



C.R.P No.4088 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.04.2024

CORAM

THE HONOURABLE MR. JUSTICE P.DHANABAL

C.R.P.No.4088 of 2022

and

C.M.P No.21236 of 2022

1.J.Mahendran

2.J.Indira

... Petitioners

..Vs..

K.B.Ashokan

...Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code against the order and decretal order dated 11.07.2014 passed in I.A.No.6763 of 2014 in O.S No.9549 of 2011 on the file of the VIII Assistant Judge, City Civil Court, Chennai.

For Petitioner

: Mr.A.Gauthaman

For Respondent

: Mr.N.Kamaraj



C.R.P No.4088 of 2022

WEB COPY

ORDER

This Civil Revision Petition has been filed, as against the order dated 11.07.2024 passed in I.A.No.6763 of 2014 in O.S No.9549 of 2011 on the file of the VIII Assistant Judge, City Civil Court, Chennai, wherein the petitioners herein have filed a petition under Order XXIII Rule (1) sub rule (3) and Section 151 of CPC to permit the petitioner to withdraw the suit in O.S No.9549 of 2011 with liberty to file a fresh suit. The said petition was partly allowed and permitted the petitioners to withdraw the case, but liberty was not given by the trial Court. As against the said order, the present Civil Revision Petition has been filed by the petitioners.

2. According to the petitioners, they are the plaintiffs in the suit and they filed a suit for permanent injunction and for other reliefs. They are the absolute owners of the property and they are in possession and enjoyment of the same. Thereafter, during the pendency of the suit, the petitioners filed a petition to permit them to withdraw the suit by granting liberty to file a fresh suit.

3. The respondent has filed a counter, by objecting to grant permission



C.R.P No.4088 of 2022

with liberty to file a fresh suit.

WEB COPY

4. The trial Court, after hearing both sides and considering the rival submissions, permitted the petitioners to withdraw the suit, but declined to grant liberty to file a fresh suit.

5. The learned counsel for the petitioners would contend that the petitioners are the owners of the suit property and they filed a suit for permanent injunction as against the respondent herein and already, the adjacent land owner got decree in respect of the suit pathway that the properties are common pathway. Now, the petitioners want to withdraw the suit with liberty to file a fresh suit and the trial Court also accepted the reasons stated by the petitioners while granting permission to withdraw the suit, but declined to grant liberty to file a fresh suit. According to the petitioners, the reason for withdrawal of the suit is that already the sale deed executed in their favour was cancelled by the District Registrar and thereby, they want to withdraw the suit and to file a fresh suit. But, the trial Court has not considered the above said aspect. Once the trial Court permitted to



C.R.P No.4088 of 2022

withdraw the suit, the trial Court ought to have grant liberty to file a fresh suit as per Order XXIII Rule (1) sub rule (3) of CPC. To support his contention, he relied on the judgment of this Court in the case of **"K.P.Selvah @ Panner Selvam Vs. Atlee and others in C.R.P (NPD) No.3331 of 2019** dated 22.10.2019.

6. The learned counsel for the respondent would contend that the trial Court has passed a reasoned order and after considering the reasons, permitted the petitioner to withdraw the suit, but declined to grant the relief of liberty to file a fresh suit. Therefore, the order of the trial Court is in order and the present petition is liable to be dismissed.

7. This Court heard both sides and perused the records.

8. In this case, the grievance of the petitioners is that when they filed a petition to withdraw the case with liberty to file a fresh suit, the trial Court allowed the petitioners to withdraw the suit, but at the same time, declined to grant liberty to file a fresh suit. As per the Order XXIII Rule (1) sub rule (3)



C.R.P No.4088 of 2022

of CPC, once the Court accepted the reasons to permit the petitioners for withdrawal, it is the duty of the Court to grant liberty to file a fresh suit. As rightly contended by the learned counsel for the petitioners, this Court in the case of **K.P.Selvah @ Panner Selvam Vs. Atlee and others** in **C.R.P (NPD) No.3331 of 2019** held as follows:

"78. However, the said action since have not been taken, the plaintiff seems to have invoked Order XXIII Rule (1), which has been entertained and the power of the trial Court under Order XXIII Rule (1) (3) since have been exercised, such power should have been exercised only in the manner prescribed in that sub-rule itself, where, as I have explained above, when the court satisfies that there are reasons under clause (a) or (b) of sub-rule (3) of Rule (1) of Order XXIII, the Court while exercising the power to permit the plaintiff to withdraw the suit, should have given such liberty, as the permission to withdraw the suit and giving liberty to institute the suit are inseparable in the context of the language used in sub-rule (3) of Rule (1) of Order XXIII.



WEB COPY

79. *In view of the aforesaid facts and circumstances, the judgments referred to by the learned counsel appearing for the respondents 1 and 2, as has been listed out above, would not advance the case of the respondents herein in the given context and circumstances of the case.*

80. *Therefore this Court is of the considered view that, the trial Court in the impugned order, while allowing the petitioner/plaintiff to withdraw the suit, ought to have permitted him to institute a fresh suit before the appropriate Court on the same subject matter of the suit, in view of the language used in Order XXIII Rule (1) sub-rule (3) of CPC. Failure to give such a liberty and rejection of such plea made by the plaintiff, in the impugned order, is nothing but an erroneous exercise of power by the trial Court. In that view of the matter, this Court is also of the considered view that, the impugned order, in so far as it disallowing the petitioner/plaintiff to get such liberty is to be interfered with and to be set aside.*

9. On perusal of the above judgment, it is clear that the trial Court while allowing the petitioner/plaintiff to withdraw the suit, ought to have permitted the petitioner/plaintiff to institute a fresh suit before the appropriate Court on the same subject matter in view of Order XXIII Rule (1) sub rule (3) of CPC. In the case on hand also, the prayer of the



C.R.P No.4088 of 2022

petitioners in respect of withdrawal of the suit was accepted by the trial Court, but the trial Court rejected the claim of the petitioners granting liberty to file a fresh suit. In view of the said judgment, it is appropriate to allow the petition and the petitioners/plaintiffs is permitted to withdraw the suit with liberty to file a fresh suit on the same subject matter of the suit, in view of the Order XXIII Rule (1) sub rule (3) of CPC. The trial Court failed to consider the said aspects and erroneously declined to grant liberty to file a fresh suit in terms of Order XXIII Rule (1) sub rule (3) of CPC. Therefore, the order of the trial Court in respect of declining the liberty to file a fresh suit is liable to be set aside.

10. In the result, this Civil Revision Petition is allowed and the order and decreetal order dated 11.07.2024 passed by the trial Court / VIII Assistant Judge, City Civil Court, Chennai, in I.A.No.6763 of 2014 in O.S No.9549 of 2011 in respect of declining the liberty to file a fresh suit on the same subject matter is set aside. Permission is granted to withdraw the suit in O.S No.9549 of 2011 with liberty to file a fresh suit on the same subject matter in view of Order XXIII Rule (1) sub rule (3) of CPC. Consequently,



C.R.P No.4088 of 2022

connected Miscellaneous Petition is closed. No cost.

WEB COPY

10.04.2024

Index: Yes/No
Internet: Yes/No
Speaking/Non-speaking order
uma

To

- 1.The VIII Assistant Judge, City Civil Court,
Chennai.
- 2.The Section Officer
V.R.Section, High Court of Madras.

P.DHANABAL, J.
uma



WEB COPY



C.R.P No.4088 of 2022

**C.M.A.No.4088 of 2022
and
C.M.P No.21236 of 2022**

10.04.2024