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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.10.2024

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THE HON'BLE MRS.JUSTICE S.SRIMATHY

C.R.P(MD)No.1970 of 2024
and
C.M.P.(MD).No. 11189 of 2024

R. Srinivasan

...Revision Petitioner

Vs.

Sree Vaishnavi Durga Sayana Vana Duragiamman,
North Seliyanallur Senaithalaivar,
Sivanrathiri Committee represented by its President,
R.Paramasivam.

... Respondent

PRAYER: Civil Revision Petition is filed under Section 115 of Civil Procedure Code, to set aside the Fair and Decreetal order in I.A. No.10 of 2024 in O.S.No. 234 of 2019 on the file of the III Additional District Court, Tirunelveli, dated 24.06.2024 in respect of granting liberty to the plaintiff to file a fresh suit alone and allow this Civil Revision Petition.

For Petitioner : Mr.S. Kumar

For Respondent : Mr.K. Sankararaman

ORDER

This Civil Revision Petition is filed by the defendants to set aside the Fair and Decreetal order dated 24.06.2024 passed in I.A. No.10 of 2024 in O.S.No.234 of 2019 on the file of the III Additional District Court, Tirunelveli.



2. The plaintiff in the suit is the respondent herein and the defendant in the suit is the revision petitioner herein. For the sake of convenience, the parties are referred to as plaintiff and the defendant.

3. The plaintiff had filed a suit in O.S.No.234 of 2019 for declaration to declare the temple belonging to Senaithalaivar community and consequential injunction restraining the defendant from interfering in the possession of the temple.

4. The contention of the plaintiff is that the said temple is belonging to Senaithalaivar community consists of 3000 families and the said community is worshipping in the said temple for more than 100 years and their community is in the management of the temple. The plaintiff is paying Thalaikattu vari to the said temple. One Narayana Iyer had served as priest and he died in the year 2005 and after his demise the defendant was engaged to serve as priest in the said temple. Further contention of the plaintiff is that the defendant with bad intention to grab the plaintiff's temple, started interfering in the affairs of the management. Hence the suit is filed for the aforesaid prayer of declaration and injunction. The defendants had filed written statement, thereafter issues were framed and examination of the witnesses were



completed. At the time of cross examination, the plaintiff had come forward with I.A.No.10 of 2024 with liberty to withdraw the suit and file a fresh suit and the same was allowed. Aggrieved over the same the defendant had filed the present revision petition.

5. The contention of the defendant is that the reason stated by the plaintiff that the plaintiff had not stated the real facts of the temple that had taken place long back and the defendant had challenged the same, hence it is necessary to narrate the history of the temple, for which liberty is sought to file fresh suit cannot be entertained. Even if the history of the temple is left out the same may be narrated by way of amending the suit and it is not necessary to file a fresh suit. The contention of the plaintiff is that to narrate the 100 year history it is necessary to file a fresh suit. Amending the pleadings as well as the prayer would be difficult and hence it is necessary to file fresh suit rather than amendment. This Court is of the considered opinion that the defendant was engaged by the plaintiff, but when the defendant is disputing the claim of the plaintiff that the temple is community temple, then the question ought to be considered. Therefore, the plaintiff ought to be granted an opportunity to file fresh suit along with proper evidence.



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6. The next contention of the defendant is that to invoke order 23 Rule 1 of CPC the plaintiff should satisfy two essential conditions when the same is not satisfied, then liberty to file fresh suit cannot be granted. The Courts have repeatedly held the liberty to file fresh suit cannot be granted as a routine or casual manner unless and until the court feels satisfaction of compliance of provision of law. The relevant provision is extracted hereunder:

(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 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

7. The Learned counsel appearing for the defendant relied on the Judgment reported in **2010(5) CTC 330 in the case of Velusamy and another Vs. Chenniappan and others** and the relevant paragraph Nos.16 & 17 are extracted hereunder:



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“16. The term 'Formal Defect' in ordinary parlance refers to defects of various kinds not affecting the merits of the case. As such, 'Formal Defect' is a defect of form unrelated to the claim of plaintiff on merits as per decision Somal Raju V. Samanthu Sivaji Ganesh AIR 2009 AP 12.

17. The provision in Order 23 Rule 1 of Civil Procedure Code is an exception to the common law principle of non suit. On principle an application by the Plaintiffs under Sub-rule (3) cannot be equated on a par with an application by them in exercise of the absolute liberty given to them under Sub-rule (1). As a matter of fact, the grant of leave contemplated in Sub-rule (3) of Rule 1 is at the discretion of the Court. However, such a discretion must be exercised by a Court of Law with care and circumspection, in the considered opinion of this Court. A Court of Law ought to apply its mind while granting permission to withdraw the Suit with a liberty to file a fresh one. Importantly, permission under Sub-rule (3) can be accorded only if the conditions specified therein are satisfied. A mere statement by the Plaintiffs that there are formal defects in the frame and form of suit are not enough, as opined by this Court. Therefore, there must be an express finding by a Court of Law that the Suit would fail by reason, of some formal defect or that there are other sufficient reasons for granting the leave to file a fresh suit as per decision [Lallu V. Board of Revenue AIR 1973 All 195.](#)”



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8. The Learned Counsel appearing for the plaintiff relied on the Judgment passed in ***C.R.P(PD)No.1286 of 2011 in the case of Balsundara Achari Vs. Shanmugam and another.*** The relevant paragraph No.8 is extracted hereunder:

“8. Likewise, in the other decision relied on by the learned counsel for the petitioner reported in 1998(III) CTC 454, Thangapandian v. Sri Muthumariamman Idol, paragraph No.6 reads as follows:

“6. I have carefully considered the submissions of learned counsel for the petitioners. The respondent has not entered appearance through counsel. I am satisfied that the facts and circumstances as presented in this case would indicate that the defect relating to the description is a formal defect only and that even otherwise, the fact that such a defect is likely to affect a proper and effective adjudication of all the claims in the suit and the further fact that plaintiff is a public institution, the affairs of which is managed from time to time by the administrator concerned, the lapse at some point of time committed by the person who instituted the suit, should not be allowed to be perpetuated to the detriment of a public institution. Consequently, the permission granted in this case by the court below on the view that the defects are in the nature of formal defects only, cannot be said to suffer from any patent error of law or perversity in the matter of exercise of its discretion by the court below. The petitioner/defendants would not in any way suffer or be prejudiced by the leave being granted. Since it is open to them to raise all objections on merits while defending the suit; whereas if the permission is



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not granted as prayed for, it will once and for all deny justice to a public institution. I am also of the view that in this case substantial justice has been rendered by the court exercising its discretion to grant permission under Order 23,

9. Considering the facts and circumstances of the case and considering the above referred decisions of this Court, I am of the view that the petitioner is entitled to succeed in this civil revision petition...”

9. After considering the rival submission this Court is of the considered opinion that the said judgment in Veluchamy's case is not applicable to the present case, since in the aforesaid case already an application was filed to amend the plaint and the same was dismissed and the same was confirmed by Hon'ble Supreme Court. Thereafter, the plaintiff again filed a petition seeking permission to withdraw the suit to file a fresh suit, which was declined. The permission was declined by citing the earlier attempt and further held that at this point of time the plaintiff cannot project as a camouflage to get an order. In the present case the claim of the plaintiff was accepted and the Court had allowed the application. Further in the present case the defendant was employed by the plaintiff, but the now the defendant is questioning the plaintiff's exclusive right or plaintiff's community's exclusive right to manage the temple, therefore it is necessary to prove the claim of the plaintiff or their community is having right to manage the temple, for which the earlier facts are



necessary. And the same is formal defect. Further, the fact that such defect would affect proper and effective adjudication of the claims of the parties. Moreover, the defendant would not in any way suffer or be prejudiced by the leave being granted. Since it is open to the defendant to raise all objections on merits while defending the suit. On the other hand, if the permission is not granted as prayed for, it will once and for all deny justice to the plaintiff. Therefore, the permission granted by the court below cannot be said to suffer from any patent error of law or perversity in the matter of exercise of its discretion. For the reasons stated supra, the Civil Revision Petition is liable to be dismissed.

10. Accordingly this Civil Revision Petition stands dismissed. No cost. Consequently the Civil Miscellaneous Petition is closed.

17.10.2024

NCC : Yes / No
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To

1. The III Additional District Court,
Tirunelveli.
2. The Section Officer,
Vernacular Records Section,
Madurai Bench of Madras High Court, Madurai.



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S.SRIMATHY, J.

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Order made in
C.R.P(MD)No. 1970 of 2024

17.10.2024