

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.08.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD).No.3245 of 2017

and

C.M.P.No.15181 of 2017

1.K.Vasanthakumar

2.P.S.Gayathri Devi

3.Kannammal

.. Petitioners

Vs.

N.M.Subramaniam

.. Respondent

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decretal order dated 11.01.2017 made in I.A.No.251 of 2016 in O.S.No.168 of 2011 on the file of the District Munsif Court, Gobichettipalayam.

For Petitioners

: Ms.Anjane Vasan
for Mr.S.P.Valliappan

For Respondent

: Mr.N.Manokaran

ORDER

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

This Civil Revision Petition is filed against the fair and decretal order dated 11.01.2017 made in I.A.No.251 of 2016 in O.S.No.168 of 2011 on the file of the District Munsif Court, Gobichettipalayam.

2.The petitioners are plaintiffs in O.S.No.168 of 2011 and the respondent is the defendant in the said suit. The petitioners filed the said suit for mandatory injunction, declaration and permanent injunction against the respondent. The respondent filed written statement on 21.09.2011 and is contesting the suit. When the suit was posted for trial, the petitioners filed I.A.No.251 of 2016 under Order XXIII Rule 1 and Section 151 of C.P.C. for permitting the petitioners to withdraw the suit with liberty to file a fresh suit on the same cause of action in respect of the suit property. According to petitioners, their Father viz., N.M.Kumarasamy, was missing since 11.02.2010 and the same was reported in F.I.R.No.40 of 2010 on the file of the Nambiyur Police Station. Hence, the petitioners did not add him as party defendant in the suit. In the written statement filed by the respondent, he has

stated that the petitioners' Father viz., N.M.Kumarasamy is alive and he is a necessary party to the suit. The respondent further stated that the description of the suit property is not correct and earlier two suits in O.S.Nos.33 of 2004 and 211 of 2009 were filed by their Father against the respondent for the relief of perpetual injunction and petitioners suppressed the earlier suits. Originally the suit property and the earlier suits were looked after by their Father. The 1st petitioner is working in Sri Lanka and he recently came to know about the earlier suits and he could not contact his advocate to discuss the suit. Only after coming to India, he contacted his advocate and came to know the status of the case. According to petitioners, they came to know that part of the property has been left out in the schedule of the property, which the respondent is in possession and in enjoyment of the same. After decree is obtained in the said suit property, it would be advantageous to the respondent to grab such property. In order to prove the above, it is necessary for the petitioners to include the same in the schedule of properties. In view of the above formal defect in the description of the property, the petitioners have to withdraw the suit and institute a fresh suit on the same cause of action in respect of the properties by including necessary parties and properties. The respondent filed counter affidavit and denied all the averments in the affidavit

and submitted that petitioners were aware of the suit filed by their Father in respect of the suit property. The petitioner's Father is alive and the 3rd petitioner was examined as P.W.1 in C.C.No.7 of 2007. During cross examination she admitted that petitioners' Father filed O.S.No.33 of 2004 and interim injunction was granted. The petitioners, especially the 3rd petitioner cannot plead that she came to know the suit filed by their Father only recently. The petitioners purposely suppressed the material fact that suit is barred by principles of *res-judicata*. The petitioners knowing fully well that they cannot succeed in the suit, filed the present petition with false averments and prayed for dismissal of the I.A.

3.The learned Judge considering the averments in the affidavit and counter affidavit, dismissed the I.A.No.251 of 2016 holding that petitioners would have availed the remedy under Order VI Rule 17 and Order I Rule 10(2) of C.P.C. The reasons given by the petitioners for the relief sought for is not acceptable. The suit was filed in the year 2011 and when the suit was posted for trial, they filed I.A. only in the year 2016.

4. Against the said order of dismissal dated 11.01.2017 made in I.A.No.251 of 2016, the petitioners have come out with the present Civil Revision Petition.

5. Ms. Anjane Vasan, learned counsel appearing for the petitioners contended that the learned Judge failed to see that the suit suffers from formal defect as some of the parties have to be impleaded and some of the properties have to be included in the suit. The learned Judge failed to appreciate the scope of Order XXIII Rule 1 of C.P.C. The learned Judge erred in holding that there are no formal defect in the suit and caused injustice to the petitioners. The learned Judge failed to consider that suit can be withdrawn with a liberty to file a fresh suit in the same cause of action at any stage. In the present suit, trial has not commenced and no prejudice will be caused to the respondent and prayed for allowing the Civil Revision Petition.

6. Mr. N. Manokaran, learned counsel appearing for the respondent submitted that the respondent filed written statement on 21.09.2011 stating that the petitioners' Father filed O.S.No.33 of 2004 and the said suit was dismissed. Suppressing the earlier suit, the petitioners filed the present suit

and the same is barred by principles of *res-judicata*. The learned Judge considered the entire materials and dismissed the I.A., holding that there is no formal defect in the suit. There is no error in the said order of the learned Judge in dismissing the I.A. and prayed for dismissal of the Civil Revision Petition.

7.Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the respondent and perused the entire materials on record.

8.From the materials available on record, it is seen that the petitioners have filed I.A.No.251 of 2016 under Order XXIII Rule 1 and Section 151 of C.P.C. for permitting them to withdraw the suit in O.S.No.168 of 2011 with liberty to file a fresh suit on the same cause of action in respect of the suit property. According to petitioners, their Father viz., N.M.Kumarasamy was missing from 11.02.2010 and he is a necessary party to the suit. Some of the properties are not included in the present suit and they came to know about the suit filed by their Father only recently and hence, filed the present I.A.No.251 of 2016. According to respondent, the petitioners' Father is alive

and their Father already filed two suits in O.S.Nos.33 of 2004 and 211 of 2009 and the 3rd petitioner was examined as P.W.1 in C.C.No.7 of 2007 and she admitted during cross examination that petitioners' Father filed suit in O.S.No.33 of 2004 and interim injunction was granted in the said suit. In view of the said admission, the reason given by the petitioners that they came to know about the suit filed by their Father only recently is not correct. Further, when a person is a necessary party to a suit, he can be impleaded at any stage of the suit as per Order I Rule 10 of C.P.C., if the petitioners prove their necessity to implead the said person. Similarly, when certain properties are not included in the present suit, it is always open to the petitioners to invoke Order VI Rule 17 of C.P.C. to amend the plaint for inclusion of all properties.

9.The petitioners have not invoked Order I Rule 10 or Order VI Rule 17 of C.P.C. The petitioners have not availed the said remedies available to them as per the provisions of C.P.C. and invoked Order XXIII Rule 1 and Section 151 of C.P.C. It is well settled that Order XXIII Rule 1 of C.P.C. can be invoked only if there is any formal defect in the suit and permission can be granted only after the Court is satisfied that the suit will fail due to some

reason of formal defect. In the present case, the petitioners have not proved by acceptable reason that there is a formal defect in the suit due to which the suit will fail. The reason given by the petitioners are not acceptable to prove that there is a formal defect in the suit. In view of the same, there is no error in the order of the learned Judge warranting interference by this Court.

10.In the result, this Civil Revision Petition stands dismissed.
Consequently, the connected Miscellaneous Petition is closed. No costs.

23.08.2021

krk

Index : Yes / No
Internet : Yes / No

To

The District Munsif,
Gobichettipalayam.

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V.M.VELUMANI, J.
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