

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.02.2021

Pronounced on : 03.03.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.PD.Nos.4252 & 4253 of 2014
and 2092 of 2020
and MP.No.1 of 2014 and
CMP.No.13216 of 2020

CRP.PD.No.2092 of 2020

Sellammal(died)

1.Kaliyappan
2.Natarajan
3.Amudha

..Petitioners

Vs.

1.Kandasamy
2.Kamala

..Respondents

PRAYER:

The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 24.03.2020 passed in IA.No.3 of 2020 in OS.No.58 of 2010 passed by the District Munsif, Mettur, Salem District.

For Petitioners : Mr.M.R.Jothimanian

For Respondents : Mr.P.Mani

CRP.PD.No.4252 of 2014

Sellammal(died)

1.Kaliyappan

2.Natarajan

3.Amudha

(petitioners 2 to 4 brought on record as LR's of the deceased sole petitioner viz., Sellammal vide court order dated 03.11.2020 made in CMP's 2429, 2430, 2432 and 2434 of 2020 in CRP's 4252 and 4253 of 2014) ..Petitioners

Vs.

1.Kandasamy

2.Kamala

..Respondents

PRAYER:

The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 16.07.2014 passed in IA.No.536 of 2014 in OS.No.58 of 2010 passed by the District Munsif, Mettur, Salem District.

For Petitioners : Mr.M.R.Jothimanian

For Respondents : Mr.P.Mani

CRP.PD.No.4253 of 2014

Sellammal(died)

1.Kaliyappan

2.Natarajan

3.Amudha

(petitioners 2 to 4 brought on record as LR's of the deceased sole petitioner viz., Sellammal vide court order dated 03.11.2020 made in CMP's 2429, 2430, 2432 and 2434 of 2020 in CRP's 4252 and 4253 of 2014)

..Petitioners

Vs.

1.Kandasamy
2.Kamala

..Respondents

PRAYER:

The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 16.07.2014 passed in IA.No.537 of 2014 in OS.No.58 of 2010 passed by the District Munsif, Mettur, Salem District.

For Petitioners : Mr.M.R.Jothimanian

For Respondents : Mr.P.Mani

COMMON ORDER

In above all the three civil revision petitions, the petitioners are the plaintiffs. The respondents are the defendants in the suit filed by the first petitioner herein for injunction in respect of the suit property. While pending the suit, the said petitioner filed applications for amendment and also to reopen the case. Both the petitions were

dismissed. Aggrieved by the same, the petitioner preferred civil revision petition in CRP.PD.Nos.4252 & 4253 of 2014. Thereafter, the petitioner filed petition seeking permission to withdraw the main suit with liberty to file fresh suit on the same cause of action and the same was also dismissed by the trial court. Aggrieved by the same, the petitioners preferred civil revision petition in CRP.PD.No.2092 of 2020.

2. In CRP.PD.No.2092 of 2020, the learned counsel for the petitioners would submit that originally the petitioners filed suit for injunction in respect of the suit property. After filing written statement, the petitioners came to understand that the suit property was already purchased by the respondents by the sale deed dated 07.03.2005 through the power of attorney. The case of the petitioners is that they purchased the suit property by the registered sale deed dated 08.02.2008 from one Radhakannan. Therefore, the petitioners necessarily have to amend the prayer including the prayer of declaration declaring the title in favour of the petitioners and also declaration declaring that the sale executed in favour of the respondents dated 07.03.2005 as null and void. However, the court below dismissed the petition and also to reopen the suit on the ground that the petitions were filed after commencement of the trial and

also prayer sought for in the amendment petition is barred by limitation. Therefore, the petitioners filed petition to seeking permission to withdraw the suit with liberty to file fresh suit. In this regard, he relied upon the judgment of the Hon'ble Supreme Court of India rendered in ***Civil Appeal No.20007 of 2017*** dated 30.11.2017.

2.1 The learned counsel for the petitioners also relied upon the following judgments in support of the contention that the petition sought for amendment of prayer can be allowed and the limitation in question being disputed can be make subject matter of the issue after allowing the amendment prayer.

- (i) Ragu Thilak D.John Vs. S.Rayappan and others
reported in (2001) 2 SCC 472
- (ii) Rameshkumar Agarwal Vs. Rajmala Exports Private Limited
and ors reported in (2012) 5 SCC 337
- (iii) Chitra Vs. Kannan reported in 2015 (1) CTC 820

3. Per contra, the learned counsel for the respondents submitted that the respondents purchased the suit property from the power of

attorney one, Radhakannan, who is the vendor of the petitioners herein by the registered sale deed dated 07.03.2005. The suit property originally belonged to one, Radhakannan and his brothers and sisters. All the brothers and sisters executed settlement deed in favour of Radhakannan and on the strength of the settlement deed, he executed power of attorney on 09.06.2004. The power holder sold out the suit property for valid sale consideration to the respondents herein. The petitioners claim the suit property on the strength of the sale deed dated 08.02.2008 executed by the very same Radhakannan, who is the vendor of the respondents herein in respect of the very same property. Therefore, the respondents filed suit in OS.No.191 of 2010 on the file of the District Munsif Court, Mettur for declaration declaring that the sale deed dated 08.02.2008 executed in favour of the deceased plaintiff as null and void and the same was decreed in their favour by the judgment and decree dated 05.12.2015. Therefore, the present suit itself is not maintainable and the amendment sought for by the petitioners is barred by limitation.

3.1 He further submitted that the petitioners filed suit on 02.03.2010. The respondent filed written statement on 11.01.2011 and categorically stated that the suit property was purchased by the respondents by the registered sale deed dated 07.03.2005 itself for valid

sale consideration from Radhakannan and other legal heirs of the deceased Seetharama pillai. After demise of the said Seetharamapillai, the legal heirs executed power of attorney in favour of the wife of one, Sundarrajan and in turn she executed sale deed in their favour. Whereas the petitioners claimed the suit property by the registered sale deed dated 08.02.2008, one, Radhakannan executed sale deed in their favour. The said property originally belonged to one Seetharamapillai and after his demise, his legal heirs executed settlement deed in favour of the said Radhakannan. By the settlement deed dated 08.02.2008 in turn, the said Radhakannan executed sale deed in their favour. Therefore, the respondents filed suit in OS.No.191 of 2010 for declaration declaring that the settlement deed executed in favour of the said Radhakannan itself is null and void and the sale deed executed in favour of the petitioners herein dated 08.02.2008 also declared as null and void. The petitioners came to knowledge about the sale deed executed in favour of the respondents as early as on 11.01.2011 itself, after period of three years and three months, i.e. 02.04.2014 the original plaintiff filed petition seeking amendment of plaint to include the prayer of declaration. Therefore, the trial court rightly dismissed the petition for seeking amendment of the prayer of declaration as barred by limitation.

3.2 He further submitted that when the trial court dismissed the petition for seeking amendment of the prayer, thereafter the petitioners came forward with the petition to withdraw the suit with liberty to file fresh suit. It is not permissible under law and it would amount to *resjudicata* since already the sale deed executed in favour of the petitioners was declared as null and void and also declared the title of the suit property in favour of the respondents herein in OS.No.191 of 2010. In support of his contention, he relied upon the judgment of this Court passed in CRP.No.2165 of 2008 dated 05.08.2011 and also the judgment of the Hon'ble Supreme Court of India rendered in Civil Appeal No.6595 of 2015 dated 26.08.2015.

4. Heard Mr.M.R.Jothimanian, the learned counsel for the petitioners and Mr.P.Mani, the learned counsel for the respondents.

5. The petitioners are the plaintiffs. Originally the plaintiff, i.e. mother of the petitioners herein purchased the suit property by the registered sale deed dated 08.02.2008 from one Radhakannan. The said Radhakannan derived the suit property by the settlement deed executed by his brother, after demise of his brother Seetharamapillai in respect of

the suit schedule property. Therefore, he became absolute owner of the suit property and executed sale deed in favour of the petitioners herein. Whereas the respondents claimed the suit property by way of registered sale deed dated 07.03.2005 vide document No.436 of 2005 registered in the Office of the Sub Registrar, Jalagandapuram, Mettur Taluk. Originally, the suit property belonged to one Seetharamapillai and after his demise, his legal heirs executed power of attorney in favour of one, Saroja. Originally the petitioner's mother filed suit for injunction in respect of the suit property on 02.03.2010. On 11.01.2011, the respondents filed written statement stating the above facts and as such the petitioners filed petition for amendment of plaint to include the prayer of declaration and also to reopen the suit. Both the petitions were dismissed by the trial court. Thereafter the petitioners challenged the said order in the civil revision petitions in CRP.Nos.4252 and 4253 of 2014. While pending the civil revision petitions, the petitioners filed petition for seeking permission to withdraw the suit with liberty to file fresh suit and the same was also dismissed and aggrieved by the same, the petitioners filed civil revision petition in CRP.No.2092 of 2020. This Court intense to decide the issue in CRP.No.2092 of 2020 and if it is allowed, the other two civil revision petitions become infructuous.

6. The petitioners filed petition under Order 23 Rule 1 of CPC seeking permission to withdraw the suit with liberty to file fresh suit. While withdrawing the suit, the parties have to satisfy the court as follows:

Order 23 Rule 1 (3):

*(a) that a suit must fail by reason of some format defect, or
(b) 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, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*

7. The learned counsel for the respondents relied upon the judgment of this Court passed in CRP.No.2165 of 2008 dated 05.08.2011, wherein it is held as follows:

10. The reason given by them for seeking amendment in I.A.No.361 of 2007 is that if they are unable to prove the will, then they would be entitled to the 7/12th share in the suit property as per the Hindu Succession Amendment Act, 2005. The trial court by the order dated 07.12.2007 dismissed the application and admittedly it was not challenged in the manner known to law and the said order has reached its finality. After dismissal of I.A.No.361

of 2007 on 07.12.2007, the plaintiffs on 06.02.2008 filed I.A.No.68 of 2008 under Order 23 Rule 1(3) CPC to withdraw the suit with a liberty to file a fresh suit on the very same cause of action by incorporating appropriate relief in the light of the provisions of the Hindu Succession Amendment Act, 2005. The trial court, on 23.04.2008, in I.A.No.68 of 2008 allowed the application and aggrieved by the same, the above revision petition has been filed.

11. From the admitted facts narrated by me as above, it is very clear that I.A.No.68 of 2008 was filed by the plaintiffs after their application filed in I.A.No.361 of 2007 was dismissed by the trial court. This fact itself is sufficient to reject the I.A.No.68 of 2008, but, the trial court without considering the facts in the proper perspective and without looking into the provisions of Order 23 Rule 1(3) of CPC, allowed the application and it is a fit case for this Court to interfere with under Article 227 of the Constitution of India.

15. In the present case, the reasons given by the plaintiffs for seeking the relief under Order 23 Rule 1(3) CPC is that the application filed by them in I.A.No.361 of 2007 was dismissed on 21.12.2007 on technical grounds. If the matter was taken up to the High Court by way of a revision, it may consume a lot of time and incur heavy expenditure. Therefore, they were advised to withdraw the present suit with the liberty to file a comprehensive fresh

suit in the light of the provisions of the Amendment Act, 2005. These reasons given by the plaintiffs for filing an application under Order 23 Rule 1(3) CPC are hardly sufficient and unacceptable as by this they only wanted to get away from the orders suffered by them in I.A.No.361 of 2007 on 07.12.2007. In other words, the plaintiffs wanted to maintain a clean slate by rubbing out the adverse orders suffered by them earlier.

8. It is true that the petitioners already filed petition for seeking amendment to include the prayer of declaration and the same was dismissed. Thereafter, the petitioners filed petition seeking permission to withdraw the suit with liberty to file fresh suit. It is curious to note that the petitioners did not mention the fresh suit to be filed with declaration prayer. That apart, the respondents already filed suit in OS.No.191 of 2010 on the file of the District Munsif Court, Mettur for declaration declaring that the settlement deed executed in favour of the said Radhakannan as null and void and the sale deed executed by the said Radhakannan in favour of the original plaintiff Sellammal as null and void. Whereas the petitioners filed suit originally for injunction in respect of the suit property. Thereafter filed amendment petition to amend the prayer of declaration, declaring that the sale deed executed in favour of the respondents as null and void.

Therefore, the sale deed executed in favour of the respondents is going to be challenged. As such, the judgments cited by the respondents is not applicable to the case on hand.

9. The learned counsel for the petitioners relied upon the judgment in the case of **Chitra Vs. Kannan** reported in **2015 (1) CTC 820**, wherein it is held as follows:

10. Here is a case, in which the revision petitioner who filed the suit as the plaintiff, could have very well proceeded with the trial of the case without even seeking the proposed amendment. Since the title of the plaintiff based on which the relief of injunction has been sought for is disputed by the respondent herein/defendant, the question of title has got to be gone into incidentally by the trial Court. In case, the trial Court ultimately come to the conclusion that the question of title cannot be resolved with convenience in the suit for injunction which has to be tried summarily, the result shall be not to drive the petitioner/plaintiff without any remedy on the ground that she has not sought for declaration of title. In such an eventuality, the Court has to relegate the plaintiff to a more comprehensive suit for declaration and injunction or other reliefs. It has been held so in Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by L.Rs & Others reported in 2008 (6) CTC 237.

This Court held that the question of limitation will not arise when the suit

is filed for injunction which involves question of title. In respect of withdrawal of the suit, he relied upon the judgment of the Hon'ble Supreme Court of India rendered in **Civil Appeal No.20007 of 2017** dated 30.11.2017, wherein it is held as follows:

23) The effect of this grant of permission to the appellant was that though he was allowed to withdraw the suit but was not permitted to file a fresh suit on the same subject matter. Since only one person had filed the suit and, therefore, sub-rule (5) of Rule 1 was not attracted.

24) In our considered opinion, when the plaintiff files an application under Order XXIII Rule 1 and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of the cost to him by the plaintiff as provided in sub-rule (4).

25) The reason is that while making a prayer to withdraw the suit under Rule 1(1), the plaintiff does not ask for any leave to file a fresh suit on the same subject matter. A mere withdrawal of the suit without asking for anything more can, therefore, be always permitted. In other words, the defendant has no right to compel the plaintiff to prosecute the suit by opposing the withdrawal

of suit sought by the plaintiff except to claim the cost for filing a suit against him.

10. In the above case, the Hon'ble Supreme Court of India held that the prayer of withdrawal of the suit with permission to file fresh suit whether in full or part, the plaintiff is always at liberty to do so and the defendant has no right to raise any objection. Insofar as liberty is concerned, the prayer of the withdrawal of the suit with permission to file fresh suit, Sub Rule 3 of Rule 1 applies and in such event, the court can consider the same with terms as provided under the provision.

11. As discussed above, though the trial court dismissed the petition seeking the amendment of prayer of declaration on the ground of limitation, the petitioners can be permitted to withdraw the suit to file fresh suit. If the petitioners file fresh suit, the provision under Order 23 Rule 2 of CPC will come into force to safeguard the interest of the respondents herein. It is relevant to extract Order 23 Rule 2 of CPC as follows:

(2) Limitation Law not affected by first suit:

In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Therefore, the petitioners are liable to satisfy the law of limitation while filing the fresh suit.

12. With the above observation, the present civil revision petition in CRP.PD.No.2092 of 2020 is allowed and the order dated 24.03.2020 passed in IA.No.3 of 2020 in OS.No.58 of 2010 passed by the District Munsif, Mettur, Salem District is set aside on payment of cost of Rs.5,000/- (Rupees Five Thousand only) payable by the petitioners to the respondents. The payment shall be made within a period of two weeks from the date of receipt of copy of this order, failing which the order passed by this Court shall stand automatically cancelled. The petitioners are permitted to withdraw the suit in OS.No.58 of 2010 with liberty to file fresh suit. It is made clear that the petitioners are bound to satisfy the law of limitation as discussed above.

13. In view of the order passed in CRP.PD.No.2092 of 2020, the other two civil revision petitions in CRP.PD.Nos.4252 & 4253 of 2014 have become infructuous. As such the civil revision petitions in CRP.PD.Nos.4252 & 4253 of 2014 are dismissed as infructuous.

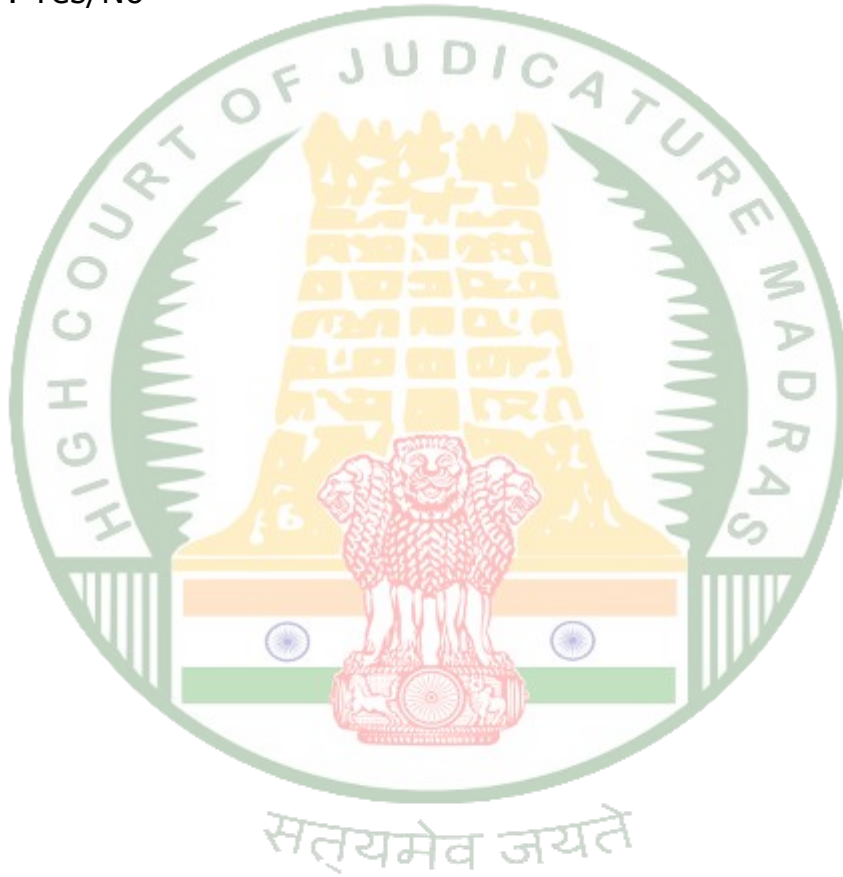
Consequently, connected miscellaneous petitions are closed. No order as to costs.

03.03.2021

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No
lok



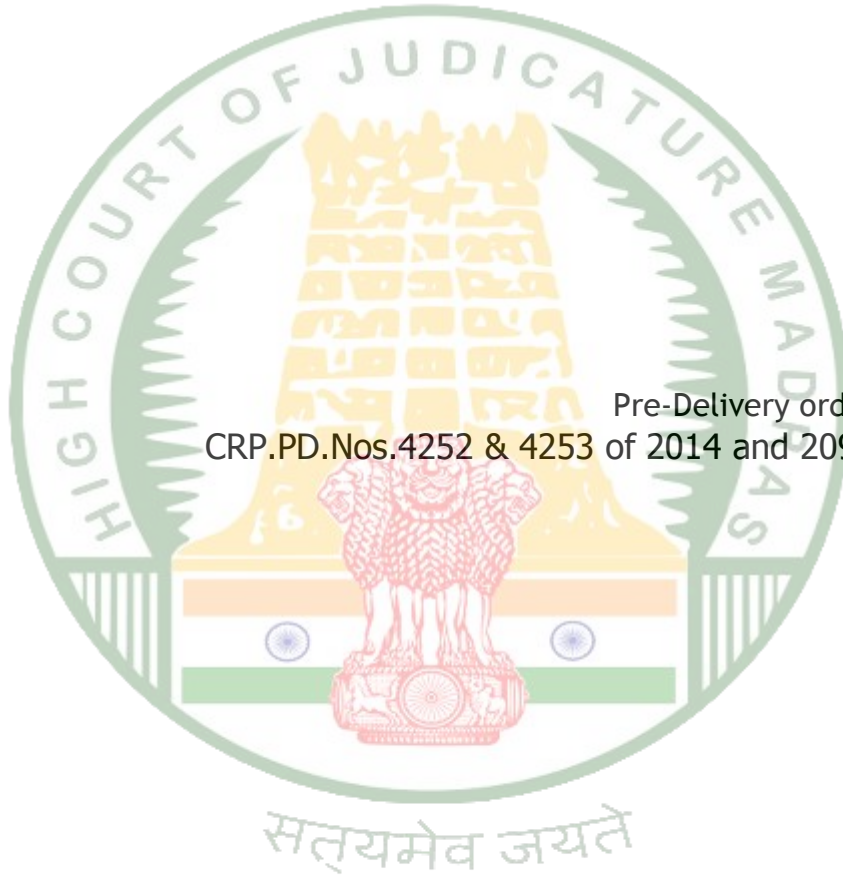
WEB COPY

G.K.ILANTHIRAIYAN,J.

lok

To

The learned District Munsif,
Mettur, Salem District.



Pre-Delivery order made in
CRP.PD.Nos.4252 & 4253 of 2014 and 2092 of 2020

WEB COPY

03.03.2021