



C.R.P.(MD)No.2088 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 15.12.2023

Delivered on : 06.03.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(PD)(MD)No.2088 of 2023

and

C.M.P(MD)No.10445 of 2023

Regina

: Petitioner/2nd Respondent/
2nd Defendant

Vs.

1.Ruby @ Rubavathy

: 1st Respondent/Petitioner/
Plaintiff

2.Jeyakumar

: 2nd Respondent/1st Respondent/
1st Defendant

Prayer : This Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decretal order, dated 07.02.2023 passed in I.A.No.4 of 2023 in O.S.No.23 of 2017 on the file of the District Munsif Court, Nanguneri.

For Petitioner : Mr.Prabu Selva Kumar

For Respondents : Mr.M.Vignesh, for R1.

: No Appearance, for R2.



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ORDER

The Civil Revision is directed against the order passed in I.A.No.4 of 2023 in O.S.No.23 of 2017, dated 07.02.2023 on the file of the District Munsif Court, Nanguneri, allowing the petition filed under Order 23 Rule 1 of the Code of Civil Procedure.

2. The first respondent, as plaintiff has filed the suit claiming permanent injunction restraining the defendants and their men from interfering in any manner with the plaintiff's peaceful possession and enjoyment of the suit property and the same is pending in O.S.No.23 of 2017 on the file of the Sub Court, Nanguneri.

3. For the sake of convenience and brevity, the parties herein after will be referred as per their status/ranking before the trial Court.

4. Admittedly, the plaintiff and the defendants are brother and sisters and are children of Ganapathy Nadar and Gnanadeepam.



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5. It is not in dispute that the suit property was owned by their father Ganapathi Nadar, who purchased the same from one Ramaiah Konar vide sale deed, dated 23.06.1999. The plaintiff by alleging that her father Ganapathy Nadar had orally gifted the suit property to the plaintiff in December 2020; that the said gift was accepted by the plaintiff and she has been in possession and enjoyment of the same; that her father died on 25.12.2012 and her mother Gnanadeepam died on 05.01.2017; that the defendants after the death of Gnanadeepam had been attempting to dispossess the plaintiff from the suit property and that therefore, the plaintiff was constrained to file the above suit claiming permanent injunction.

6. The defence of the second defendant is that her father Ganapathy Nadar had executed a settlement deed in favour of his wife Gnanadeepam and son Jeyakumar/1st defendant vide document dated 05.12.2001; that thereafter, Ganapathy Nadar had mortgaged the suit property with his daughter/2nd defendant vide registered document dated 05.05.2006; that thereafter, Ganapathy Nadar sold the suit property for Rs.12,00,000/- to the second defendant vide sale deed dated 12.10.2011; that the plaintiff and the first defendant had subscribed their signatures as witnesses to the sale deed; that the second defendant has been residing in Mumbai with her two



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daughters; that since the house in the suit property was closed after the death of her mother, the plaintiff taking advantage of the same had trespassed into the suit property and started to use the same illegally; that thereafter, the plaintiff has filed a false and vexatious suit in O.S.No.23 of 2017 claiming permanent injunction as if she is the owner of the property on the basis of the alleged oral gift given by their father and that therefore, the suit is liable to be dismissed.

7. It is not in dispute that after completion of trial and when the case was posted for arguments, the plaintiff has filed the above application under Order 23 Rule 1 C.P.C., seeking permission to withdraw the suit with liberty to file a fresh suit on the same cause of action.

8. The learned counsel for the petitioner has relied on the decision of Hon'ble Supreme Court in *Anil Kumar Singh Vs. Vijay Pal Singh and others* reported in **2017 (6) CTC 771**, wherein the Hon'ble Supreme Court has observed that mere withdrawal of the suit without asking for anything more can always be permitted and the defendant has no right to compel the plaintiff to prosecute the suit by opposing the withdrawal of suit sought by the plaintiff except to claim the cost for filing a suit against him. But in the



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case on hand, the plaintiff has sought for withdrawal of the suit with liberty to file a partition suit on the same cause of action and as such, the above decision cannot be applied to the case on hand.

9. The case of the plaintiff in the affidavit filed in support of the above petition is that though she has filed the suit for permanent injunction on the basis of the oral gift given by her father, she could not prove the alleged oral gift through proper evidence; that the second defendant, taking advantage of the position of the plaintiff, has been proclaiming that she would evict the plaintiff from the suit property; that the plaintiff is attempting to file a partition suit with regard to the share of her mother on the basis of the cause of action pleaded in the present suit and that therefore, the plaintiff has to be granted permission to file the fresh suit on the same cause of action or else the plaintiff would be put to irreparable loss and hardship.

10. The second defendant has filed a counter statement raising serious objections stating that the averments made in the plaintiff's affidavit are all totally false; that the plaintiff has been trying to inherit the second defendant's property illegally and only for that purpose, she has filed the above frivolous petition; that the plaintiff is liable to pay compensation of



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Rs.25,00,000/- as damages for filing vexatious suit; that the above petition has been filed at arguments stage, causing huge financial loss and damages to her property and that therefore, the petition is liable to be dismissed.

11. The learned trial Judge, by observing that the father of the parties had executed settlement deed in favour of his wife and at the time of execution of sale deed to the second defendant, father was not having any right over the suit property, that the plaintiff wanted to file a partition suit claiming share over the mother's property and that since the plaintiff after abandoning her claim through oral gift, has come forward to claim partition in respect of mother's share, he was inclined to grant liberty, but on heavy terms. Order 23 of C.P.C., provides for withdrawing and abandonment of suits. Order 23 Rule 1 (3) of C.P.C., contemplates the withdrawal of the suit with liberty to institute a fresh suit on the same cause of action with the leave of trial court.

12. In order to get an order under Rule 1 (3) of Order 23 of C.P.C., the plaintiff has to satisfy that the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim. Formal defect is



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a defect of form prescribed by the Rules of procedure. The plaintiff must specifically mention and satisfy the trial court of the existence of a 'formal defect' or other 'sufficient ground' by virtue of which he should be allowed to withdraw the suit and granted the liberty to institute a fresh one on the same cause of action after curing that defect.

13. In the case on hand, the plaintiff in the affidavit filed in support of the above petition has nowhere whispered about the existence of any formal defect or any other sufficient reason analogous to the formal defect. As already pointed out, the only reason canvassed is that since the second defendant has been proclaiming that she should evict the plaintiff from the suit property, she has to be permitted to file a partition suit with regard to her mother's share in the suit property on the same cause of action by withdrawing the present suit.

14. As rightly contended by the learned counsel for the respondents, by no stretch imagination, the above reason or ground canvassed by the plaintiff can be considered as a formal defect or any other sufficient reason so as to attract Order 23 Rule 1(3) of C.P.C., for granting liberty.



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WEB COPY 15. It is the specific case of the second defendant that in the mortgage deed executed by her father, her mother Gnanadeepam had subscribed her signature as witness to the said document and that in the subsequent sale deed executed by her father, the plaintiff and the first defendant have signed as witness to the said document and that after fully knowing about the above transactions and the title of the suit property to the second defendant, the plaintiff by suppressing of the above, has filed the suit alleging oral gift from her father and claimed permanent injunction and that when the suit was at the fag end, after fully coming to know about that she cannot succeed in the present suit, as a last resort, she has filed the above petition.

16. As rightly contended by the learned counsel for the respondents, even assuming that the settlement deed executed by the father is in force, mother as well as brother were given equal rights in the suit property and after the death of the mother, absolute right was given to the brother, the first defendant herein and that therefore, the plaintiff cannot claim any share in the mother's property, alleging that mother had died intestate.



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WEB COPY 17. Moreover, this Court is also at loss to understand as to how the plaintiff can file a fresh suit for partition on the basis of the cause of action alleged in the present suit, as both are entirely different.

18. Considering the entire facts and circumstances of the case, this Court has no hesitation to hold that the very filing of the above petition under Order 23 Rule 1(3) of C.P.C., is a clear abuse of process of Court, but the learned trial Judge, without considering the above factual and legal aspects in proper perspective and by taking note of the irrelevant aspects, has allowed the petition and as such, the impugned order is liable to be set aside.

19. In the result, the Civil Revision Petition is allowed and the impugned order dated 07.02.2023 passed in I.A.No.4 of 2023 in O.S.No.23 of 2017 on the file of the District Munsif Court, Nanguneri, is set aside. Since the suit is pending from 2017, the learned trial Judge is hereby directed to complete the trial and dispose of the suit as expeditiously as possible preferably within a period of two months from the date of receipt of copy of this order. The first respondent/plaintiff is hereby directed to pay



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cost of Rs.5,000/- to the Legal Services Authority attached to this Bench within 15 days from the date of receipt of copy of this order. Consequently, connected Miscellaneous Petition is closed. No costs.

20. Post the matter after four weeks 'for reporting compliance'.

06.03.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
das

To

- 1.The District Munsif, Nanguneri.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

DAS

Pre-delivery order made in
C.R.P.(PD)(MD)No.2088 of 2023
and
C.M.P(MD)No.10445 of 2023

Dated : 06.03.2024