



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 26.07.2021

Delivered On : 04.10.2021

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CORAM:

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (PD) (MD).No.2442 of 2015

and

M.P. (MD) No.1 of 2015

Pushpa Kala devi

... Petitioner/1st Respondent/
1st Respondent

Vs.

1.Mookkan

...1st Respondent/Petitioner/
Appellant

2.Krishnan

... 2nd Respondent/ 2nd Respondent/
2nd Respondent

PRAYER: This Civil Revision Petition has been filed under Article 227 of Constitution of India, to call for the records relating to the impugned fair and decreetal order dated 31.08.2015 made in I.A.No.18 of 2015 in A.S.No.7 of 2009 on the file of the Sub Court, Sivagangai, and to set aside the same.

For Petitioner : Mr.S.Srinivasa Raghavan

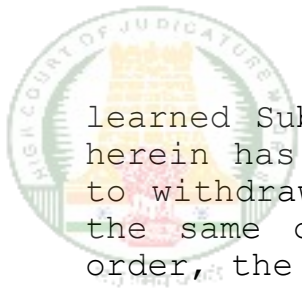
For Respondents : Mr.S.P.Maharajan for R1

R2- No Appearance

ORDER

This petition has been filed to set aside the order in I.A.No.18 of 2015 in O.S.No.18 of 2015 in A.S.No.7 of 2009 dated 31.08.2015 on the file of the Sub Judge, Sivagangai.

2.The petitioner herein is the first respondent, the first respondent herein is the petitioner and the second respondent herein is the second respondent in the original petition. The first respondent herein has filed a suit in O.S.No.11 of 2007 for declaration and for permanent injunction. The suit was dismissed. Against which, an appeal in A.S.No.7 of 2009 was filed before the



learned Sub Judge, Sivagangai. Pending appeal, the first respondent herein has filed a petition in I.A.No.18 of 2015 seeking permission to withdraw the original suit with liberty to file a fresh suit on the same cause of action and the same was allowed. Against that order, the revision petitioner has approached this Court.

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3. Brief substance of the petition in I.A.No.18 of 2015 reads as follows:

The petitioner is the first appellant in the appeal. The original suit was filed for declaration and for injunction. The petitioner filed the original suit along with the other legal heirs of his father and with the legal heirs of his father's brothers Raman and Chinnaya. The trial Court has decided that the legal heirs of the deceased Raman were not entitled to the property. The legal heirs of the father of the plaintiff alone has to file a fresh suit. If such a permission is not granted, great prejudice will be caused to the petitioner.

4. Brief substance of the counter in I.A.No.18 of 2015 reads as follows:

The reasons stated in the petition are not acceptable. Certain benefits are given to the first respondent/first defendant in the judgment rendered by the trial Court. There is no defect sufficient enough to withdraw the appeal and to permit the petitioner to file a fresh suit.

5. After hearing both sides, the trial Court allowed the petition. Against which, the revision petitioner has preferred this Civil Revision Petition.

6. On the side of the revision petitioner, it is stated that the appeal and the original suit were not the first round of litigation. Already the first respondent has instituted a suit through his representative. The ingredients under Order 23 Rule 1 of CPC has to be satisfied before allowing the application. The withdrawal of the suit at the first appellate stage cannot be allowed to take away the privileges and benefits confer upon the defendants in the judgment of the trial Court. There is no formal defect in the original suit filed by the first respondent that cannot be rectified. Compensatory cost cannot justify a prayer for permission to file a fresh suit.

7. On the side of the revision petitioner, it is stated that the revision petitioner refused to receive the cost imposed by the first appellate Court. The revision petitioner filed this Civil Revision Petition and he obtained a stay order in M.P.(MD)No.1 of 2020 on 17.11.2015 but the respondent filed a fresh suit in O.S.No.191 of 2015. Filing of O.S.No.191 of 2015, when the stay was in force is not valid. The learned District Munsif, Sivagangai is pressuring the suit for trial. The suit is pending for recording of evidence. The suit was posted to 17.08.2021. Without considering the stay



order, the trial Court is proceeding the case.

8. On the side of the respondents, it is stated that the first appellate Court gave permission to withdraw the suit and to file a fresh suit. A fresh suit was filed on 28.10.2015 and the fresh suit was numbered as O.S.No.191 of 2015. There is no stay order in O.S.No.191 of 2015.

9. On the side of the revision petitioner, it is stated that the original suit was filed by Mookkan and 11 others in the year 2007 questioning the power deed executed in the year 2001. The property never belong to the plaintiffs or the father of the first plaintiff. The plaintiffs executed a power deed in favour of the second defendant. On 10.08.2021, a sale deed was registered, on the basis of the power deed. The revenue documents were mutated. Only after the trial, the suit was dismissed on 26.11.2008. As per the decision of the trial Court, the other plaintiffs except Mookkan has no right over the property.

10. There is no document to show that the property is ancestral in nature. The legal heirs of one Raman are not entitled to any right over the property. The first respondent Mookkan cannot deny the power deed. Only when there is a formal defect which cannot be rectified, the Court can grant permission to withdraw the suit and to file a fresh suit under Order 23 Rule 1 of CPC. No reason for withdrawal is stated in the affidavit filed by Mookkan. Some of the plaintiffs alone can file a fresh suit is not a valid ground for seeking permission to file a fresh suit on the same cause of action. Deleting the name or exonerating some of the plaintiffs or impleading some of the plaintiffs is not a ground for granting liberty to file a fresh suit. Some of the plaintiffs are not entitled to the property is not a reason to withdraw a case, at the appellate stage. The judgment of the trial Court is based on the facts of the case, not based on mere formal defects.

11. On the side of the revision petitioner, it is stated that on 15.10.2014, the Civil Revision Petition was filed. A stay was granted on 17.11.2015. The first respondent filed a fresh suit on 28.10.2015. Even before the first hearing, the stay order was obtained. The stay order was confirmed on 31.06.2015. When the order passed by the first appellate Court was stayed by this Court, subsequent proceedings on the basis of that order is not operative. At the time of filing of the Civil Revision Petition, the petitioner was not aware of the second suit or its number. If the Civil Revision petition is allowed, the second suit will automatically become infructuous. If the Civil Revision Petition is dismissed, the second suit will be taken up for trial and the first appeal will be closed.

12. On the side of the respondent, it is stated that the first appellate Court granted permission to withdraw the suit and to file



a fresh suit. The second suit was filed on 28.10.2015. On that date, there was no stay order pending against the filing of the second suit. The Civil Revision petition itself is infructuous. The other parties to the suit were not mentioned in the revision petition. Their rights are prejudiced.

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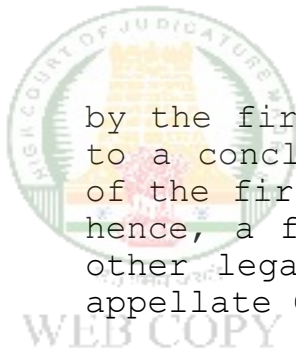
13. The learned counsel for the respondent would rely upon the judgment passed by the Hon'ble Supreme Court in the case of **V.Rajendran and another v. Annasamy Pandian (Dead) through Legal Representatives Karthyayani Natchiar** reported in **(2017) 5 Supreme Court Cases 63**, wherein it is stated as follows:

"As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b), that is, existence of a 'formal defect' or 'sufficient grounds'. The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again on the same cause of action."

14. It is further stated that the first appellate Court has the power to grant leave. The suit was already filed. No prejudiced will be caused to the other side and the revision petition has to be dismissed.

15. On the side of the revision petitioner, it is stated that the observation of the trial Court is that the properties are not ancestral in nature and that the legal heirs of Raman are not entitled to the suit properties and that the trial Court has made some other observation in favour of the defendants and only to overcome all such observations, the first respondent herein has approached the first appellate Court for liberty to file a fresh suit.

16. A perusal of the records reveals that the first respondent and 11 others filed a suit before the trial Court in O.S.No.11 of 2007. The suit was dismissed by the trial Court and the first respondent and others filed an appeal in A.S.No.7 of 2009 on the file of the learned Sub Judge, Sivagangai. During the pendency of the first appeal, the first plaintiff in the original suit has filed a petition for leave of the Court to withdraw the suit with liberty to file a fresh suit on the same cause of action. The reason stated



by the first plaintiff is that the learned District Munsif has come to a conclusion that the legal heirs of the brothers of the father of the first plaintiff were not having any share in the property and hence, a fresh suit has to be filed by the first plaintiff and the other legal heirs of the father of the first plaintiff. The first appellate Court allowed the petition with costs.

17.The contention of the revision petitioner is that leave for filing a fresh suit under Order 23 Rule 1(3) of CPC, can be granted, only when there is a formal defect, which could not be rectified. Here the first respondent herein is at liberty to delete some of the plaintiffs and if needed, he can implead some others as plaintiffs. There is no necessity to file a fresh suit.

18.The revision petitioner obtained a stay order in M.P.(MD) No.1 of 2015. Before the grant of stay order, a fresh suit was filed by the first respondent herein. The contention of the first respondent is that a second suit was already filed and the civil revision petition is infructuous. It is stated that there is no stay order against the second suit in O.S.No.191 of 2015.

19.Order 23 Rule 1(3) of CPC reads as follows:

"1.(3)Where the Court is satisfied -

(a)that a suit must fail by reason of some formal 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".

20.Only for formal defects, which cannot be rectified, liberty has to be given to the parties to the suit to withdraw the suit and to file a fresh case on the same cause of action. No such formal defect was pointed out by the first plaintiff. If the first plaintiff is having some adverse interest against the other plaintiffs, the first plaintiff is at liberty to make amendments.

21.In the above circumstances, the order passed by the first appellate Court is not maintainable and the same has to be set aside. In view of the same, the second original suit in O.S.No.191 of 2015 filed by the respondents has to be closed.



22. With the above direction, this Civil Revision Petition is allowed and the order passed in I.A.No.18 of 2015 in O.S.No.18 of 2015 in A.S.No.7 of 2009 dated 31.08.2015 on the file of the Sub Judge, Sivagangai is set aside. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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/ /2021

Sub Assistant Registrar(CS)

MRN

Note : In view of the present lock down owing to COVID - 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

The Subordinate Judge,
Sivagangai.

Copy to

The Section Officer, V.R. Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.SRINIVASA RAGHAVAN, Advocate (SR-31102[F] dated 04/10/2021)

C.R.P. (PD) (MD) .No.2442 of 2015
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