

(1999) 02 MAD CK 0023
In the Madras High Court

A. Henry and Another

APPELLANT

Vs

St. George Church and Others

RESPONDENT

Date of Decision : 22-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 227

Citation : (1999) 3 LW 49 : (1999) 3 MLJ 468

Hon'ble Judges : S. S. Subramani, J

Bench : Division Bench

Judgement

S. S. Subramani, J.—Defendants 2 and 3 in Order S.No. 727 of 1998 on the file of Principal District Munsif, Madurai town are revision

petitioners herein. This revision is filed under Article 227 of the Constitution of India.

2. These petitioners along with others came to this Court on earlier occasion in C.R.P.No. 2752 of 1998. At that time, these petitioners challenged

the ad interim order passed by lower court. I disposed of that revision with certain directions. I directed lower court to decide the question of

jurisdiction and thereafter to consider whether plaintiffs are entitled for injunction, if it ultimately found that court has jurisdiction. The ad interim

order passed by lower court was also suspended.

3. Consequent to my direction, lower court has passed the impugned order. Lower court has held that the court has jurisdiction to decide the case

and it is seen from the progress diary that the issue regarding jurisdiction is decided in the main suit itself. Challenging the said finding. defendants

have come to this Court under Article 227 of the Constitution of India.

4. When the matter came for admission. Respondents were also heard since they entered caveat.

5. Learned Counsel for petitioners submitted that the very institution of suit is abuse of process since on earlier occasion, very same plaintiffs filed

suit as Order S.No. 119 of 1997 on the file of Subordinate Judge, Madurai. Consequently, the said suit was withdrawn without getting leave for instituting fresh suit.

6. It is alleged that the present suit is barred under Order 23, Rule 1 of Code of Civil Procedure. It is submitted that even at that time plaintiffs have

waived their right to get leave to file another suit and the suit as allowed to be dismissed as not pressed. It is further said that the finding of lower

court that court has jurisdiction is also patent illegality.

7. As against the said contention, learned Counsel for respondent submitted that even though suit is one for injunction, relief sought for is the right

to administer. That is not a right in respect of immovable property. Such a suit could be filed where cause of action arises and therefore impugned

suit filed before lower court is proper and finding of lower court is also not liable to be interfered with. It is also admitted that the suit is not barred

under Order 23, Rule 1 of CPC since it is on different cause of action.

8. I will first consider the question of jurisdiction. For the said purpose I need only consider the allegations in the plaint.

9. Upto paragraphs 1 to 8 in the plaint, plaintiffs alleges how the church was established. Paragraph 9 onwards. It deals with how church was

constructed and how funds were raised. It is said therein, that in order to spread over the system of Anglican method of worship St. Thomas

Church in Anna Nagar, Tahsildar Nagar was constructed with the funds raised by the pastorate of plaintiff church. It is also said that the movable

and immovable properties were purchased for the said St. Thomas Church out of its own funds. Administration and peaceful possession and

enjoyment of the churches are by its members. In paragraph 10 of the plaint it is said that the properties purchased for the construction and

administration of St. Thomas Church, Tahsildar Nagar, Annanagar was exclusively out of the funds of Plaintiff church and plaintiff is having entire

control over the same. In paragraphs 11 and 12, the statement is that defendants made certain false allegations and they attempted to take

possession of scheduled church. In paragraph 13, it is further said that defendants further attempted to take possession of the church through pastor and the same was prevented by plaintiff church members. It also claims to have autonomous status and defendants 2 and 3 conspired with their henchmen to destroy the autonomous status of plaintiff church. In paragraph 16 it is said that on the strength of alleged affiliation by defendants to first defendant, they made an attempt in the last week of June, 1998 to interfere with the peaceful possession and enjoyment of management of church by members. The same is repeated in paragraph 17 also. In paragraph 18, threat alleged to have been made by defendants 2 and 3 are reiterated. A complaint to Revenue Divisional Officer was also made. In paragraph 20 it is said that plaintiff has no objection in allowing defendants and their men in the scheduled church for worshipping without causing any interference to the administration and management of scheduled church by plaintiff church. Paragraph 21 deals with cause of action.

10. Relief sought for in the plaint read thus,

- (a) granting a permanent injunction restraining the defendants and its men and agents from in any way interfering with the plaintiff's peaceful administration, possession and enjoyment of the suit property;
- (b) directing the defendant to pay the plaintiffs the costs of the suit, and,
- (c) granting such other relief as this Honourable Court thinks deem fit in the circumstances of the case and thus render justice.

Property described in the plaint is thus,

St. Thomas church situated at Maruthupandiar Street, Tahsildar Nagar (Anna Nagar Area), Madurai-625 020.

11. Even at the time when suit was instituted, Office raised objection as to territorial jurisdiction and plaintiff was asked to explain about jurisdiction. It has been represented with following endorsement:

As the suit property is situated near Anna Nagar within the Corporation limit which falls within the jurisdiction of this Honourable Court, this

Honourable Court has territorial jurisdiction. Hence represented.

Office again had some doubt and it again raised following objection:

The plaint is returned on the question of territorial jurisdiction on 31.7.1998. The counsel states that the suit property falls within the jurisdiction of

this Court. It is submitted that it is doubtful whether the Tahsildar Nagar" falls within the jurisdiction of this Court.

Lower court then passed following order:

Heard. File subject to the question of territorial jurisdiction to be decided as preliminary issue.

12. By the impugned order. Lower court has found that since part of the cause of action arises with its jurisdiction u/s 20 of Code of Civil

Procedure, it can entertain the suit. Lower court came to the conclusion for the reason that the reliefs is for peaceful possession and enjoyment of

suit property. In the case of administration it is not right or interest in the immovable property is in issue and therefore u/s 20 of Code of Civil

Procedure, suit could be instituted where cause of action arises.

13. Learned Counsel for petitioner submitted that this finding of lower court is perverse. Section 20 of CPC is a residuary section and only in cases

where Sections 16 to 19 will not apply. Section 20 could be made applicable. Section 20 begins with the word, "subject to the limitation

aforesaid". It could be applicable only if Sections 16 to 19 do not apply to the given case. So, if any of other sections could be made applicable.

Section 20 cannot be made use of for instituting suit.

14. Section 16 of CPC says about suits to be instituted where subject matter situate. It says:

Subject to the pecuniary or other limitations prescribed by any law suits-

(a) to (c) omitted

(d) for the determination of any other right to or interest in immovable property.

15. I have already narrated the salient features of the plaint. If it is not in respect of immovable property, there is no necessity for plaintiff to give

history of how it is acquired and as to the person in possession and management of its properties. Most of the documents that is filed in the court

are intended to prove only those allegations. When office objected to the territorial jurisdiction, an endorsement was made that suit property is

within the jurisdiction of this Court and suit should be entertained. From that endorsement it is clear that the suit is filed claiming some right and

interest over the suit property and that is the matter in issue in the case.

16. In one of the earlier decision reported in Om Prakash and Another Vs. Anar

Singh and Others, , the relief sought for in the suit read thus:

The defendants be permanently enjoined not to interfere with the said tube - well (any machinery remaining ought to be set up or with the electric

connection etc.) themselves or through other's direction or indirectly or under any appearances or claims or orders.

The question was whether the suit was in respect of immovable properties and whether Section 20 could be invoked. His Lordships considered

the scope of Section 16 of Code of Civil Procedure. It is held in paragraphs 7 to 9 of the judgment thus:

7. The right to get the relief of injunction to restrain the defendant from interfering with the plaintiff's right to hold and enjoy the property is not

covered by any of the rights or reliefs contemplated by clauses (a), (b) and (c) of Section 16, and hence would fall within the ambit of ""Some other

right to or interest in the immovable property"" mentioned in Clause (d) of Section 16, C.P.C.

8. Learned Counsel for the petitioner urged that the determination of the right or interest in the immovable property the present case and generally

in the case of all injunctions, is only an incidental matter and not a matter essential for the grant of relief and accordingly Section 16(d) will not be

attracted. The contention is not correct. Section 38 of the Specific Relief Act speaks about the grant of perpetual injunctions. Sub-section (iii) of

Section 38 says that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of the property the court may grant a

perpetual injunction in the circumstances detailed in the section. Thus a court can grant a perpetual injunction only after it determines that the

plaintiff has a right to enjoy the property. As it is a matter essential for granting the injunction, the determination of the right of the plaintiff cannot be

held to be a matter only incidental and not essential for granting the relief of injunction. And, as such determination is a necessary prerequisite for

the grant of the relief of injunction. Section 16(d) must apply to a suit for a permanent injunction.

9. The purpose of Section 16 appears to be to give jurisdiction regarding a suit in respect of immovable property to a court whose limbs might not

be able to reach the property. As this would not only facilitate inspection of property but make the processes of court reach the property without

necessitating the intervention of any other court. In a suit for injunction to restrain the defendant from interfering with an immovable property

occasion can arise where the court may be required to extend its hand to the property directly, such an occasion will arise if the injunction is not

obeyed. Order 21, Rule 32 provides for various processes which the court may take where the defendant does not obey the injunction. Clause (5)

of Rule 32 of Order 21 provides that in lieu of or in addition to the processes indicated in clauses (1) to (4). The court may direct that the act

required to be done by the judgment debtor may be done so far as practicable by the decree-holder or some other person appointed by the court

at the cost of the judgment-debtor. The illustration given to Clause (5) states that where A erects a building which renders unmaintainable property

belonging to B and A declines to obey a decree directing him to remove the building, the injunction may be executed by removal of the building

itself. Similarly, the court may have to deal with the property in matters of interim injunctions. The court within whose territorial jurisdiction the

property lies will be in the best position to deal with the matter. A suit for injunction in respect of an immovable property can therefore be no

exception for the applicability of Section 16(d), C.P.C. and has to be instituted in the court in whose territorial jurisdiction the property lies.

The said decision fully applies to the facts of this case. Unless and until the right over the immovable property is established, plaintiff cannot claim

right to administer or to manage or to be in possession of suit property. Relief is in respect of immovable property and therefore Section 16(b)

alone applies to the facts of this case. Finding of lower court that it has got jurisdiction is therefore not correct. Even if we assume that part of

cause of action arises within the jurisdiction of lower court, once Section 16 is made applicable, application of Section 20 is excluded. Section 20

is residuary clause and could be made applicable only when Sections 16 to 19 will not be made applicable. Therefore, finding of lower court that it

has got jurisdiction is not correct.

17. Once I find that court has no jurisdiction, I can only return the plaint for presenting the same in proper court. Whether plaintiff must be given

liberty to get plaint returned and resubmit in the proper court So far as this case is concerned. learned Counsel for petitioner submitted that liberty

shall not be granted in this case because that will be encouraging plaintiff to misuse process of court. Once court is informed that the intention of

plaintiff is only to abuse machinery of court, it should not be permitted to institute the suit even in a court of proper jurisdiction. Argument is that if

the very same plaint is presented in the court having proper jurisdiction, that plaint is also liable to be struck off. If the plaint is liable to be struck

off, it is only proper that plaintiff must be prevented from filing such suit.

18. It is admitted that plaintiff filed an earlier suit as Order S.No. 119 of 1997 on the file of Subordinate Judge, Madurai for identical relief and the

copy of plaint is also placed before me for verification. That suit is also challenging the resolution passed by respondent and claiming absolute right

over the Church. On a comparative reading of the plaint in this case and O.S.No. 119 of 1997 it is clear that it is mostly identical. In that suit, relief

sought for read thus:

(a) by declaring that the resolution passed by the office bearers of St. Thomas Church and also by the Diocese of Madurai and Ramnad for

recognition and acceptance of St. Thomas Church in TahsildarNagar which under the administration and control of the plaintiff church as Tahsildar

Nagar Pastorate under the control of the Diocese of Madurai and Ramnad is null and void, and

(b) in consequence thereon pass an order permanent of injunction restraining the defendants and their men and agent from in any way interfering

with the administration and activities of the plaintiffs church and of its branch St. Thomas Church, Tahsildar Nagar, which is under the supervision

and control of plaintiff St. George's church;

(c) and directing the contesting defendants to pay the costs of this suit;

(d) and such other reliefs as this Honourable Court may deem fit and proper in course of the case and thus render justice.

Cause of action in the plaint is stated in paragraph 11 of the plaint, which read thus:

The cause of action for the suit arose on during 1900 when the church was established and during the year 14.1.1949 when the constitutional and

autonomous status was given by the Dicocese of Madurai and Ramnad and from that date the St. George's Church has been enjoying the

constitutional and autonomous status without any interruption in that

administration and affairs and they have opened several branches in and around Madurai from their own funds without any assistance from the Diocese of Madurai and Ramnad and on 7.2.1997 when the defendants 1 to 3 passed a resolution for the recognition and acceptance of St. Thomas Church as Tahsildar Nagar Pastorate under the Control of Diocese of Madurai and Ramnad by contravening the provisions of the Constitution which otherwise ultra vires and they conducted the inaugural function on 9.2.1997 to that effect and on several dates the defendants doing and against acts the constitution and attempting to interfere in their administration and at Madurai when the Church is situated within the jurisdiction of this Honourable Court.

So far as cause of action in the present suit is concerned, by narrating various facts by which defendants attempted to interfere in the rights of management of Church, in paragraph 21 of the plaint in O.S.No. 727 of 1998, it is stated thus,

The cause of action for the suit arose autonomous status was given by the Diocese of Madurai and Ramnad and from that date the St. George's church has been enjoying the constitutional and autonomous status without any interruption in that administration and affairs any they have opened several branches is and around the Madurai from their own funds without any assistance from the Diocese of Madurai and Ramnad and on 7.2.1997 when the defendants 1 to 4 passed a resolution for the recognition and acceptance of St. Thomas Church of Tahsildar Nagar pastorate under the Control of Diocese of Madurai and Ramnad by contravening the provisions of the Constitution which otherwise ultra vires and on several dates, the defendants doing and against acts the constitution and attempting to interfere in their administration and on 19.7.1998 when 2 and 4 defendants are attempted to enter into the schedule church with their henchmen mentioned in para and on 24.7.1998 when the matter was referred to the R.D.O. who is conducting a partial enquiry supporting the defendants and threatened the plaintiff church members to lockout the church at his office on 24.7.1998 within the jurisdiction of this Honourable Court and at Madurai Town. Wherein this church is situated within the jurisdiction of this Honourable Court.

19. In the earlier case, an injunction application was filed but no interim order

was passed except to state to maintain status quo. Thereafter, an application was filed under Order 23, Rule 1, Code of Civil Procedure. Relief sought for in that application in I.A.No. 493 of 1997 read thus:

For the reasons stated in the accompanying affidavit it is prayed that this Honourable Court may be pleased to permit the petitioner to withdraw

the suit with a liberty to file a fresh suit on the same cause of action if necessary as against these respondents/defendants should they attempt to

cause any disturbance and thus render justice.

Counter-affidavit was filed for the above application. On 15.12.1997, counsel for petitioner made following endorsement:

The petitioner/plaintiff hereby withdraws the suit leave for filing a fresh suit on the same cause of action is not contemplated now. Hence, the suit

may be dismissed as not pressed without leave.

Lower court passed the following order:

In view of the above, the petition is allowed.

20. Scope of Order 23, Rule 1 of CPC came for consideration before Honourable Supreme Court in the decision reported in *Sarguja Transport*

Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, . The question that came for consideration was whether the provisions

of Order 23, Rule 1 of CPC could be made applicable to writ proceedings also? In paragraphs 7 to 9 of the judgment, their Lordships held thus:

7. The Code as it now stands thus makes a distinction between "abandonment of a suit" and "withdrawal" from a suit with permission to file a fresh

suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission, referred to in Sub-rule (3) of Rule 1 of

Order 23 of the Code, he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. The principle

underlying Rule 1 of Order 23 of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under

law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it

without the permission of the court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does

not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the court by

instituting suits again and again on the same cause of action without any good reason the code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in Sub-rule (3) of Rule 1 of Order 23. The principle underlying the above rule is founded on public policy, but it is not the same as the rule res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties. or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in Sub-rule (4) of Rule 1 of Order 23 of the Code when the first suit is withdrawn without the permission referred to in Sub-rule (3) in order to prevent the abuse of the process of the court.

8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying" Rule 1 of Order 23 of the Code is adopted in respect of writ petitions filed under Article 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner of his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated in *Daryao v. State of U.R.*, in a case involving the question of enforcement of fundamental rights file a

petition before the Supreme Court under Article 32 of the Constitution of India because in such a case there has been no decision on the merits by

the High Court. The relevant observation of this Court in Daryao case is to be found at page 593 and it is as follows:

If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no

decision on the merits by the court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata

which has been argued as a preliminary issue in these writ petitions and no other.

9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the

Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article. On this point

the decision in Daryao case is of no assistance. But we are of the view that the principle underlying Rule 1 of Order Order 23 of the Code should

be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the

ground of public policy as explained above. It should also discourage the litigant from indulging in bench-hunting tactics. In any reason there is no

justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the

Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar

other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the

remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action

relied on in the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same

subject matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that

whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in

which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article

21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open.

21. Earlier suit was one for declaration that the resolution of defendant is bad. An injunction was sought for as consequential relief. It is on the basis of declaration, present suit is also filed though the relief sought for is only for injunction. While considering the identity of cause of action the only fact court will have to see is whether same evidence in both the suits will be sufficient? On going by the averments in the plaint in both suits, the evidence that has been adduced will be the same. It is the alleged illegal act of defendant that caused interference to the administration, management and possession of church, naturally, whether the act of defendant is illegal or not, whether the resolution passed is valid or not will have to be considered and only then whether plaintiff is entitled to the relief could be decided. On going by the averments in the plaint in both the suits, the court finds that the cause of action is the same. The suit has been withdrawn and the plaintiff has endorsed that he is not going to file a separate suit and he also does not want leave for filing separate suit on the same cause of action. Farther endorsement is that the suit may be dismissed as not pressed. I find force in the contention of learned Counsel for petitioner that the withdrawal of earlier suit as not pressed will bar entertaining the present suit.

22. In this connection, what is the effect of dismissal on the basis of an endorsement as "not pressed". In Mohammed Master v. Abu Haji 1981

K.L.T. 578, a Division Bench of Kerala High Court considered this question. Their Lordships said by endorsing "not pressed", plaintiff is really

conceding that the issues may be decided against him and virtually a decision by consent. In paragraph 4 of the judgment, their Lordships held thus,

As a result of ""not pressing" certain allegations and grounds raised in a pleading, a litigant submits that the issues arising therefrom may be decided

against him and in favour of his opponent; and those issues are decided accordingly. It is virtually a decision by consent, in that the party asserting

or disputing, concedes that his assertion or dispute, as the case may be, merits no consideration as he cannot substantiate the same. The allegations

are however there, and they are decided. Therefore, what has been said of consent decisions, namely: the truth is, a judgment by consent is

intended to put a stop to litigation between the parties just as much as in a judgment which results from the decision of the court after the matter has

been sought out to the end" (Lord Horschell in *In re., South American and Mexican Company, Ex parte Bank of England*, (1895)1 Ch. 37, can,

with much more force, be said of a decision of the court after the matter has been fought out to the end"" that the allegations in the pleading have not

been substantiated because they are not "pressed" by the maker of those allegations. It cannot be said that the allegations which have been found

and held to be not established, are withdrawn in such circumstances.

[Italics supplied]

23. I accept the contention of learned Counsel for petitioner that plaintiff should not be permitted to institute such a suit even in a court of proper

jurisdiction and if permitted that will be only encouraging plaintiff to abuse the process of court. When plaintiff concedes that he has no claim and

wanted to put an end to the litigation by endorsing as "not pressed" and did not want any leave of court for instituting another litigation, he should

not be again permitted to file another suit under the same cause of action.

24. In the result, the civil revision petition is allowed, I hold that the order of. Lower court holding that it has territorial jurisdiction to decide the

case is perverse and is set aside. I hold that the court has no jurisdiction. The question of returning the plaint to plaintiff for presentation to the

proper court will not arise in this case for the reasons stated above, and therefore it is struck off the file. I forbear plaintiffs from instituting suit in

any court having jurisdiction, on the same cause of action.

25. The civil revision petition is allowed with cost. Advocate fees Rs. 3,000. Consequently, C.M.P.No. 2664 of 1999 is closed.