

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

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| <b>Reserved on: 19.11.2020</b> | <b>Delivered on: 16.02.2021</b> |
|--------------------------------|---------------------------------|

**CORAM**

**THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM**

**CRP.(PD).No.2156 of 2014**  
**and**  
**M.P.No.1 of 2014**

S.Subramaniam

...Petitioner

**Vs.**

1.Pongiammal  
2.Pappathi @ Thangammal  
3.K.Parameswaran  
4.AnnaKodi  
5.Krishnamoorthy  
6.Krishnamoorthy  
7.Pavathal  
8.Thulasimani  
9.R.Chinnaswamy

...Respondents

**PRAYER:** Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order and decreetal order dated 13.03.2014 in I.A.No.20 of 2014 in O.S.No.387 of 2008 on the file of the II Additional District Munsif, Erode.

For Petitioner : Mr.V.LakshmiNarayanan  
For Respondents : Mr.A.Sundaravadhanam  
for R1 to R6, R8 and R9  
: R7- No appearance

**ORDER**

This Civil Revision Petition has been filed by the petitioner/plaintiff against the dismissal of his application in I.A.No.20 of 2014 in O.S.No.387 of 2008 on the file of the II Additional District Munsif, Erode, dated 13.03.2014.

2. The petitioner herein had filed an application in I.A.No.20 of 2014 in O.S.No.387 of 2008 on the file of the II Additional District Munsif, Erode, under Order 23 Rule 1 and Section 151 of the Civil Procedure Code, seeking leave of the Court to withdraw the suit in O.S.No.387 of 2008 with liberty to file a fresh suit on the same cause of action. The learned II Additional District Munsif, Erode, by the order dated 13.03.2014 had dismissed the said application. Feeling aggrieved, the petitioner/plaintiff has filed the present Civil Revision Petition.

3. Heard, Mr.V.LakshmiNarayanan, the learned counsel for the petitioner/plaintiff and Mr.A.Sundaravadhanam, the learned counsel for the respondents/defendants.

4. The learned counsel for the petitioner has submitted that the petitioner herein had filed a suit in O.S.No.387 of 2008 on the file of the II Additional District Munsif, Erode, for permanent injunction restraining the respondents herein from evicting him from the suit property except under due process of law. He further submitted that during pendency of the said suit, the petitioner herein had filed an application in I.A.No.1216 of 2011 seeking permission of the Court to amend the plaint to incorporate the relief to declare that the settlement deed dated 17.04.2008 executed by the first respondent herein in favour of the respondents 3 and 4 is not valid and will not bind upon him and the said application was allowed and accordingly, the plaint was amended. He further submitted that when the respondents/defendants made an attempt to dispossess the petitioner from the suit property, as

an urgent measure, the petitioner had filed the said suit seeking injunction to restrain the respondents from evicting him from the suit property except under due process of law, based on the long and continues possession.

5. He further submitted that the petitioner in fact had perfected his title over the suit property by adverse possession but since there was an urgency to protect his possession, the petitioner had filed a suit for limited relief of injunction but, subsequently he changed the counsel and new counsel advised him that there are formal defects in the said suit which cannot be rectified and he has to file a fresh comprehensive suit for declaration of title and hence the petitioner had filed an application in I.A.No.20 of 2014 seeking permission of the Court to withdraw the suit with liberty to file a fresh suit on the same cause of action, but without considering the aforesaid facts, the trial Court had dismissed the said application. He further submitted that since the petitioner wants to file a comprehensive suit for declaration of

his title, permission may be given to withdraw the said suit with liberty to file a fresh suit on the same cause of action. Therefore, he prayed to allow this Civil Revision Petition and set aside the order passed by the trial Court in I.A.No.20 of 2014 and allow the said application.

6. The learned counsel for the petitioner in support of his contentions, relied upon the following decisions:-

1) *Anathula Sudhakar Vs. Buchi Reddy (Dead) and Ors*,  
(2008) 4SCC 594;

2) *Rajamanickam Vs. P.Dhandapani and others*, 2013  
(5) CTC 385.

7. Per contra, the learned counsel for the respondents has submitted that the petitioner herein had filed the aforesaid suit on 21.06.2008 for the relief of permanent injunction restraining the defendants herein from evicting him except under due process of law.

He further submitted that the respondents herein had filed a detailed written statement denying the allegations made by the petitioner. Thereafter, when the suit was posted for trial, the petitioner did not appear and hence, the suit was dismissed for default on 08.09.2009. He further submitted that on the application filed by the petitioner, the suit was restored to file on 15.07.2010 and thereafter, again the suit was posted for trial on 08.09.2010. On that date, the petitioner did not appear and hence, the suit was dismissed for default for the second time.

**8.** He further submitted that the petitioner herein had filed an application in I.A.No.1418 of 2010 to restore the said suit for the second time and the same was allowed and thereafter, again the suit was posted for trial on 01.03.2011. On that date, the petitioner herein, with an intention to drag on the proceedings, had filed an application in I.A.No.156 of 2011 to amend the plaint to declare the settlement deed executed by the first defendant dated 17.04.2008 in favour of the

defendants 3 and 4 as null and void and it will not bind upon him and the said application was allowed and consequently, the plaint was amended. He further submitted that thereafter, when the suit was posted for trial, the petitioner did not come forward to let in evidence and after taking several adjournments, had filed an application in I.A.No.20 of 2014 seeking permission of the Court to withdraw the said suit with liberty to file a fresh suit on the same cause of action.

9. He further submitted that according to the petitioner, there are defects in the suit and the same cannot be rectified and hence, he was advised to withdraw the said suit and file a fresh comprehensive suit for declaration of his title. He further submitted that since the petitioner had originally filed a suit admitting the respondents' title and he wants to protect his possession only for a limited period until he is evicted under due process of law and that being so, he cannot claim title over the suit property by adverse possession and taking into consideration of the said fact, the trial Court had rightly dismissed the

application and therefore, he prayed to dismiss this Civil Revision Petition.

10. The learned counsel for the respondents in support of his contentions, relied upon the following decisions:-

1) *Duraikannu and others Vs. Malayammal (2003) 3 MLJ 551;*

2) *K.S.Bhoopathy Vs. Kokila (2000) 5 SCC 458.*

11. A perusal of the typed set of papers filed by the petitioner shows that the petitioner herein had filed a suit in O.S.No.387 of 2008 on the file of the II Additional District Munsif, Erode, for the relief of permanent injunction restraining the respondents herein from evicting him from the suit property except under due process of law. In the said suit, the petitioner herein had stated that he occupied the suit property and he is in possession of the suit property by cultivating the same.

**12.** He further stated that the defendants are his mother and sisters and they gave troubles in all the ways and hence, he was constrained to file a suit in O.S.No.583 of 2001 on the file of the Principal Sub-Judge, Erode, in respect of the property situated in S.No.66/5 of Modavandi Sathyamangalam Village and in that suit a decree was granted in his favour. As against the same, the defendants had filed an appeal in A.S.No.83 of 2006 and the same was allowed and he was taking steps to file a Second Appeal. He further stated that after allowing of the appeal filed by the defendants, they tried to dispossess him from the suit property and hence, he filed a suit seeking permanent injunction restraining the defendants from evicting him from the suit property except under due process of law.

**13.** It is seen from the order of the trial Court passed in I.A.No.20 of 2014 that the petitioner herein had allowed the said suit for dismissal twice and on his applications, the said suit was restored to

file and thereafter, when the suit was posted in the list for trial, he filed an application in I.A.No.335 of 2013 to amend the plaint to declare that the settlement deed executed by the first defendant in favour of the defendants 3 and 4 as null and void and will not bind upon him. The said application was allowed on 14.03.2012 and consequently, the plaint was amended. Thereafter, again the suit was posted for trial in the list and after taking several adjournments, the petitioner had filed an application in I.A.No.20 of 2014 under Order 23 Rule 1 of CPC, seeking permission of the Court to withdraw the suit with liberty to file a fresh suit on the same cause of action. In the affidavit filed in support of the said application, the petitioner herein had stated that since the respondents made attempts to dispossess him from the suit property on 16.06.2008, as an urgent measure, he filed a suit seeking permanent injunction on the basis of long and continuous possession against the true owner namely his mother who is the first respondent herein. He further stated that in fact he perfected title by adverse possession.

14. It is to be pointed out that when the petitioner had filed a suit admitting the fact that the first respondent, is the true owner and his possession has to be protected till he is evicted by due process of law, he cannot take a plea that he perfected title by adverse possession. If really, he perfected title by adverse possession, he should have pleaded the said fact in the original plaint itself, but he has chosen to admit that the first respondent is the true owner and he wanted to protect his possession only for a limited period, i.e., till he is evicted by due process of law.

15. The Petitioner herein has also stated in the affidavit that he changed his counsel and the said counsel advised him that there are formal defects in the said suit which cannot be rectified. If really, he is in settled possession of the suit property for a long period, in view of the decision of the Hon'ble Supreme Court in ***Rame Gowda (D) by LRs Vs. M.Varadappa Naidu (D) by LRs, 2004-3.L.W.143*** he can protect

his possession by seeking injunction from the Court until he is evicted by due process of law. He has to establish the settled possession and in such a case, the Court will grant injunction for a limited period even against the true owner from evicting him except under due process of law and therefore, it cannot be said that the present suit is suffering from any formal defect.

16. In *Rajamanickam Vs. P.Dhandapani and others* (cited supra) the plaintiff had filed a suit against eight defendants, however, relief was asked against the defendants 1 to 5 alone and the defendants 6 to 8 were arrayed as formal parties and no relief was asked against them in the said suit. The defendants 1 to 5 remained exparte but, the trial Court had dismissed the suit and the same was confirmed by the Appellate Court and the plaintiff filed Second Appeal before this Court and during pendency of the said Second Appeal, he filed an application under Order 23 Rule 1(3) of CPC, seeking permission of the Court to withdraw the suit with liberty to file a fresh

suit including the relief of declaration. This Court taking into consideration of the fact that no relief was asked against the defendants 6 to 8, has held that the defendants 6 to 8 have no right to oppose the said application and accordingly allowed the said application on payment of Rs.15,000/- to the defendants 6 to 8. Further in that case, the defendants themselves raised a plea that the suit is bad for want of a prayer for declaration.

17. In this case, the facts are totally different. As already pointed out that the petitioner had filed a suit admitting that the first defendant is the true owner and since he is in long possession, possession has to be protected until he is evicted except under due process of law. If he is able to establish his possession, he could get injunction for a limited period i.e., till he is evicted by due process of law and therefore, there is no formal defect in the said suit. So, the aforesaid decision will not apply to the facts of this case.

**18. In *Anathula Sudhakar Vs. Buchi Reddy (Dead) and***

***Ors*** (cited supra) the Hon'ble Supreme Court has held that where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raise a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration or alternatively, he may withdraw the suit with permission to file a comprehensive suit for declaration and injunction. But in this case the petitioner herein has admitted the title of the first defendant and he asked injunction only for a limited period i.e., he can be evicted from the suit property only by due process of law and that being so, he cannot take a plea that he perfected title by an adverse possession and therefore, the aforesaid decision also will not apply to the facts of this case.

**19. In *Duraikannu and others Vs. Malayammal*** (cited supra), this Court in Para Nos.7 to 9 as follows:-

*“7. The granting of the permission to withdraw with liberty to bring a fresh suit removes the bar of res judicata which would otherwise apply, if a fresh suit on the same cause of action is brought. Clause (3) contemplates the circumstance in which the permission could be granted by the Court on its satisfaction namely (i) a suit must fail by reason of formal defect, and (ii) 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.*

*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."*

**20. In *K.S.Bhoopathy and others Vs. Kokila and others***

(cited supra) the Hon'ble Supreme Court in para-13 held as follows:-

*"13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non soit. 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, In (he former it is actually a prayer for concession from the Court after*

*satisfying the Court regarding existence of the circumstances justifying the grant of the such concession. 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 manner 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 roust fail by reason of some formal defect, and 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.”*

**21.** From the aforesaid decisions it is clear that the grant of leave envisaged in sub-rule (3) of Rule 1 of Order XXIII of CPC is at

the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. It is also clear that the permission could be granted by the Court on its satisfaction namely (i) a suit must fail by reason of formal defect, and (ii) there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of such suit or part of a claim. It is also clear that the formal defect may be omission to obtain permission of Court to file the suit, mis-joinder of parties or cause of action, failure to disclose cause of action in the plaint, erroneous valuation of the suit and institution of a suit in a Court which has no jurisdiction to entertain it. The other sufficient ground is that the defect must not be due to plaintiff's own fault.

**22.** In this case, after knowing fully well that the first respondent is the true owner of the suit property, he filed the suit suppressing the said fact and pleaded in the plaint that he occupied the suit property and he is cultivating the same and hence he can be evicted

only by due process of law. In the written statement the first respondent herein has categorically stated that she was the absolute owner of the suit property by virtue of a registered partition deed dated 19.11.1968 and she gifted the said property to the defendants 3 and 4 under a registered settlement deed dated 17.04.2008 and hence the defendants 3 and 4 are in possession of the suit property. Only thereafter, in the affidavit filed in support of the application in I.A.No.20 of 2014, the petitioner has admitted that the first respondent /first defendant was the true owner. Therefore, this Court is of the view that the petitioner has not made out a case that the suit must fail by reason of formal defect and also there are other sufficient grounds for granting permission to withdraw the suit with liberty to file a fresh suit on the same cause of action. The trial Court taking into consideration the aforesaid facts had rightly dismissed the application in I.A.No.20 of 2014. This Court does not find any infirmity in the said order. Hence, this Civil Revision Petition is liable to be dismissed.

**P.RAJAMANICKAM.J.,**

dna

**23.** In the result, this Civil Revision Petition is dismissed.

No costs. Consequently, connected Miscellaneous Petition is also closed.

**16.02.2021**

Internet : Yes/No

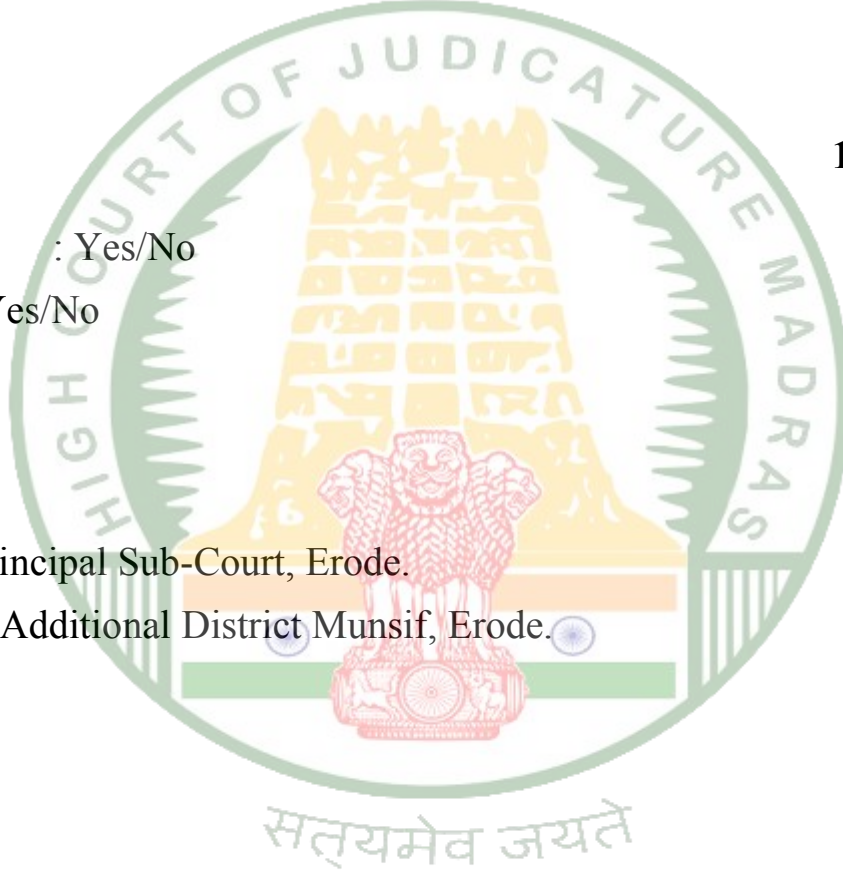
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**To**

1.The Principal Sub-Court, Erode.

2.The II Additional District Munsif, Erode.

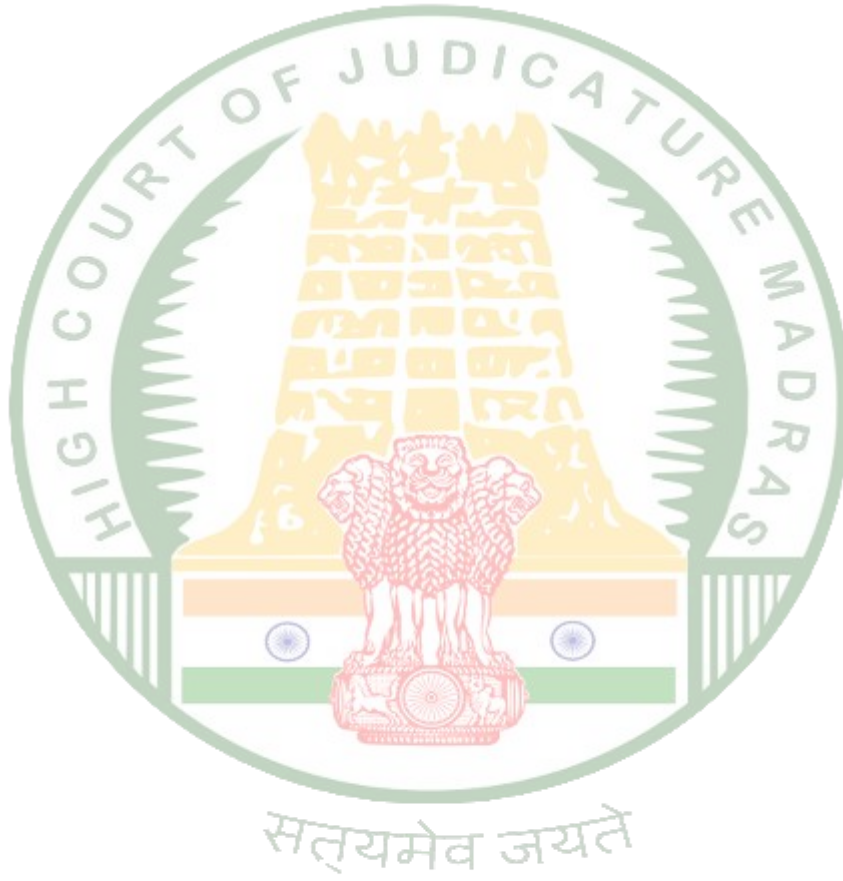


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**Pre-Delivery Order in**  
**CRP.(PD).No.2156 of 2014**

**and**

**M.P.No.1 of 2014**



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