civil Procedure was formulated. The formal defect mentioned by the petitioner is not a formal defect as contemplated under Order XXIII Rule (1) & (3) of the Code of Civil Procedure. Further, the formal defect alleged by the petitioner can be rectified by impleading necessary parties and amend the plaint to include all the properties which are liable to be partitioned. The reason given by the petitioner that impleading all the necessary parties will take time and therefore, she may be permitted to withdraw and file a fresh suit is not a valid ground for invoking Order XXIII of the Code of Civil Procedure. In the year 2013 itself, the petitioner knowing that she has not impleaded the parties now sought to be impleaded, the properties to be included are sale deeds and partition deed, she has not taken any steps to implead and amend the plaint. Further, as rightly pointed out by the learned counsel appearing for 1st respondent, the petitioner has not sought for permission to file a fresh suit on the same cause of action after withdrawal. The learned Judge has properly appreciating the scope of Order XXIII Rule (1) & (3) of the Code of Civil Procedure and materials placed before him, dismissed the I.A. by giving cogent and valid reason. There is no error or irregularity in the order of the learned Judge warranting interference by this Court.



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9.For the above reasons, this Civil Revision Petition is dismissed. The suit is of the year 2013 and the learned Subordinate Judge, Perundurai is directed to dispose of the suit, in any event, within a period of six months from the date of receipt of a copy of this order. Consequently, the connected Miscellaneous Petition is closed. No costs.

06.12.2021

krk

Index : Yes / No

Internet : Yes / No

To

The learned Subordinate Judge,
Perundurai.



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V.M.VELUMANI, J.
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