
(2004) 04 MAD CK 0128

In the Madras High Court

Case No : Civil Revision Petition (NPD) No. 1190 of 2002

Arulmigu Adhisakthi, Siva Bala Subramanya Temple,
Thirumanikuzhi by Hereditary Trustee

APPELLANT

Vs

The Executive Officer, Arulmigu Vamanapureswarar Temple

RESPONDENT

Date of Decision : 19-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 7 Rule 11, 115

Citation : AIR 2004 Mad 402 : (2004) 2 LW 619 : (2004) 2 MLJ 660

Hon'ble Judges : S. Sardar Zackria Hussain, J

Bench : Single Bench

Advocate : P. Mani, for the Appellant; Usha Raman, for Sunil Kumar, for the Respondent

Final Decision : Allowed

Judgement

S. Sardar Zackria Hussain, J.—The revision petitioner is the plaintiff in O.S. No. 536 of 1999 on the file of the Additional District Munsif Court, Cuddalore. The revision is directed against the rejection of the plaint as per order in I.A. No. 356 of 2001 dated 24.6.2002 which was filed under Order 7 Rule 11 C.P.C. to reject the plaint.

2. The revision petitioner filed the suit as the hereditary trustee of the plaintiff temple for permanent injunction restraining the respondent/defendant and their men from interfering with the peaceful possession and enjoyment of the properties by the plaintiff and from conducting auction of the trees in the suit properties. It appears the suit was filed on 21.12.1999.

3. The respondent/defendant filed I.A. No. 356 of 2001 under Order 7 Rule 11 C.P.C. to reject the plaint, in that the plaintiff has not paid or deposited the cost as ordered in the previous suit O.S. No. 120 of 1998 on the file of the same Court pursuant to the order in I.A. No. 2615 of 1999. In the affidavit of the respondent/defendant, it is stated that the revision petitioner/plaintiff previously

filed the suit O.S. No. 120 of 1998 against the respondent/defendant seeking permanent injunction from auctioning the trees and when the suit came up for trial, the plaintiff/revision petitioner, who filed that suit filed I.A. No. 2615 of 1999 under Order 23 Rule 1 C.P.C. seeking permission to withdraw the suit O.S.No.120 of 1998 with liberty to file fresh suit on the same cause of action and the said petition was allowed after contest on 18.1.2000, in which it was ordered that the plaintiff/revision petitioner is to pay or deposit the cost of the suit at the time of filing fresh suit on the same cause of action. Though there was such an order, the revision petitioner/plaintiff has failed to deposit or pay the cost of the pervious suit and as such, the plaint is to be rejected.

4. The petition was opposed in the counter that no order was passed in the earlier suit O.S.No.120 of 1998 directing to deposit or pay the cost of that suit at the time of filing of the fresh suit on the same cause of action.

5. The trial Court considering the argument advanced on either side and the materials placed before the Court, ultimately allowed the petition ordering rejection of the plaint in the suit O.S.No.536 of 1999. Such order is challenged in this Civil Revision Petition by the plaintiff.

6. Heard the learned counsel for the revision petitioner and the learned counsel for the respondent.

7. The learned counsel for the revision petitioner/plaintiff argued that though in the previous suit O.S.No.120 of 1998 filed by the plaintiff/revision petitioner, it was directed as per order in I.A.No.2615 of 1999 filed under Order 23 Rule 1 C.P.C. seeking permission to withdraw the suit with liberty to file fresh suit on the same cause of action and the suit O.S.No.536 of 199 subject matter of this Civil Revision Petition was filed without paying or depositing the cost as ordered in the earlier suit, the rejection of the plaint by the trial Court is not proper, in that the cost ordered in the previous suit can be recovered by filing execution petition. The learned counsel further argued that such order rejecting the plaint in O.S. No. 536 of 1999 by the trial Court without affording opportunity to the revision petitioner/plaintiff to pay or deposit the cost as ordered in the earlier suit O.S. No. 120 of 1998, is not proper.

8. The learned counsel for the respondent/defendant has argued that due to non-depositing or paying the cost which was ordered to be deposited or paid to the respondent/defendant herein against whom previous suit was filed by the same plaintiff who sought to withdraw the said suit under Order 23 Rule 1 C.P.C. with liberty to file fresh suit on the same cause of action, the rejection of the plaint as per order made in I.A.No.356 of 2001 filed by the respondent/defendant under order 7 Rule 11 C.P.C. is very much proper.

9. The fact remains that the revision petitioner/plaintiff filed the suit O.S. No. 536 of 1999 for permanent injunction restraining the respondent/defendant and their men from interfering with the peaceful possession and enjoyment of the properties by the plaintiff and from conducting auction of the trees in the suit

properties and when the suit was ripe for trial, he filed I.A.No.2615 of 1999 seeking permission to withdraw the suit with liberty to file fresh suit on the same cause of action and it was allowed after contest in which it was directed that the plaintiff/revision petitioner is to deposit or pay the cost of that suit at the time of filing of the fresh suit. It is also not in dispute that the cost ordered has not been deposited or paid by the plaintiff when he filed the suit O.S.No.536 of 1999 subject matter of this revision, but on that ground, the order made by the trial court rejecting the plaint is not proper in view of the fact an opportunity could have been afforded to the plaintiff/revision petitioner to deposit or pay the cost as ordered in the earlier suit.

10. In the decision relied on by the learned counsel for the revision petitioner/plaintiff Konkan Trading Company Vs. Suresh Govind Kamat Tarkar and Others, , the Apex Court has ruled:-

"Under Order 23 Rule 1(3) while granting permission to the plaintiff to withdraw the suit with liberty to file a fresh suit, it is open to a Court to direct the plaintiff to pay the costs of the defendants. Even if such order for costs in a given case is construed as directing payment of costs as a condition precedent for filing a fresh suit, the defect of not paying costs before instituting the fresh suit, if any, may be cured by depositing in Court or paying to the defendants concerned the costs within a reasonable time to be fixed by the Court before which the second suit is filed. If the plaintiff fails to comply with the said direction, then it will be open to the Court to reject the plaint, but if the amount of costs is paid within the time fixed or extended by the Court the suit should be deemed to have been instituted validly on the date on which it was presented. This view not only advances the cause of justice but is also in accord with the spirit behind section 148. C.R.A.No.87 of 1985 (Bom), Reversed.

The order under Order 22 Rule 1(3) passed in the instant case, this application is granted but on payment of costs..." held, could not be construed as imposing a condition precedent for the filing of the fresh suit."

Therefore it is clear as per the dictum of the Supreme Court, an opportunity is to be given to the revision petitioner/plaintiff for depositing cost as ordered in the earlier suit in O.S. No. 120 of 1998 pursuant to the order in I.A. No. 2615 of 1999 of that suit. Failure of which within the stipulated time, the plaint is to be rejected.

11. In the result, this Civil Revision Petition is allowed on condition, the revision petitioner/plaintiff deposits the cost of the earlier suit O.S.No.120 of 1998 pursuant to the order made in I.A. No. 2615 of 1999 in that suit as a pre-condition for filing fresh suit on the same cause of action. The cost is to be deposited on or before 30.4.2004 to the credit of the suit O.S. No. 536 of 1999 in the Additional District Munsif Court, Cuddalore, failing which the order in I.A. No. 356 of 2001 dated 24.6.2002 will stand. On such deposit, the trial Court is directed to dispose the suit O.S.No.536 of 1999 in accordance with law.