



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Friday, the Sixth day of January Two Thousand and Twenty Three

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CMP(MD) No.2934 of 2017
IN
AS(MD) No.275 of 2009

S.SRINIVASAN

... PETITIONER/APELLANT

Vs

1 V. JEYARAMAN

2 V. PANDIYARAJAN

3 V. SANKARAN

4 V. VELMURUGAN

5 S.P. RAJU (DIED)

(MEMO DT 13.06.22 FILED ON 15.06.22 IN USR
NO.15330 IS RECORDED AS R5 DIED VIDE COURT
ORDER DATED 15.06.2022 MADE IN AS(MD)No.275/09
BY PVJ)

6 A.N. VISWANATHAN

... RESPONDENTS/RESPONDENTS

7 S.B.MARYA,

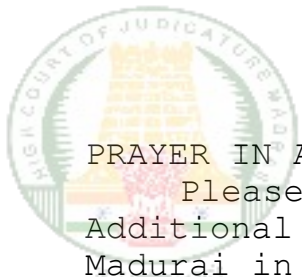
8 VIBBIN RICHARD

9 NIRMAL PRABHU,

...RESPONDENTS 7 TO 9

RESPONDENTS 7 TO 9 ARE BROUGHT ON RECORD AS
LRS OF THE DECEASED 5TH RESPONDENT VIDE COURT
ORDER DATED 23.08.2022 MADE IN CMP(MD)No.6185
OF 2022 IN AS(MD)NO. 275 OF 2009 BY PVJ

Petition filed praying that in the circumstances stated therein
and in the affidavit filed therewith the High Court may be pleased
to permit me to withdraw the suit and to give liberty to institute
fresh suit in respect of the suit property on the same cause of
action.



PRAYER IN AS (MD) No.275 OF 2009:

Pleaded to set aside the judgment and decree passed by the Additional District and Sessions Judge (Fast Track Court No.1) Madurai in O.S.No. 313 of 2004 dated 25.04.2008.

ORDER : This petition coming up for orders on this day, upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.NIRANJAN S. KUMAR, Advocate for the petitioner and of MR.T.K.GOPALAN, Advocate for MR.V.KARUNA, Advocate for the respondents 1 to 4 and of MR.D.NALLATHAMBI, Advocate on behalf of the Respondents 7 to 9, the court made the following order:-

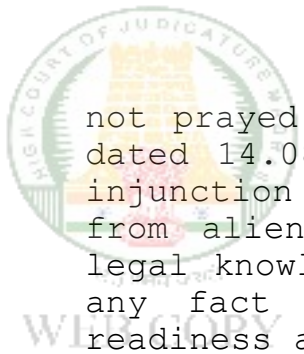
RESERVED ON:08.11.2022
PRONOUNCED ON:06.01.2023

The above petition has been filed under Order XXIII Rule 1(3) of the Code of Civil Procedure to withdraw the suit with liberty to institute a fresh suit on the same cause of action.

2. The petitioner has filed the suit to declare that the registered deed of made over of cultivating right dated 27.04.2000, executed by the respondents 1 to 4/defendants 1 to 4 in favour of the fifth respondent/fifth defendant in respect of the suit properties is null and void and not binding on the petitioner/plaintiff and after full trial, the learned Additional District Judge, Madurai, vide judgment dated 25.04.2008 dismissed the suit. Aggrieved by the dismissal of the suit, the petitioner/plaintiff has preferred an appeal in A.S.(MD)No.275 of 2009 and the same is pending on the file of this Court. Pending appeal, the above petition came to be filed.

3. The case of the petitioner is that the respondents 1 to 4 entered into an agreement with the petitioner on 14.08.1998 to made over the cultivating tenancy right for consideration of Rs.32,00,000/- and received a sum of Rs.15,00,000/-, that the respondents 1 to 5 have colluded and registered the cultivating tenancy made over deed on 27.04.2000 to defraud the petitioner and hence, the petitioner was advised to file the suit to declare the said deed dated 27.04.2000 as null and void, that the respondents 1 to 4 have admitted the agreement and the receipt of Rs.10,00,000/-, but pleaded that the petitioner was not ready and willing to pay the balance consideration and complete the contract and that the respondents 1 to 4 by alleging so, have terminated the agreement by sending a legal notice dated 19.04.2000 and registered the impugned document in favour of the fifth respondent on 27.04.2000.

4. It is the further case of the petitioner that the trial Court dismissed the suit on the sole ground that the petitioner has



not prayed for the relief of specific performance of the suit dated 14.08.1998 against which, he has filed the above appeal and injunction was also granted by this Court against the respondents from alienating the suit properties, that the petitioner has no legal knowledge, that he has pleaded everything without suppressing any fact in the plaint, that the petitioner has pleaded his readiness and willingness in the plaint, that the petitioner was not advised by his previous Counsel to file the suit for specific performance or to amend the plaint for the said relief, that the omission to ask the relief of specific performance is not *malafide* or deliberate, that the petitioner has already parted with huge amount of Rs.15,00,000/-, which amounts to nearly 50% of the agreed amount, that the respondents did not return the amount till now, that the petitioner was enlightened by their Senior Counsel that he was non-suited only on the ground that he has not asked for the relief of specific performance and that therefore, it has become just and necessary to permit the petitioner to withdraw the suit and to give liberty to institute fresh suit in respect of the suit property on the same cause of action, as necessary pleadings are already pleaded in the suit.

5. The petitioner, in the affidavit filed in support of the above petition has further stated that since he has no legal knowledge, he was guided by the legal advice given by the Counsel who filed the suit, that he was not aware that the remedy sought for in the suit is not maintainable, that the petitioner was prosecuting the suit as well as the first appeal bonafidely and without negligence, that the cause of action is the same, that the prayer alone has to be modified in respect of declaration, specific performance of the agreement ought to have been prayed for and that if the permission sought for is not given, the petitioner will be put to great financial loss of Rs.15,00,000/- with interest.

6. The first respondent has filed a counter statement which was adopted by the respondents 2 to 4 and wherein it has been stated that the petitioner was not ready and willing to act according to the agreement within the time stipulated, the respondents 1 to 4 sent termination notice of the agreement, that the petitioner has specifically admitted in the plaint about the receipt of termination notice and even after receiving the same, the petitioner did not choose to file a suit for specific performance, that the above petition was filed only on 23.02.2017 after 17 long years, since the date of termination notice, that the claim of the petitioner is totally barred by limitation, that the petitioner was fully aware of the fact as per the pleadings in his plaint and also the evidence adduced by him, that only proper legal remedy available to him is to file a suit for specific performance, that the petitioner's pleading of ignorance and blaming his earlier Counsel cannot be accepted, that the petitioner is a big business man of the locality and as such, he cannot plead ignorance and that therefore, the petitioner's claim is not maintainable either factually or legally.



7. The fifth respondent/fifth defendant has filed an affidavit stating that after completion of 8 years from the date of institution of appeal, the above petition came to be filed, that the petitioner has not come forward with any valid reason like what is the formal defect in the suit and that there are sufficient grounds for allowing the petitioner to institute a fresh suit, that the petitioner has found fault with the previous Counsel in filing the suit for declaration only, that the fifth respondent in his written statement itself has specifically pleaded that the suit is not maintainable and the petitioner ought to have filed the suit for specific performance, that the petitioner and his Counsel were fully aware that they have to file the suit for specific performance, but the reasons best known to them, the petitioner has not exhausted the said remedy, that the relief for specific performance was hopelessly barred by limitation in the year 2003 itself, that there is no formal defect in the suit and that if the permission is granted, the fifth respondent will be put to irreparable loss and hardship.

8. Whether the petitioner is to be permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action? is the point for consideration.

9. Before entering into further discussion, it is necessary to refer Order 23 Rule 1 (3) of the Code of Civil Procedure, which is extracted as follows:

" (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."

10. Sub Rule (3) contemplates a withdrawal from the suit with liberty to bring a fresh suit and the plaintiff must ask for leave and make out a case within Clause(a) or (b). It is settled law that the Court has no jurisdiction to allow such withdrawal with liberty, unless the condition in either of the clauses ie., the existence of a formal defect fatal to the suit is satisfied. The very principle is founded on public policy to prevent filing of suit again and again on the same cause of action. As per sub Rule(3), the only kind of defect which attracts the rule is formal defect. The formal defect is a defect in form prescribed by rules or procedure.

11. At this juncture, it is necessary to refer the decision



relied on by the learned Counsel for the respondents in *D1* **and others Vs Malayammal** reported in (203)3 MLJ 551, wherein this Court has held as follows:

"5. Under Clause (b) of Order 23 Rule 1 (3), suit can be withdrawn with a liberty to sue afresh on sufficient grounds. The expression "sufficient grounds" must be read 'ejusdem generis' with clause (a) and a ground to be sufficient ground must be similar or alike to the cause mentioned in Order 23 Rule 1 (3) (a).

6. No doubt, a Court of appeal has power in a proper case to grant permission to withdraw a suit with liberty to file a fresh suit, however, such power should be used very cautiously by a Court of appeal. The Plaintiff/appellant is not entitled, as a matter of right to withdraw his suit and he will not be permitted to do so if the effect of allowing him to withdraw it would be to deprive the defendant of the benefit of the lower court's adjudication in his favour.

7. The granting of the permission to withdraw with liberty to bring a fresh suit removes the bar of resjudicata which would otherwise apply, if a fresh suit on the same cause of action is brought. Clause (3) contemplates the circumstance in which the permission could be granted by the Court on its satisfaction namely (i) a suit must fail by reason of formal defect and (ii) 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.

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

12. It is settled law that the appellate Court has also power to grant permission to withdraw a suit with liberty to file a fresh suit, but at the same time, such power should be used very cautiously as the same would amount to deprive the defendant of the benefit of the lower court's adjudication in his favour.



13. Bearing the above legal position in mind, let us consider the case on hand. As already pointed out, the only reason canvassed by the petitioner are that he has no legal knowledge and he has filed the suit for declaration as per the advice of his Counsel and that the petitioner has already pleaded the necessary averments required for a suit for specific performance as the cause of action is the same and only the prayer has to be modified.

14. At the outset, it is pertinent to mention the maxim "*ignorantia juris non excusat*" ie., the ignorance of law is no excuse and the same would imply that the Court presumes that every party is aware of the law and hence, he cannot claim the ignorance of law as a defence to escape the liability. Hence, the main ground canvassed by the petitioner that he has no legal knowledge, cannot be entertained.

15. Moreover, as rightly pointed out by the Counsel for the respondents, the plaintiff in paragraph No.12 of the plaint has specifically stated that "the plaintiff is also taking all steps to file a suit for specific performance against the defendants 1 to 4 very soon and as such, he has reserved his right to sue for specific performance".

16. Considering the above, it is clearly evident that the petitioner as well as his previous Counsel were fully aware of the legal position that they have to file a suit for specific performance. Admittedly, the suit came to be filed on 16.05.2000 and the trial Court, after full trial, has dismissed the suit on 25.04.2008. The petitioner has not offered any reason or explanation for not taking steps, as stated by him in paragraph No.12 of the plaint. Moreover, the appeal is pending from 2009 onwards, but the above petition came to be filed on 23.02.2017.

17. As rightly contended by the learned Counsel for the respondents, the petitioner, in his affidavit filed in support of the above petition, has nowhere whispered about the existence of any formal defect or any other sufficient ground for getting the permission. As rightly contended by the learned Counsel for the respondents, the petitioner, after the lapse of 17 years since the filing of the suit, cannot be allowed to withdraw the suit and more particularly, when the petitioner has miserably failed to show the existence of any of the reason contemplated under Order XXIII Rule 1 (3) of the Code of Civil Procedure. Considering the above, this Court has no hesitation to hold that the above petition is absolutely devoid of merits and the same is liable to be dismissed.



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18. In the result, this Civil Miscellaneous Petition is dismissed. No costs.

sd/-
06/01/2023

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/01/2023

Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

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TO

THE ADDITIONAL DISTRICT AND SESSIONS JUDGE,
FAST TRACK COURT NO.1
MADURAI.

+1 CC to M/s.NIRANJAN S KUMAR, Advocate (SR-396[I] dated 09/01/2023

+1 CC to M/s.V.KARUNA, Advocate (SR-377[I] dated 09/01/2023)

+1 CC to M/s.NALLATHAMBI.D., Advocate (SR-345[I] dated 06/01/2023)

ORDER

IN

CMP (MD) No.2934 of 2017

IN

AS (MD) No.275 of 2009

Date :06/01/2023

PKP/BUC/SAR-3/10.01.2023/7P/5C