



IN THE HIGH COURT OF JUDICATURE AT MADRAS
(Civil Appellate Jurisdiction)

Tuesday, the First day of March Two Thousand Twenty Two

PRESENT

THE HON'BLE MR.JUSTICE RMT.TEEKAA RAMAN

CMP.Nos.13793 of 2020 and 11371 of 2020
in
S.A.No.874 of 2014

1 J.GEORGE MANOHAR [PETITIONERS IN BOTH THE PETITIONS]

2 J.ALEXIS RAJKUMAR

Vs

1 A.JOSEPH AROKIARAJ [RESPONDENTS IN BOTH THE PETITIONS]

2 J.GRACE RANI

3 J.REGINA

4 J.GREGORY MOHAN

5 J.JULIEN SANTHANARAJ

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant permission to the Petitioners/Appellants to withdraw the O.S.No.1707/2007 and file a fresh suit on the very same cause of action.(CMP.No.13793 of 2020)and;

(2)To permit us to file the documents viz. 1. 15.02.1989 Alleged will executed by S.Jeganathan 2.28.03.1997 Agreement between D1/R1 and Late S.Jagannathan 3. 01.08.2006 Taped conversion between the 1st Appellant and 1st Respondent with Transcript 4. 17.01.2007 Taped conversion between the 1st Appellant and 1st Respondent with Transcript 5.10.03.2010 Appellant's Counsel to Respondent's Counsel as additional evidence under Order XLI Rule 27 of CPC and receive the same Under order XLI Rule 28 of CPC (CMP.No.11371 of 2020)

Order : These petitions coming on this day for hearing upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.R.THAGARAJAN, Advocate for the petitioners in both the petitions, the court made the following order:-



WEB COPY

The appellants/plaintiffs filed the above C.M.P.No.13793 of 2020 under Order XXIII Rule 1(3) (a) &(b) of the Civil Procedure Code to withdraw the O.S.No.1707 of 2007 and to file a fresh suit on the very same cause of action.

2. The first respondent/first defendant is the contesting party. Both parties appeared.

Brief facts that are essential for proper and better appreciation are as under:

(3.1) The appellants herein originally filed a civil suit in O.S.No.1707 of 2007 claiming the following reliefs as against the respondents herein:

a. for a decree of mandatory injunction, directing the first defendant to remove the drainage of his property connected to the property of the plaintiffs and defendants 2 to 5 in the portion marked in colour yellow in the plaint plan and removal of the bore-well put up in the property belonging to the plaintiffs and defendants 2 to 5 in the portion marked in colour yellow in the plaint plan;

b. for a decree of permanent injunction restraining the first defendant, his men, or agents or anybody acting on his behalf from in any manner dealing with the property more fully described in schedule hereunder and marked yellow in colour in the plan annexed to the plaint, belonging to the plaintiffs and defendants 2 to 5;

(3.2). The said suit was dismissed by a judgment and decree, dated 11.11.2008. Aggrieved by the same, the plaintiffs preferred a regular appeal in A.S.No.367 of 2009 before the lower Appellate Court/III-Additional City Civil Judge, Chennai and pending appeal, the plaintiffs had also taken out an application for appointment of an Advocate Commissioner, who should take the assistance of an Expert Engineer to inspect the premises and submit a report and accordingly, the report was submitted before the lower Appellate Court.

4. Pending appeal, C.M.P.No.641 of 2010 was filed under Order 41 Rule 27 C.P.C., and both the said interim application and the A.S.No.369 of 2009 were dismissed. Pending first appeal, it appears that the plaintiff also filed a separate suit in O.S.No.3961 of 2012 for partition and separation of the suit property, which includes the property of the subject matter of the second appeal and the said suit is still pending.

5. The plaint schedule indicates the suit property as Plot No.48 in R.S.No.3180/33, Co-operative Colony, Kellys, Chennai-600 010.



WEB COPY

6. The learned counsel for the plaintiffs/appellants/petitioners seeks to rely upon the decision of our High Court in O.S.A.No.88 of 2010 dated 11.02.2011 in the case of S.Balasubramanian v. B.K.Krishnamurthy and others. (MANU/TN/0304/2011)

7. The learned counsel for the first respondent/first defendant would contend that both the Courts below have concurrently rendered a finding that the alleged agreement between the first defendant and father of the plaintiffs was not come into force because the property was mortgaged with his employer bank through the substance of mortgage and hence, the agreement alleged by the plaintiffs said to have been entered between the first defendant and the father of the plaintiffs has not come into force and both the Courts below also held that he is in possession and enjoyment of the property and he has already constructed a building and the same is being used even from the year 2007, that was during the life time of the plaintiffs' father. These two findings cannot be vacated.

8. After hearing both the parties, I find that the first defendant is the contesting party, defendants 2 to 5 are only formal parties. The first defendant is none other than the sister's husband of the first plaintiff. By virtue of the said relationship, the first plaintiff's father Jaganathan gifted a vacant portion of A-schedule property in favour of the first defendant through gift deed, dated 27.03.1987-Ex.A2. In and by which the first defendant had constructed a building by availing loan from his office and residing there.

9. On the above facts and position, it is the plaintiffs' case that the first defendant had agreed to register certain portion of the land in 'B' schedule property measuring 3 feet x 66 feet out of 10 feet x 66 feet passage running from west to east on the northern side to the plaintiffs' father. But later he failed to do the same. But connected his drainage and other water connections in the provisions provided in the plaintiffs' land, which caused inconvenience to the plaintiffs and therefore the plaintiffs filed the suit.

10. As per Clause-4 in the written statement, the agreement could not be given effective, because, the property was already mortgaged with the employer and in the circumstance, the agreement could not be given effect and therefore the agreement was not acted upon. The above explanations of the first defendant has become acceptable, in view of the registered mortgage deed in favour of the bank.

11. Based upon the above pleadings and the evidence thereto, both the Courts below have concurrently held that after getting the gift deed, the first defendant put up construction in the gifted land given to him at that time Jaganathan was also alive and he died in the year 1989 only. Therefore, over the drainage and water connections made by the first defendant had happened during the



life time of Jaganathan and he had not objected the same. Therefore, the plaintiffs cannot now project the same after lapse of several years that too in the year 2007.

12. In fact, PW1 has also admitted that the first defendant has constructed the house in the year 1987 and all of them are residing in the said place. PW1 and plaintiffs also admitted that the first defendant has returned the property and no document has been filed by the plaintiffs evidencing the same. Based upon the admission of PW1, both the Courts below are concurrently held that there is no acceptable document to hold that some of the portions were gave back to the plaintiffs' enjoyment. The plaintiffs have no ultimate right over the schedule property because the property was ultimately given to 5th defendant's daughter. But the plaintiffs have not come forward to mark that Will, though the same was relied upon in the plaint. Hence, the plaintiffs have no legal right to get a decree of mandatory injunction to remove the drainage enjoyed by the first defendant. Further hold that the first defendant had put up bore-well only in the gifted property. Therefore, they are not entitled to remove the bore well, since the first defendant is enjoying the 'B' schedule property on the basis of gift deed and subsequent handing over the possession only. The plaintiffs are not entitled to have his possession by way of decree of permanent injunction.

13. In view of the specific finding rendered by both the Courts below, no permission could be granted to the plaintiffs/appellants/petitioners to institute a fresh suit on the same cause of action. Thus findings in favour of the first defendant would be prejudice to the defendant is writ large, because he loses the benefit of the decision in his favour by both the Courts below. In a similar circumstance, the Hon'ble Supreme Court in 2005 (5) SCC 458 [K.S.Boopathi and others v. Kokila and others] wherein, the Hon'ble Apex Court held that before granting permission for withdrawal of the suit, the Court is duty bound to satisfy itself that proper grounds exist for granting such permission. Further, held that when such permission is granted at the first or second appellate stage, prejudice to the Defendant is writ large because he loses the benefit of the decision in his favour by the lower Court.

14. The learned counsel for the plaintiffs also filed C.M.P.No.11371 of 2020 seeking permission to file three documents, viz., alleged Will, the tape-record version of the conversation and the alleged agreement between D1/R1 and Late S.Jagannathan along with C.M.P.No.13793 of 2020 for withdrawal with liberty to file fresh suit.

15. A Division Bench of our High Court in the decision reported in 1982 (2) MLJ 400 [K.Chinna Vaira Thevar v. S.Vaira Thevar] held that the failure or inability of the Plaintiff to secure necessary evidence to support his case will not be a ground as contemplated in Order 23, Rule 1(3)(b) of CPC and hence in view of the actual decision as discussed supra and in view of the



citations referred supra, I find that the facts of this case squarely falls under the above said decision and hence, I have no hesitation to hold that the permission to withdraw the suit with liberty to re-agitate the fresh suit cannot be granted.

WEB COPY

16. Accordingly, these two C.M.P.Nos.13793 of 2020 and 11371 of 2020 are dismissed.

-sd/-
01/03/2022
/ TRUE COPY /

Sub-Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 THE III ADDITIONAL JUDGE,
CITY CIVIL COURT, CHENNAI.

2 THE VII ASSISTANT JUDGE,
CITY CIVIL COURT, CHENNAI.

COPY TO

THE SECTION OFFICER,
VR SECTION, HIGH COURT,
MADRAS-104.

C.C. to M/S.T.S.GOPALAN & CO, Advocate SR.NO.1449/2022

Order
in
CMP.Nos.13793 of 2020 and 11371 of 2020
in
S.A.No.874 of 2014

Date :01/03/2022

From 26.2.2001 the Registry is issuing certified
copies of the Interim Orders in this format
GS(09/03/2022)