

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2021

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P(NPD)No.1806 of 2017
& C.M.P.No.8606 of 2017

P.Theivanai

.... Petitioner

Vs

1. E.Munusamy

2. S.Mohan

3. S.Rajendran

4. N.R.Kasturi

5. K.Viswanathan

6. The Sub Registrar,
Tambaram,
Tambaram Registrar Office,
Kancheepuram District.

7. The Tahsildar,
Tambaram Taluk,

Kancheepuram District. Respondents

PRAYER: Civil Revision Petition is filed under Section 115 of C.P.C., to set aside the order and decretal order dated 14.02.2017 passed by the learned Sub Judge, Tambaram in I.A.No.166 of 2016 in A.S.No.32 of 2014.

For Petitioner

: Mr.Ravikumar,
Senior Counsel
For M/s. Paul and Paul

For Respondents

For R1 : Mr.R.Narayanan
For R2 to R5 : Not ready in notice
For R6 : Mr.T.M.Pappiah
Special Government Pleader
For R7 : Mr.S.Jaganathan
Government Advocate (CS)

ORDER

This Civil Revision Petition is directed as against the fair and decreetal order dated 14.02.2017 passed by the learned Sub Judge, Tambaram in I.A.No.166 of 2016 in A.S.No.32 of 2014, thereby allowing the first respondent to withdraw the suit with liberty to file fresh suit.

2. The first respondent is the plaintiff and the petitioner is the fifth defendant in the suit in O.S.No.244 of 2010 filed by the first respondent for the following prayers :-

"a. For declaration to declare that Power of Attorney dated 15.10.1991 executed by the 1st and 2nd defendant along with their father Subramani in favour of the third defendant duly registered as Document No.802/1991 in the Office of the Sub Registrar, Tambaram, in respect of the suit B schedule property as null and void, not acted upon and not binding on the plaintiff;

b. For a declaration to declare that the sale deed dated 03.06.1994 executed by the 3rd defendant in favour of the 4th defendant, registered as Document No.1911/1994 in the office of the Sub Registrar, Tambaram in respect of the suit B schedule property as null and void, not acted upon and not binding on the plaintiff;

c. For a declaration to declare that the sale deed dated 11.04.1997 executed by the 4th defendant in favour of the 5th defendant, registered as Document No.194/1997 in the Office of the Sub Registrar, Tambaram in respect of the suit B schedule property as null and void, not acted upon and not binding on the plaintiff;

d. For consequential injunction restraining the 5th defendant, her men, agents and any other person or persons claiming through her from in any manner alienating or encumbering the suit B schedule property to any other third party;

e. for declaration to declare that the patta (patta No.1992) issued by the 7th defendant in favour of the 5th defendant as null and void.

g. To direct the defendants to pay the costs of the suit to the plaintiff; and

h. To grant such other relief or reliefs as

*this Honourable Court may deem fit and proper
and thus render justice."*

After full-fledged trial, the suit filed by the first respondent was dismissed by the trial Court. Aggrieved by the same, the first respondent filed appeal suit before the first appellate Court in the year 2014 in A.S.No.32 of 2014. After the period of two years, the first respondent filed petition in I.A.No.166 of 2016 seeking permission to withdraw the appeal suit with liberty to file fresh suit for declaration and possession for the very same property. The same was allowed by the first appellate Court and aggrieved by the same the present Civil Revision Petition.

3. The learned counsel appearing for the petitioner would submit that without stating any sufficient reasons or grounds and also without any formal defect in the suit filed by the first respondent herein, he filed petition to withdraw the appeal suit with liberty to file fresh suit. The first respondent filed suit for declaration declaring that Power of Attorney dated 15.10.1991 and subsequently sale deeds dated 03.06.1994 and 11.04.1997 and also the patta issued in respect of the suit property as null and void and for consequential injunction restraining the fifth defendant from alienating or encumbering the suit property. The trial

Court framed issues in respect of the prayer sought for by the first petitioner herein and after elaborate discussion of all the issues, the trial Court dismissed the suit. Therefore, the first respondent filed appeal suit in the year 2014 and while pending the appeal suit, after the period of two years, the first respondent filed petition in I.A.No.166 of 2016 for seeking permission to withdraw the appeal with liberty to file fresh suit for declaration and possession in respect of very same property. The appellate Court allowed the said petition for the reasons that the trial Court held that without deciding the title of the property the clear adjudication cannot be arrived as claimed by the first respondent herein.

3.1. He further submitted that the first respondent failed to state any sufficient ground to withdraw the appeal suit and also seeking liberty to initiate the fresh suit for the same cause of action for the very same property. In support of his contention, he relied upon the following reported judgments :-

- i) 2000 (5) SCC 458 - K.S.Bhoopathy and ors Vs.Kokila and ors***
- ii) CDJ 2003 MHC 1563 - Duraikannu & ors Vs. Malayammal***

4. The learned counsel appearing for the first respondent would submit that though the first respondent filed suit for declaration declaring that the Power of Attorney and subsequent sale deeds and patta as null and void with consequential prayer of restraining the fifth defendant from alienating the suit property to third party, he intent to file suit for declaration declaring the title in his favour. Therefore, there are sufficient reasons to withdraw the appeal suit with liberty to file fresh suit. The appellate Court rightly permitted the first respondent to withdraw the suit and to file fresh suit.

5. Heard Mr.Ravikumar, learned Senior Counsel appearing for the petitioner and Mr.R.Narayanan, learned counsel appearing for the first respondent.

6. The only point for consideration is that when the first respondent filed petition under Order 23 Rule 3(b) of C.P.C., whether he estopped to withdraw the suit with liberty to file fresh suit or not. On perusal of the affidavit filed in support the petition for seeking permission to withdraw revealed that, no reasons stated in the affidavit

and simply stated that the first respondent intent to file suit for declaration of title and therefore, he sought for permission to withdraw the appeal suit with liberty to file fresh suit.

7. In this regard, the learned counsel appearing for the petitioner relied upon the judgment reported in **2000 (5) SCC 458** in the case of ***K.S.Bhoopathy and ors Vs.Kokila and or***, as follows :-

"17.From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the

judgments of the trial court and the first appellate court it is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse of Order XXIII Rules 1(3) CPC and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandates not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses

the benefit of the decision in his favour in the lower court.

18. For the reasons discussed in the foregoing paragraphs we have no hesitation to hold that the impugned order is unsustainable, Accordingly the appeal is allowed with cost. The order of the High Court dated 21.8.1998 granting permission for withdrawal of the suit with permission to file fresh suit is set aside. The High Court will now proceed to dispose of the second appeal in accordance with law.

8. He also relied upon the judgment of this Court reported in **CDJ 2003 MHC 1563** in the case of **Duraikannu & ors Vs. Malayammal**, which held as follows :-

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.*

10. *The object of the Rule is not to enable a plaintiff, after he failed to conduct his suit with proper care and diligence and after his witnesses failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.*

11. *The sufficient grounds are like the evidence being not available for no fault of the plaintiff, the suit being pre-matured and the cause of action accruing pending the suit, the plaintiff has failed to put in evidence an important document and where the plaintiff had been misled by the absence of a specific denial by the defendant.*

.....

13. *In this case, the petitioners herein*

wants to withdraw the suit on the ground that the respondent claims her title under a sale deed said to have been executed by one Pachiammal, wife of Marimuthu Udayar, who is no more and the petitioners herein claim their title and possession from one Pachiammal, wife of Subbaraya Udayar and that the identity of the names between two different person was not clarified properly in the suit by the lower court, hence they want to withdraw the suit as this technical omission stands in the way of enquiry of the appeal. The appellate Court found that both parties trace their title and possession of the suit property by producing so many documents, adducing oral evidence before the trial court and on the basis of the evidence by which the trial court decided the right of the parties and if the petition is allowed as prayed for, it will affect the vested right of the respondent herein and ultimately dismissed the application to withdraw the suit.

14. The respondent relied on the decision of the Supreme Court reported in (Rathinavel Chettiar Vs. Sivaraman) 1999 II CTC Page No.593 before the lower Appellate Court wherein it was held that withdrawal of suit

at appellate stage having effect of destroying or nullifying the decree affecting the rights of the parties vested under the decree cannot be allowed as a matter of course and such withdrawal can be allowed only when a strong case is made out. The said decision of the Honourable Supreme Court, relied on by the respondent before the lower Appellate Court is squarely applicable to the facts and circumstance of the case.

15. As mentioned supra, the Rule is not to enable the Plaintiffs after they fail to conduct the suit with proper care and diligence, hence the lower appellate Court is right in dismissing the application to withdraw the suit. The decision relied on by the counsel for the petitioner is not applicable to the facts and circumstance of the case on hand. Therefore, interference of this Court is unwarranted."

The Hon'ble Supreme Court of India held that grant of permission for withdraw 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 Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order 23 Rule 1(3) of

C.P.C., for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file fresh suit on the same cause of action. Clause No.3 of Rule 1 of order 23 of C.P.C., contemplates the circumstances in which the permission could be granted by the Court on its satisfaction, viz., the suit must fail by reasons of formal defect and 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.

9. The above judgment clearly explained that the object of the Rule is not enable a plaintiff, after he failed to conduct his suit with proper care and diligence and after his witnesses failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party. In the case on hand, the first respondent filed suit and the trial Court dismissed the same after full-fledged trial and after discussing all the issues framed by the trial Court. The first respondent having been failed before the trial Court and also filed appeal suit in the year 2014. After the period of two years, the first respondent filed the petition for withdrawal with liberty to file fresh suit.

10. As stated supra, the first respondent cannot be permitted to withdraw his appeal suit with liberty to file a fresh suit for the very same cause of action. In fact, on perusal of the judgment dated 03.06.2014 passed in O.S.No.244 of 2010, the trial Court discussed about the declaration of title as well as the possession of part of the suit property and concluded that the first respondent failed to prove his title as well as his possession in respect of the suit property. Therefore, the order passed by the first appellate Court is perverse and liable to be set aside.

11. In view of the above discussions, the order dated 14.02.2017 passed by the learned Sub Judge, Tambaram in I.A.No.166 of 2016 in A.S.No.32 of 2014 is hereby set aside. The first appellate Court is directed to dispose the appeal suit within a period of three months from the date of receipt of copy of this order, without influencing any of the observations made by this Court.

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12. With the above directions, this Civil Revision Petition stands allowed. There shall be no orders as to costs. Consequently connected miscellaneous petition is closed.

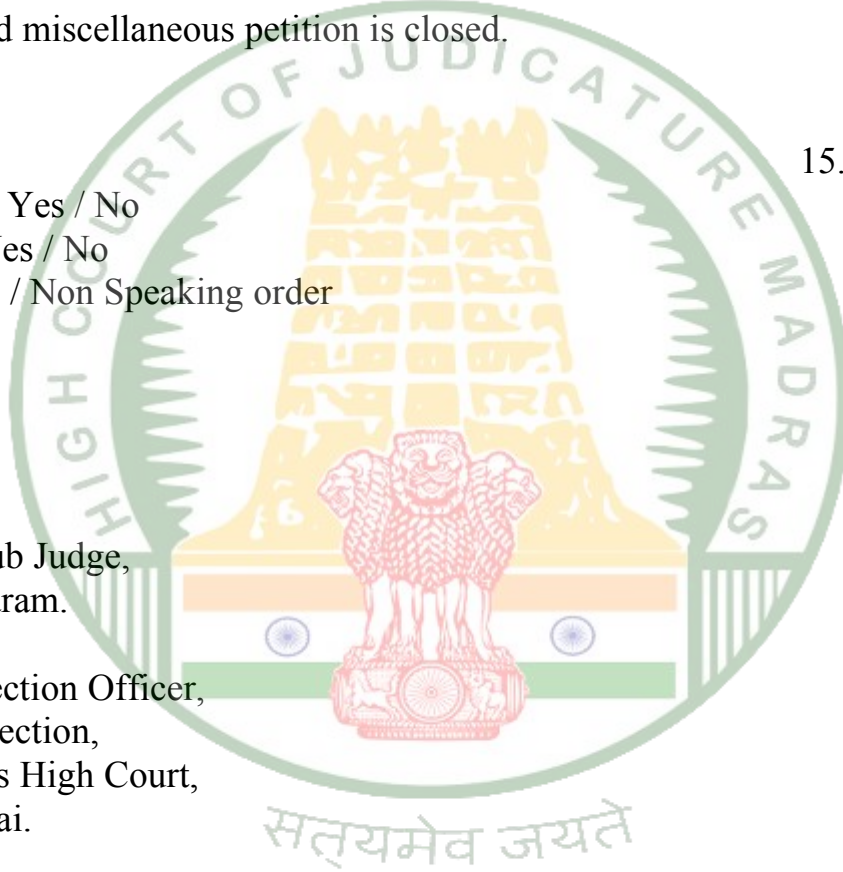
15.02.2021

Internet : Yes / No
Index : Yes / No
Speaking / Non Speaking order

rts

To

1. The Sub Judge,
Tambaram.
2. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

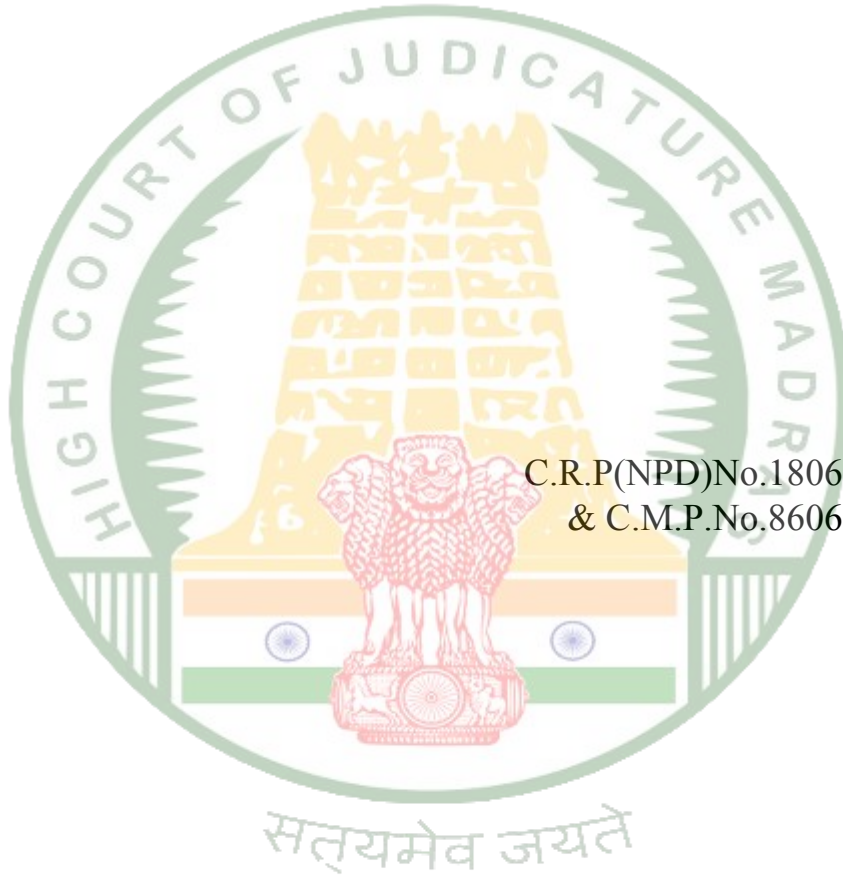


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