

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.04.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRP (PD) No.3644 of 2018

and

CMP.No.20275 of 2018

Chellamuthu Gounder

... Petitioner

Vs.

1. Kuppusamy Gounder

2. Kuppusamy Gounder

3. Chellamuthu

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decretal dated 16.08.2018 made in I.A.No.1361 of 2017 in O.S.No.155 of 2003 on the file of the District Munsif, Dharapuram by allowing this Civil Revision Petition.

For Petitioner : Mr.N.Ponraj

For Respondents : Mr.R.Asokan (for R1)

ORDER

This Civil Revision Petition is directed against the fair and decretal order passed in I.A.No.1361 of 2017 in O.S.No.155 of 2003 dated 16.08.2018 on the file of the District Munsif, Dharapuram, thereby

dismissing the petition seeking permission to withdraw the suit with liberty to institute a fresh suit on the same cause of action.

2. The petitioner is the plaintiff and the respondents are the defendants. Originally, the petitioner filed a suit seeking right in Well comprised in S.No.354/1 with 6 HP oil engine and to get water for 4 days in 8 days as per the partition deed dated 28.03.1959 and 01.07.1967. On receipt of the summons, the respondents filed their written statement and specifically avered that no Well is situated in S.No.354/1 and the Well is situated only in S.No.352, in which the petitioner has absolutely no right. It is also stated that the respondents alone have right to draw the water from the Well. While pending the suit, an Advocate Commissioner was appointed and he also confirmed the contentions raised by the respondents. Therefore, the petitioner was constrained to file a petition in I.A.No.928 of 2017 to amend the Survey Number as S.No.352 instead of S.No.354/1 in the schedule of property and the same was dismissed. As such, the petitioner filed a petition seeking permission to withdraw the present suit with liberty to file a fresh suit for the same cause of action.

3. The learned counsel for the petitioner relied upon the judgment reported in (2017) 5 SCC 63 (**V.Rajendran -vs- Annasamy Pandian**), wherein it is held as follows:-

“10. In K.S.Bhoopathy v. Kokila (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1 (3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of

action, etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order 23 Rule 1 (3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the words “sufficient grounds”, there are two views: one view is that these grounds in clause (b) must be “ejusdem generis” with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds in clause (b) should be read independent of the words a “formal defect” and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with “formal defect” envisaged under clause 9a) of Rule 1 sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b), that is, “sufficient grounds”.

12. In the present case, the appellants have filed the suit describing the suit property as Suvey No.192/9 but the respondents are said to have transferred the patta for the suit property setting as Survey No.192/14. The defect in the survey

number of the suit property goes to the very core of the subject-matter of the suit and the entire proceedings would be fruitless if the decree-holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a “formal defect” within the meaning of Order 23 Rule 1(3)(a) CPC. That apart, the respondents are said to have executed an Inam settlement deed on 21.09.2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No.194/14. We are convinced that the case of the appellants would fall under clause (a) of Rule 1(3) CPC.

13. In the facts and circumstances of the case, the trial court considered the allegation set out in the application as a ground for withdrawal. The view taken by the trial court that the suit suffered from a formal defect to allow the appellants to withdraw the suit with permission to institute a fresh suit, is correct. The High Court, in our view, was not right in interfering with the discretion exercised by the trial court, permitting the appellants to withdraw the suit with liberty to file a fresh suit. Based on the order passed by the trial court, the appellants have already filed suit before the District Munsif and the same is numbered as OS.No.11 of 2015. The High Court while passing the order on 9.3.2015 Annasamy Pandian v.Rajendran, 2015 SCC OnLine Mad 261 : (2015) 2 LW 360 does not seem to have kept in view of the said suit filed by the

appellants. In the facts and circumstances of the case, the impugned order passed by the High Court cannot be sustained”.

4. The Hon'ble Supreme Court of India has held that the defect in the Survey Number of the suit property went to the very core of the subject-matter of the suit and the entire proceedings would be fruitless if the decree-holder was not able to get the decree executed successfully. Therefore, the said defect constituted a “formal defect” within the meaning of Order 23 Rule 1 (3) (a) of the Code of Civil Procedure.

5. In the case on hand, the suit Well is not situated in the land comprised in S.No.354/1 and as per the contentions of the respondent, the Well is situated in S.No.352 at Peramiam Village, Dharapuram Taluk. In fact, the petitioner also filed a petition seeking amendment of the Survey Number and the same was dismissed. Though the petitioner failed to challenge the said order in the manner known to law, he come forward with the petition to withdraw the suit with liberty to institute a fresh suit on the same cause of action. Therefore, the judgment cited by the learned counsel for the petitioner is squarely applicable to the present case on hand, since

the defect in the plaint is only a formal defect and it is within the meaning of Order 23 Rule 1(3) (a) of the Code of Civil Procedure.

6. In view of the above discussion, this Civil Revision Petition is allowed and the order passed in I.A.No.1361 of 2017 in O.S.No.155 of 2003 dated 16.08.2018 is set aside on condition that the petitioner shall pay a sum of Rs.5,000/- as costs to the respondents, within a period of two weeks from the date of receipt of a copy of this order. The petitioner is permitted to withdraw the suit in O.S.No.155 of 2003 and to file a fresh suit on the same cause of action. It is made clear that the petitioner shall not amend any of the averment made in the present plaint, except the Survey Number. Consequently, the connected Miscellaneous Petition is closed. No costs.

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Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

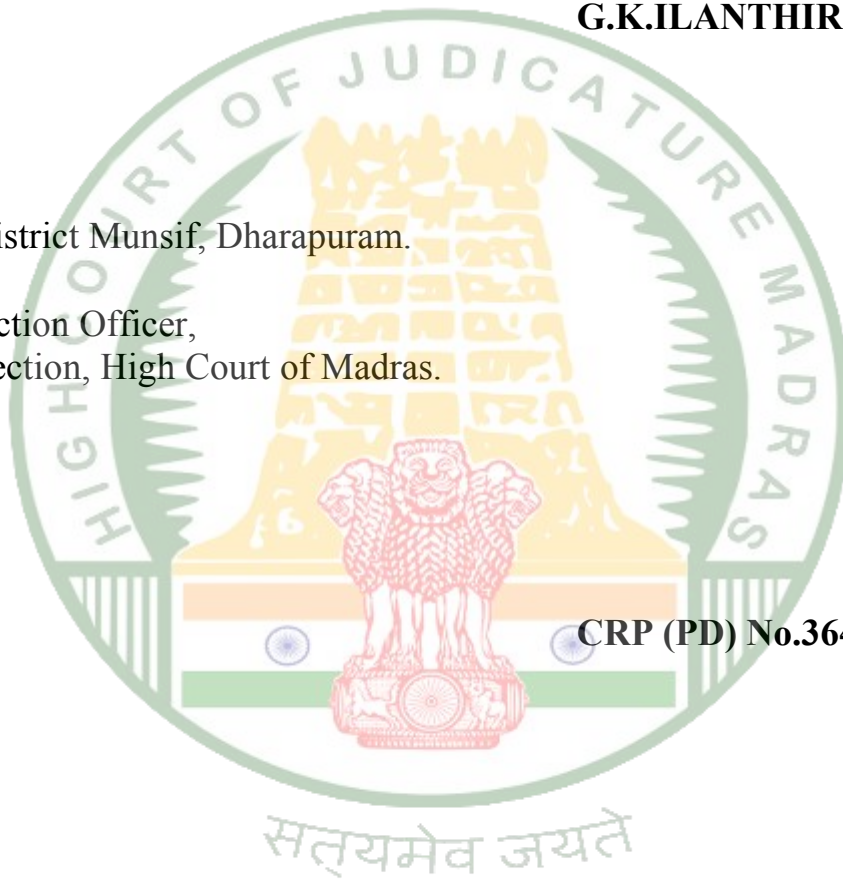
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G.K.ILANTHIRAIYAN,J.

Kv

To

1. The District Munsif, Dharapuram.
2. The Section Officer,
V.R. Section, High Court of Madras.



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