



C.R.P.(NPD).No.3312 of 2019

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2023

CORAM

CORAM : **JUSTICE N.SESHASAYEE**

C.R.P.(NPD).No.3312 of 2019

Elangovan

... Petitioner

Vs.

Rajabai

... Respondent

Prayer: Petition filed under Article 227 of the Constitution of India, seeking to set aside the judgment and decree dated 23.01.2019 passed in O.S.No.33 of 2016 on the file of the Principal Sub Judge, Puducherry.

For Petitioner : Mr.Prakash Adiapadam
for J.Zeakumar

For Respondent : Mr.A.Gouthaman

ORDER

A suit in O.S.No.33 of 2016 was laid for declaration of plaintiff's title over the suit property and a set of ancillary reliefs. A written statement was filed, by the defendant resisting the cause of action, and the suit was listed for trial. While so, on 23.01.2019, the learned counsel for the plaintiff is stated



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to have made an endorsement in the docket of the plaint that the plaintiff is not pressing the suit and a liberty be given to the plaintiff to institute a fresh suit. That was instantly ordered by the learned Trial Judge.

2. Even prior to the impugned judgment of the trial Court, the plaintiff is said to have instituted another suit and that suit was taken on record on the very day on which O.S.No.33 of 2016 was dismissed as withdrawn.

3. This judgement passed by the learned Trial Judge in O.S.No.33 of 2016 is now under challenge in this revision.

4. Learned counsel for the revision petitioner submitted that the law requires that an application be made under Order XXIII Rule 1 C.P.C, and apparently no such application is filed. Even if it is presumed that an oral application can be entertained, yet the defendant must be given an opportunity to resist it since granting leave to file a fresh suit affects the right and interest of the defendant, argued the counsel.



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5.This court perused the impugned judgement dated 23.01.2019 in O.S.No.33 of 2016. In the context of the submissions made, it is apposite to extract Paragraph 3 of the impugned judgement as hereunder:

"3.On this day, the counsel for the plaintiff made an endorsement to the effect that 'the plaintiff is not pressing this suit with liberty to file a fresh comprehensive suit.' In view of endorsement made by plaintiff's counsel, this suit is dismissed as not pressed with liberty to file fresh suit."

6.It is very evident that the learned Trial Judge has not chosen to apply her mind while granting leave to the plaintiff. While the plaintiff as the master of the suit has the prerogative to prosecute or withdraw the suit, yet granting leave to file a fresh suit on the same cause of action cannot be put in the same pedestal.

7.In the above circumstances, this court holds that the judgement dated 23.01.2019 cannot be sustained in law, and accordingly it has to be set aside.



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8.Learned counsel for the plaintiff / respondent herein submitted that if this judgement goes, then the other suit the plaintiff has laid now pending in O.S.No.12 of 2019 might have to go.

9.This court does not incline to address this issue since that suit was laid even prior to the disposal of O.S.No.33 of 2016. The fact that O.S.No.12 of 2019 was taken on record on the very same day the court dismissed O.S.No.33 of 2016, may not by itself adequate to construe the same as one filed on the strength of the leave granted by the court vide the impugned judgement. This, however, is a broad statement made on the point, but it requires evidence on facts which the trial court will be in a best position to undertake.

10.This Civil Revision Petition stands allowed accordingly and that portion of the impugned judgement passed by the trial Court in O.S.No.33 of 2016, granting leave to the plaintiffs to institute a fresh suit on the same cause of action alone is set aside. No Costs.

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Anu
Index : yes / no
Speaking / non speaking



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The Principal Sub Judge, Puducherry



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N.SESHASAYEE.J.,

Anu

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