



C.R.P.(MD)No.2391 of 2018

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Reserved on : 07.03.2024

Pronounced on : 12.04.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.2391 of 2018

and

C.M.P.(MD)No.10688 of 2018

1. M.Thangam

2. M.Palvel

3. M.Lakshmanan

4. G.Pappa

5. E.Ponnusamy

6. E.Chelladurai

... Petitioners/
Respondents/
Defendants

Vs.

P.Subbammal

... Respondent/
Petitioner/
Plaintiff

Prayer : This Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order passed in I.A.No.206 of 2017



C.R.P.(MD)No.2391 of 2018

in O.S.No.297 of 2013 dated 16.03.2018 on the file of the II Additional District Munsif Court, Tirunelveli, by allowing this Civil Revision Petition.

For Petitioners : Mr.H.Arumugam

For Respondent : M/s.J.Roshini
for Mr.D.Srinivasa Raghavan

ORDER

The Civil Revision Petition is directed against the order passed in I.A.No.206 of 2017 in O.S.No.297 of 2013 dated 16.03.2018 on the file of the 2nd Additional District Munsif Court, Tirunelveli, allowing the application filed under Order 23 Rule 1(3) of the Code of Civil Procedure.

2. The revision petitioners are the defendants and the respondent is the plaintiff. For the sake of convenience and brevity, the parties herein will be referred to as per their status/ranking in the trial Court.

3. The plaintiff has filed the suit in O.S.No.297 of 2013 against the defendants before the District Munsif Court, Tirunelveli, claiming permanent injunction restraining the defendants and their men from in any manner interfering with the plaintiff's peaceful possession and enjoyment



C.R.P.(MD)No.2391 of 2018

WEB COPY

of the suit property. The defendants have filed their written statement and are contesting the suit. When the suit was in part-heard stage, the plaintiff has filed the above application in I.A.No.206 of 2017 under Order 23 Rule 1(3) C.P.C. seeking permission to withdraw the suit with liberty to file a fresh suit. The defendants have filed their counter statement raising serious objections. The learned District Munsif, after enquiry, has passed the impugned order dated 16.03.2018 allowing the application by imposing cost. Aggrieved by the impugned order, the defendants have preferred the present revision.

4. The case of the plaintiff, in the application filed under Order 23 Rule 1(3) C.P.C., is that the plaintiff has been suffering from diabetes and blood pressure, that she is aged about 64 years, that her son is working as auto driver in Chennai, that since she is an illiterate, while filing the suit, has given lesser measurements in the suit property, that she has also not claimed the relief of declaration, that there are some defects in the main plaint and some other reliefs ought to have been claimed, that the defendants sold more extent than that was owned by them and as such, she has to challenge those sales, that the above defects cannot be rectified by amendments and that therefore it has become just and necessary for her to



C.R.P.(MD)No.2391 of 2018

WEB COPY

withdraw the suit with liberty to file a fresh suit on the same cause of action or else, she will be put to irreparable loss and hardship.

5. The defence of the defendants is that the defendants have filed their written statement as earlier as on 11.12.2013, that they have already taken a stand that the respondent ought to have claimed the relief of declaration, that the description of the property given in the plaint are not correct, that an Advocate Commissioner was appointed at the instance of the defendants in I.A.No.1260 of 2013, that when the Advocate Commissioner visited the property along with Surveyor, the Surveyor informed that the property in dispute could not be measured, that the plaintiff, without taking any steps to amend the plaint, has examined herself as P.W.1 and subsequently, she was cross-examined, that the plaintiff has also examined another witness Chellammal as P.W.2 and was cross-examined and that the plaintiff, after taking so many adjournments for adducing further evidence, has come forward with the above application.

6. It is the further contention of the defendants that they have elicited several admissions from the plaintiff's side witnesses and the



C.R.P.(MD)No.2391 of 2018

plaintiff sensing that if the suit is proceeded, the same would be dismissed has filed the above application, that the limitation to claim the relief of declaration was also barred and that the above application is devoid of merit and the same is liable to be dismissed.

7. The main contention of the plaintiff is that due to her illiteracy, she has given lesser measurements of the suit property while taking note of the sales made by her, that she has to claim declaratory relief, that since the defendants had sold more extent than their entitlement, those sales have to be changed and that there were some defects in the plaint.

8. Order 23 Rule 1(3) 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 the trial Court. In order to get a permission under Order 23 Rule 1(3) C.P.C., the plaintiff has to satisfy that the suit must fail by reason of some formal defects or that there are other 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 a defect of form prescribed by the Rules of procedure. The plaintiff must specifically mention and satisfy the trial



C.R.P.(MD)No.2391 of 2018

Court of the existence of a formal defects or other sufficient grounds, by virtue of which he should be allowed to withdraw the suit and granted the liberty to institute a fresh suit on the same cause of action after curing that defect.

9. The learned counsel appearing for the revision petitioners/ defendants has relied on the decision of this Court in ***Manivannan and others Vs. P.Ambal Devi*** reported in ***(2015) 1 MLJ 564*** and the relevant passages are extracted hereunder:-

“8. The circumstances under which the application for withdrawal has been filed has already been indicated. The circumstances under which the petition for withdrawal can be allowed has been indicated in the decision reported in 2013 (1) CTC 38 (Olympic Cards Limited v. Standard Chartered Bank) (relied upon by the learned counsel for the respondent / plaintiff) where-under it has been held as follows:-

“14. The object of Order XXIII, Rule 1 C.P.C. is to give power to the Court to allow the Plaintiff at any time to withdraw his suit unconditionally or to withdraw from the suit on the fulfillment of conditions:-



WEB COPY



C.R.P.(MD)No.2391 of 2018

(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. The object of the rule is only to prevent the defeat of justice on technical grounds.

Sub-rule (3) contemplates, withdrawal from the suit with liberty to bring a fresh suit. Plaintiff who asks/seek for leave to withdraw the suit must make out a case within Order XXIII, Rule 1(3)(a) or (b) C.P.C. Order XXIII, Rule 1 and sub-rule (2) and sub-rule (3) 17 all are to be read together. Application seeking permission of the Court to withdraw the suit and bar under Order XXIII, Rule 1(4) C.P.C. to file a fresh suit pre-supposes the institution of the suit.....

9. The Order passed by the Court below do not indicate that the suit must fail because of those defects indicated under Order 23 Rule 1 of CPC. The reasons stated for allowing the plaintiff to withdraw the suit and to institute a fresh suit will not amount to proof of “sufficient grounds”



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C.R.P.(MD)No.2391 of 2018

for allowing the plaintiff to institute a fresh suit on the same cause of action. As indicated already, allowing the petition to withdraw the suit after the case was posted for arguments and after the dismissal of the amendment application, would amount to abuse of process of law, more specially when the grounds under Order 23 Rule 1 CPC is not satisfied. Therefore, the order passed by the Court below is liable to be set-aside.”

10. The learned counsel appearing for the respondent/plaintiff has relied on the decision of the Hon'ble Supreme Court in the case of ***V.Rajendran and others Vs. Annasamy Pandian (D) thr. L.Rs. Karthyayani Natchiar*** reported in ***2017 (1) CTC 762***, wherein, the Hon'ble Apex Court has specifically observed that the Court can allow the application filed under Order XXIII Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a “formal defect” or “sufficient grounds” and the principle under Order XXIII Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action and the relevant passages are extracted hereunder:-

“9. Order XXIII Rule 1(3) CPC lays down following grounds on which a Court may allow withdrawal of suit. It



C.R.P.(MD)No.2391 of 2018

reads as under:

R.1. Withdrawal of suit or abandonment of part of claim.-

(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.

As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of



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C.R.P.(MD)No.2391 of 2018

the clauses (a) or (b) that is, existence of a “formal defect” or “sufficient grounds”. The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10. In K.S. Bhoopathy and Ors. vs. Kokila and Ors. (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-



C.R.P.(MD)No.2391 of 2018

WEB COPY

joinder of parties, failure to disclose a cause of action etc.

“Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order XXIII Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word “sufficient grounds”, there are two views: One view is that these grounds in clause (b) must be “ejusdem generis” with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds” in clause(b) should be read independent of the words a ‘formal defect’ and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with “formal defect” envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is ”sufficient grounds”.



C.R.P.(MD)No.2391 of 2018

WEB COPY

11. In the present case, the plaintiff, in the affidavit filed in support of the above application, has nowhere whispered that the grounds canvassed by her are the formal defects or sufficient grounds analogous to the formal defects and that the same are fatal to the suit.

12. It is pertinent to note that the defendants have filed their written statement as earlier as on 11.12.2013. As already pointed out, the defendants have filed an application for appointment of Advocate Commissioner in I.A.No.1260 of 2013 and the same was allowed and that when the Advocate Commissioner visited the property in dispute along with Surveyor, the Surveyor informed that property could not be measured and even thereafter, the plaintiff has not taken any steps to amend the plaint.

13. It is evident from the records that the trial was commenced on 02.03.2017 and after examination of two witnesses on the plaintiff's side and after taking so many adjournments for adducing plaintiff's side further evidence, the above application came to be filed. As rightly pointed out by the learned counsel appearing for the revision petitioners/defendants, since



C.R.P.(MD)No.2391 of 2018

some rights have accrued to them on the basis of the admissions made by the plaintiff's side witnesses in the trial, the same cannot allowed to be defeated by withdrawing the suit at this point of time.

14. The learned trial Judge, without considering the above factual and legal aspects in proper perspective and without recording his satisfaction about the existence of formal defect or other sufficient grounds, has mechanically allowed the application and thereby granted the leave sought for. A cursory perusal of the impugned order would reveal that the learned trial Judge has nowhere indicated that the suit would fail because of the defects indicated under Order 23 Rule 1 C.P.C. As rightly contended by the learned counsel appearing for the revision petitioners/defendants, the reasons canvassed by the plaintiff, by no stretch of imagination, can be taken as formal defects or sufficient grounds for allowing the plaintiff to institute a fresh suit on the same cause of action. Considering the above, this Court has no hesitation to hold that the impugned order allowing the application filed under Order 23 Rule 1(3) C.P.C. cannot legally be sustained and as such, the same is liable to be dismissed.



C.R.P.(MD)No.2391 of 2018

WEB COPY

15. In the result, this Civil Revision Petition is allowed and the impugned order dated 16.03.2018 passed in I.A.No.206 of 2017 in O.S.No.297 of 2013 is set aside. The application in I.A.No.206 of 2017 in O.S.No.297 of 2013 stands dismissed. Since the suit is pending from 2013 onwards, the learned 2nd Additional District Munsif, Tirunelveli, is directed to complete the trial in O.S.No.297 of 2013 and dispose of the same within a period of three months from the date of receipt of a copy of this order. Consequently, connected Miscellaneous Petition is closed. No costs.

12.04.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
csm

To

1. The 2nd Additional District Munsif,
Tirunelveli.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.R.P.(MD)No.2391 of 2018



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C.R.P.(MD)No.2391 of 2018

K.MURALI SHANKAR,J.

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Pre-Delivery Order made in
C.R.P.(MD)No.2391 of 2018
and
C.M.P.(MD)No.10688 of 2018

Dated : 12.04.2024