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CRP. PD. No.797 of 2025



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:03.07.2025

Pronounced on:14.07.2025

CORAM

THE HONOURABLE MR.JUSTICE P.B.BALAJI

CRP. PD. No.797 of 2025

Senthilkumar

Petitioner(s)

Vs

Kulandaivel

Respondent(s)

PRAYER: This Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 03.01.2025 made in I.A. No.38 of 2023 in O.S. No.235 of 2017 on the file of the Additional Sub Court, Kallakurichi.

For Petitioner : Mr.N.Manoharan

For Respondent : Mr.K.Prabakar

ORDER

The petitioner/plaintiff preferred a revision petition challenging the order passed in the Application under Order XXIII, Rule 1 (3)(b), refusing leave to the plaintiff to withdraw the suit, with liberty to file a fresh suit.

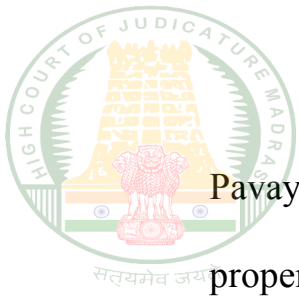


2. Heard Mr.N.Manoharan, learned counsel for the petitioner
Mr.K.Prabakar, learned counsel for the respondent.

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3. Mr.N.Manoharan, learned counsel for the petitioner would submit that power under Order XXIII, Rule 1(3)(b) of Code of Civil Procedure, 1908 is discretionary in nature and liberty can be granted to the plaintiff, not only when the plaintiff is able to show that there is a formal defect, but also for other sufficient grounds. He would state that the suit has been filed for declaration and injunction. However, it has come to the notice of the plaintiff that as a purchaser of a common half share, plaintiff has to necessarily sue for partition in view of the provisions of Section 44 of the Transfer of Property Act, 1882. Therefore, the plaintiff wanted to withdraw the suit and file a fresh suit on the same cause of action.

4. The learned counsel for the petitioner would further state that the respondent's father, one Muthu Gounder and one Kumaresan had jointly purchased one acre, under sale deed dated 02.05.1964 and thereafter, the said Kumaresan sold his 50 cents entitlement to Pavayammal under a sale deed dated 26.06.1965. After the death of

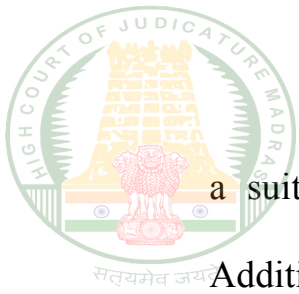


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Pavayammal, her son Subbaraya Gounder and his brothers partitioned the property on 11.12.1974. The plaintiff is the son of the said Subbaraya Gounder and he was allotted the suit property and based on the said partition deed dated 11.12.1974, the suit for declaration has been filed. He would therefore state that the provisions of Order XXIII Rule 1 permit the plaintiff to withdraw the suit, with liberty to file a fresh suit, on the same cause of action and relying on the decision of the Hon'ble Supreme Court in *V.Rajendran and another Vs. Annasamy Pandiyan (dead) through Legal Representatives*, reported in (2017) 5 SCC page 63.

5. Mr.N.Manoharan, learned counsel would contend that when the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, then the Court may permit the plaintiff to withdraw the suit. The Hon'ble Supreme Court has further held that the Court has been given wider discretion to allow withdrawal from the suit, in the interest of justice, in cases where prayer is not covered by 'formal defect'. He would therefore pray for the revision being allowed.

6. Per contra, the learned counsel for the respondent Mr.K.Prabakar, would state that the father of the plaintiff had earlier filed



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a suit for declaration in O.S. No.30 of 1991 before the learned II Additional District Munsif, Kallakurichi. The said suit was dismissed and the First Appeal filed by the father of the plaintiff in A.S. No.123 of 1998 before the learned Sub Judge, Kallakurichi was also dismissed, as against which, the plaintiff/father filed a Second Appeal in S.A. No.2006 of 2001. The Second Appeal also came to be dismissed on 18.04.2016 and in respect of the very same property, the plaintiff in the earlier proceedings, through his sons is now re-agitating the same issues. Further, he would contend that even in the plaint, the plaintiff has specifically averred about a partition in respect of one acre and therefore, there is no necessity for including the relief of partition, claiming that the plaintiff has purchased only a common undivided 50 cents out of one acre.

7. I have carefully considered the submissions advanced by the learned counsel on either side.

8. The Trial Court finding that there is no formal defect or sufficient grounds made out for granting permission to the plaintiff to withdraw the suit, with liberty to file a fresh suit on the same cause of



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action, dismissed the Application. The case of the plaintiff is that one acre was jointly purchased by Muthu Gounder and Kumaresan, under sale deed dated 02.05.1964 and the share of Kumaresan was sold to one Pavayammal, in and by sale deed dated 26.06.1965. According to the plaintiff, the said 50 cents was conveyed only as a common half share and thereafter, there was a partition on 11.12.1974 in and whereby, the plaintiff, son of Subbaraya Gounder was allotted the suit schedule property. Now the plaintiff contends that what he has purchased is only a common half share and necessarily the plaintiff has to file a suit for partition as envisaged under Section 44 of the Transfer of Property Act, 1882 and the reliefs of declaration and injunction alone have been sought for in the present suit. It is therefore contended that it is a formal defect and also, sufficient grounds are made out and hence permission has to be granted under Order XXIII Rule 3(1)(b) CPC.

9. On a reading of plaint, it is seen that in respect of one acre, the plaintiff himself has stated that there was an oral partition between Kumaresan and Muthu Gounder and specifically averred that Northern 50 cents was allotted to Kumaresan. Therefore, having pleaded so specifically in the plaint regarding division of one acre, it is now not



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open to the plaintiff to retract from his own admission and contend that he has purchased only common half share and consequently there being a formal defect and sufficient grounds, the plaintiff should be permitted to withdraw the suit with liberty to file a fresh suit seeking relief of partition and other appropriate reliefs. Moreover, as rightly contended by the learned counsel for the respondent Mr.K.Prabahar, the plaintiff's father had earlier filed a suit for declaration and permanent injunction in respect of the very same property. The plaintiff's father was unsuccessful upto this Court and thereafter, his son as plaintiff is now choosing to attempting to re-agitate the very same issue. All these factors have been rightly taken note of by the Trial Court in holding that there is no necessity to file any fresh suit and the plaintiff can proceed with the suit as framed.

10. Considering the above, I do not find any perversity in the findings arrived at by the Trial Court. Even in the decision relied on by the learned counsel for the petitioner in *V.Rajendran's* case (referred herein supra), the Hon'ble Supreme Court has held that though the plaintiff is entitled to abandon or withdraw the suit or part of the claim, it is not meant to be used as a licence to the plaintiff to claim or to do so, to



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the detriment of the legitimate right of the defendant. Here, the suit is alleged the defendant, to amount to re-litigation and all issues have already been settled with the dismissal of S.A. No.2006 of 2001 before this Court. Therefore, I do not find any grounds to interfere with the well reasoned order of the Trial Court, especially since, if seek liberty is granted, it will seriously prejudice the rights of the defendants.

11. Accordingly, this Civil Revision Petition is dismissed. No costs.

14.07.2025

rkp

Index : Yes / No

Internet : Yes / No

To:

The Additional Sub Judge,
Kallakurichi.



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P.B.BALAJI, J.,

rkp

Pre-delivery order in
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