



C.R.P.No.2090 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.03.2023

CORAM

**THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN**

C.R.P.No.2090 of 2020 &  
C.M.P.No.13212 of 2020

1. Jayakumar  
2. Shankar  
3. Sekar  
4. Senthil

... Petitioners

Vs.

1. Varadharajan  
2. Radha

... Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 21.10.2019 made in I.A.No.1004 of 2017 in O.S.No.166 of 2008 on the file of the learned District Munsif Court, Jayankondam.

For Petitioners : Mr.M.Senthil Vadivu

For Respondents : Mr.M.Selvam

O R D E R

The present Civil Revision Petition has been filed to set aside the fair and decreetal order dated 21.10.2019 made in I.A.No.1004 of 2017 in O.S.No.166 of 2008 on the file of the learned District Munsif Court,



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Jayankondam.

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2. The brief facts of the case are as follows:-

The petitioners are the defendants 4 to 7 and the 1<sup>st</sup> respondent is the plaintiff and the 2<sup>nd</sup> respondent is the 1<sup>st</sup> defendant in O.S.No.166 of 2008. The suit has been filed for permanent injunction restraining the petitioners and 2<sup>nd</sup> respondent and others from interfering with the peaceful possession and enjoyment of the property and written statement was also filed. Pending suit, the 1<sup>st</sup> respondent / plaintiff filed I.A.No.1004 of 2017 to permit him to withdraw the suit with a liberty to file a fresh suit stating that during the pendency of the suit, the petitioners / defendants had alienated certain property to the 3<sup>rd</sup> parties. A counter was filed resisting the prayer made in I.A., The court below allowed the 1<sup>st</sup> respondent / plaintiff's application and permitted to withdraw the suit with a liberty to file a fresh petition. As against the same, the present Petition is filed.

3. The learned counsel for the petitioners / defendants would submit that the 1<sup>st</sup> respondent / plaintiff failed to establish that there is a formal defect, which would warrant allowing the application under Order 23 Rule 1



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of Civil Procedure Code and the 1<sup>st</sup> respondent has not given any sufficient reason to withdraw the suit and seeking permission to file a fresh suit on the same cause of action. Further, the court below failed to note that the 1<sup>st</sup> respondent / plaintiff could move an application to implead the subsequent purchaser as necessary party to the proceedings instead of moving an application for withdrawal of the suit without giving any sufficient reasons as contemplated under the law, thereby sought to set aside the order passed in I.A.No.1004 of 2017 dated 21.10.2019.

4. On the contrary, the learned counsel for 1<sup>st</sup> respondent / plaintiff contends that during the pendency of the suit, it came to the knowledge of the 1<sup>st</sup> respondent / plaintiff that the petitioners / defendants had alienated certain property to the 3<sup>rd</sup> parties. Since the petitioners / defendants have restrained the 1<sup>st</sup> respondent / plaintiff's right and enjoyment over the suit property and the petitioners / defendants are in possession and enjoyment of the suit property, the nature of the suit and character and time, date have been changed, therefore, sought permission to withdraw the said suit and file a fresh suit, the court below has rightly allowed the same and pleaded to dismiss the present petition.



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5. In reply, the learned counsel for the petitioners / defendants would contend that after withdrawing the suit in O.S.No.166 of 2008, as per the orders passed in I.A.No.1004 of 2007 on 21.10.2019, the 1<sup>st</sup> respondent / plaintiff has sold the subject property in question to the 3<sup>rd</sup> party, viz., Kalaiarasi, on 02.01.2020.

6. Heard the learned counsel on either side and perused the documents placed on record.

7. On going through the averments in the plaint, it is seen that the suit property was in possession and enjoyment of one Sabapathy Pillai and thereafter, his son, namely, Muthukrishnan pillai was in possession and enjoyment of the same. Thereafter, the said Muthukrishnan pillai had executed the document on 26.07.1972 in favour of the 1<sup>st</sup> respondent / plaintiff's mother, namely, Sarojammal as a guardian, since the 1<sup>st</sup> respondent was minor at that point of time. After attaining majority, the 1<sup>st</sup> respondent / plaintiff is in possession and enjoyment of the property. The petitioners and the 2<sup>nd</sup> respondent / defendant sought for ownership of the



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property, which the 1<sup>st</sup> respondent / plaintiff did not oblige, hence they prepared some forged documents and trying to disturb the possession of the said 1<sup>st</sup> respondent / plaintiff.

8. On going through the written statement filed by the petitioners and 2<sup>nd</sup> respondent / defendants, it is seen that originally on 26.07.1972, a document was executed in favour of the Minor Varadarajan, the 1<sup>st</sup> respondent / plaintiff herein as well as his mother, Sarojammal and the 1<sup>st</sup> respondent / plaintiff cannot seek for a injunction by way of a Suit against the co-parcener, viz., his mother, Sarojaammal and the same has to be dismissed. The said document itself is executed only for a loan transaction and it is not the sale agreeent and the said documents/tax receipts are still in possession of Muthukrishnan's family members and the 1<sup>st</sup> respondent / plaintiff was never in the possession of the said property and the plaintiff's mother herself has executed an agreement of sale in the year 1990 by fixing the amount as Rs.90,000/- and thereby received an amount of Rs.45,000/- on 05.02.1990, thereafter, she has also sold her share to 1<sup>st</sup> petitioner, viz., Jayakumar on 19.07.1990 by way a registered document and received



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another sum of Rs.45,000/- .

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9. It is important to note that the suit was filed on 31.07.2008 and written statement was filed on 04.12.2008, thereafter, trial has been conducted, at that juncture, the 1<sup>st</sup> respondent / plaintiff sought for withdrawal of the suit, viz., O.S.No.166 of 2008 by way of I.A.No.1004 of 2017 on the ground that the petitioners/ defendants have sold the 1<sup>st</sup> respondent's property to the third party and the said 3<sup>rd</sup> party is in possession of the suit property and restrained the 1<sup>st</sup> respondent / plaintiff from his possession and thereby cause of action and nature of the suit has changed, hence sought to withdraw the said suit and file a fresh suit and the said petition was allowed on 21.10.2019, on ground if the suit is continued, it will be dismissed on the ground of formal defects, thereby given liberty to withdraw the suit and file a fresh petition.

10. It is relevant to note that the 1<sup>st</sup> respondent / plaintiff had submitted that the petitioners/ defendants had sold the property to 3<sup>rd</sup> party, however, has failed to state the name of 3<sup>rd</sup> party. The plaintiff has mentioned in the pleadings of the suit that the 1<sup>st</sup> respondent / plaintiff is in



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the possession of the suit property, however, while filing an application to withdraw the suit has mentioned that the defendants have sold the property to the third party and the third party is in possession of the property. The plaintiff was himself examined as P.W1, on 02.06.2016, at that point of time, the plaintiff has mentioned that he is in possession of the property. After one year and three months, the plaintiff submits that the third party is in possession of the property, by stating so, the plaintiff had withdrawn the suit.

11. In so far as law regarding withdrawal of suit is concerned, the High Court of Bombay, Nagpur Bench, Nagpur in case of Baliram S/o Laxman Raut reported in 2006 (2) Mh.L.J.693 has relied upon the decision of the Hon'ble Supreme Court and observed that in the absence of fatal defects, withdrawal of suit is not permissible, as amendment is the proper remedy available.

12. From the pleadings as well as counter pleadings and the submissions made on either side, it is clear that under the guise of withdrawing the suit and filing a fresh suit, the 1<sup>st</sup> respondent / plaintiff had



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sold the said property to 3<sup>rd</sup> party, viz., Kalaiarasi, on 02.01.2020, which is evident through the Certificate of encumbrance on property dated 08.02.2023 submitted by the petitioners, in a calendistine manner. Though Interim stay has been granted in this Revision Petition on 08.12.2020, the subject mentioned property was sold on 02.01.2020 itself.

13. In the case of **Duraikannu v. Malayammal**, reported in 2003 (3) M.L.J.551, with regard to formal defect, this Court 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*



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*is no ground for allowing him to withdraw his suit with liberty of suing again for the same subject matter."*

14. In the present case, it can be seen from averments in application I.A.No.1004 of 2017 that 1<sup>st</sup> respondent / plaintiff was to bring subsequent development on record. According to him, the petitioners / defendants had sold the suit mentioned property to the third parties and the same was discovered at a later point of time only and hence the cause of action and nature of the suit was changed. It is apparent from the impugned order that trial court is not satisfied with the above said averment of the 1<sup>st</sup> respondent / plaintiff in view of the fact that during chief examination, the 1<sup>st</sup> respondent / plaintiff contended that he is in possession of the property and during cross examination also, the 1<sup>st</sup> respondent / plaintiff contended that he is possession of the property and in the application, suddenly, the 1<sup>st</sup> respondent proceeded to state that the petitioners / defendants have sold the properties to the third parties, however, granted liberty to withdraw the suit and file a fresh suit on the ground that suit suffers from formal defects. The defects, as pointed out by plaintiff, were not fatal and the plaintiff could have filed applications for impleading the subsequent purchasers in the suit. It appears that instead of moving amendment / impleading application, the



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1<sup>st</sup> respondent / plaintiff has filed application for withdrawal of suit with liberty to file a fresh.

15. Considering the above said facts and circumstances of the case and taking note of the fact that the 1<sup>st</sup> respondent / plaintiff has approached the court below in a clandestine manner with unclean hands and with an intention of deceiving the court, has withdrawn the suit by filing an application and sold the property to the third party that too when they have sold half of the portions to the defendants herein, this Court is inclined to set aside the order passed in I.A.No.1004 of 2017 dated 21.10.2019.

In view of the above, the present Revision is allowed and the order passed in I.A.No.1004 of 2017 dated 21.10.2019 is hereby set aside and the regular suit in O.S.No.166 of 2017 is restored to the file of learned District Munsif, Jayankondam for disposal according to law. Consequently, connected miscellaneous petition is closed. No costs.

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Index : Yes/No

10/12



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Internet : Yes/No  
Speaking /Non-Speaking Order  
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To

The District Munsif Court,  
Jayankondam.

**V.BHAVANI SUBBAROYAN, J.,**

ssd

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