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CRP.No.2927 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.No.2927 of 2014
and MP.No.1 of 2014

1.Sundaram(died)
2.Mathuram
3.Venkatesan
4.Thirumugam
(petitioners 2 to 4 brought on record as LR's
of the deceased sole petitioner viz., Sundaram
vide court order dated 21.03.2022 in
CMP.No.3541 of 2018 in CRP.No.2927 of 2014)

... petitioners

Vs.

1.Periyammal
2.Muthusamy

... Respondents

PRAYER:

Civil Revision Petition filed under Article 227 of the Constitution of India to
set aside the fair and decretal of the Subordinate Judge's Court at Perambalur dated
18.03.2014 in IA.No.56 of 2013 in AS.No.17 of 2012.

For Petitioners : Mr.Deeraj
for Mr.S.M.S.Shriram Narayanan

For Respondents
For R1 : Mr.C.Prabakaran



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ORDER

This civil revision petition has been filed to set aside the fair and decretal of the Subordinate Judge's Court at Perambalur dated 18.03.2014 in IA.No.56 of 2013 in AS.No.17 of 2012, thereby dismissed the application filed under Order XXIII Rule (1) 3 r/w Section 151 of CPC seeking permission to withdraw the appeal suit with liberty to file a fresh suit on the same cause of action.

2. The first petitioner was the sole plaintiff and the respondents are the defendants. The first petitioner filed suit for declaration, permanent injunction and mandatory injunction in respect of the suit property. While pending the suit, the first petitioner filed application seeking appointment of advocate commissioner to note down the physical features of the suit property and the same was allowed. Accordingly, the Advocate Commissioner inspected the property and filed his report. On receipt of the Advocate Commissioner's report, the first petitioner filed application seeking amendment of plaint under Order VI Rule 17 of CPC pertaining to the measurement of the cart track. It was allowed and aggrieved by the same, the respondents preferred a civil revision petition before this Court in CRP.No.2558 of 2011. It was allowed by this Court by order dated 08.09.2011 for the reason that it would affect the rights of the respondents herein. Thereafter, the suit was dismissed by the trial court. Aggrieved by the same, the first petitioner preferred an appeal



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suit in AS.No.17 of 2012. While pending the appeal suit, the petitioner filed application under Order XXIII Rule (1) (3) r/w Section 151 of CPC seeking permission to withdraw the appeal with liberty to file a fresh suit on the same cause of action and the same was also dismissed. Aggrieved by the same, the present civil revision petition has been filed.

3. The learned counsel for the petitioners mainly contended that the provision under Order XXIII Rule 1 of CPC clearly permits the party to withdraw the suit with liberty to file a fresh suit in case the suit suffers from formal defects. While pending the suit, the Advocate Commissioner noted the correct measurement of the cart track and as such, the petitioner was constrained to file an application seeking amendment of the extent of the cart track. It was negated by this Court. He further contended that if any suit suffers by any formal defect, the person can be permitted to file a fresh suit on the same cause of action. It does not operate as a bar to seek withdrawal of the suit with liberty to file a fresh suit on the same cause of action inasmuch as refusal of amendment implies that the party seeking such amendment is not entitled to amend in that suit and withdrawal of the suit with liberty to file a fresh suit on the same cause of action, stands on an entirely different footing. In support of his contention, he also relied upon the judgment of the Hon'ble Supreme Court of India in the case of ***V.Rajendran and Ors. Vs.***



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Annasamy Pandian(D) thr. Lrs. Karthyayani Natchiar reported in

MANU/SC/0094/2017, in which the Hon'ble Supreme Court of India held that 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. 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'. He also relied upon the judgment of this Court in the case of **Ameena Bi and Ors. Vs. Ameer Bi and Ors** reported in **MANU/TN/1022/1997**, in which this Court held that an appeal is a continuation of the suit and the appellate court is also competent to grant permission to withdraw the suit.

4. Heard, the learned counsel for the petitioners and the learned counsel for the first respondent.

5. The petitioner has no right to withdraw the suit where the rights of the parties with regard to any of the matters in controversy in the suit has been finally decided. The suit has been dismissed by the trial court and certain rights have been vested in the party in whose favour a decision is made. It conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the



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suit and therefore, at the stage of appeal, though it may be a continuation of proceedings, the petitioners have no absolute right to withdraw the suit. If an appeal was preferred by an unsuccessful plaintiff against the judgment dismissing the suit and if the petitioners wanted to withdraw not only the appeal, but also the suit unconditionally, then such permission insofar as the withdrawal of the suit can be granted, if there is no question of any adjudication on merits, in favour of the defendants by the trial court being nullified by such withdrawal. The mere general statement that there is a formal defect in the description of the suit schedule property is not sufficient to attract the said word of defect. The application to withdraw the suit at the stage of appeal on the ground of defect in the description of the suit schedule property will nullify the entire judgment and decree passed by the trial court based on the oral and documentary evidence. Therefore, it would also amount to setting aside the order passed by this Court in CRP.No.2558 of 2011, wherein the amendment application was dismissed by this Court.

6. Therefore, the first appellate court rightly dismissed the application and this Court finds no infirmity or illegality in the order passed by the first appellate court. Accordingly, this civil revision petition is dismissed. The appeal is of the year 2012. As such, the first appellate court is directed to dispose of the appeal in AS.No.17 of 2012 within a period of three months from the date of



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receipt of a copy of this order, if not already disposed of. Consequently, connected

miscellaneous petition is closed. There shall be no order as to costs.

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Speaking/non-speaking

Index : Yes/No

Internet : Yes

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G.K.ILANTHIRAIYAN, J.

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To



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The Subordinate Judge's Court at Perambalur

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