

(2006) 07 MAD CK 0003

In the Madras High Court

Case No : C.R.P. PD No's. 349 and 350 of 2005

N. Veerappan

APPELLANT

Vs

Dr. M. Kandasamy, V. Ammakannu and Chinnamma

RESPONDENT

Date of Decision : 21-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3)
Constitution of India, 1950 — Article 227

Citation : (2006) 4 MLJ 119

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Hema Sampath, for the Appellant; A. Thyagarajan, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—The 1st defendant in O.S.No.300/2000 is the revision petitioner herein.

2. O.S.No.300/2000 was filed by the plaintiff/1st respondent herein for partition and separate possession of 5/12th share in the suit schedule

properties. The plaintiff filed I.A.No.508/2004 under Order 23 Rule 1 of the CPC praying for an order for permission to withdraw the present suit

with a liberty to file a fresh suit on the same cause of action. By order dated 15.12.2004 the trial court allowed I.A.No.508/2004 on payment of

cost of Rs. 1,000/- to be paid on or before 17.12.2004 to the defendants. As the cost was refused by the defendants, the same was deposited in

the court and recording the same, the I.A. was allowed by the trial court on 17.12.2004. Challenging the orders dated 15.12.2004 and

17.12.2004 the above Civil Revision Petitions have been filed by the 1st defendant in the suit alone.

3. Heard the learned Counsel for the revision petitioner and also the learned Counsel for the respondents. I have also gone through the documents

and the judgments referred to by them in support of their submissions.

4. Learned Counsel for the revision petitioner submitted that the trial court ought to have considered the fact that already another Application was

filed by the plaintiff in I.A.No.285/2004 praying to amend the plaint and the same is pending. In such circumstances orders should have been

passed in the amendment Application and if that had been done, there would have been no occasion for the trial court to pass any order in

I.A.No.508/2004.

5. Learned Counsel further represented that two conditions must be satisfied before granting permission to withdraw a suit with liberty to institute a

fresh suit, namely, (1) there must be a formal defect in the suit resulting in failure of the suit itself and (2) there must be sufficient grounds for

allowing the plaintiff to institute a fresh suit for the subject matter of the suit. As both the ingredients are absent in the present case, according to the

learned Counsel for the revision petitioner, the trial court ought not to have permitted the plaintiff to withdraw O.S.No.300/2000 and to file a fresh

suit on the same cause of action. She relied on the judgments reported in Ramrao Bhagwantrao Inamdar Vs. Babu Appanna Samaga, and AIR

1953 Bh 32 (Gorelal and Ors. v. Nandlal).

6. Per contra, learned Counsel for the respondents submitted that the earlier I.A.No.285/2004 was filed for amending the plaint on the ground that

the suit schedule properties were not valued properly and proper value of the suit could be given in the place of the value wrongly mentioned in the

plaint. If such proper value replaced the wrong value, then the court could lose its pecuniary jurisdiction and the plaint was to be returned for

presenting the same in the District Court, Salem. She further added that even if I.A.No.285/2004 was allowed and amendment was carried out,

the same had to be returned to be presented before the District Court, Salem and taking into consideration the formalities and complications

involved, another I.A. was filed in I.A.No.508/2004 to withdraw the present suit with liberty to file a fresh suit on the same cause of action.

Learned Counsel further submitted that the trial court considered the matter in the proper perspective and permitted withdrawal of the suit with

payment of cost to the defendants which order need not be interfered with by this Court under Article 227 of the Constitution of India.

7. I have given my due consideration to the rival contentions of the learned Counsel on either side.

8. Under Order 23 Rule 1, the plaintiff may at any time after the institution of the suit against all or any of the defendants abandon the suit or part of

the claim. Under Order 23, Rule 1(3) the court can permit the plaintiff to withdraw the suit with liberty to institute a fresh suit in respect of the

subject-matter of such suit if it is satisfied that the suit must fail by reason of some formal defect, or there are sufficient grounds for allowing the

plaintiff to institute a fresh suit.

9. For better appreciation, Order 23 Rule 1(3) is extracted below:

1. Withdrawal of suit or abandonment of part of claim:

(1) ...

(2) ...

(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.

10. From the above, it is clear that Order 23 Rule 1(3) cannot be invoked unless the suit must fail by reason of formal defect and in (b) of the said

Rule (3) it is mentioned that even for sufficient grounds, similar relief could be granted. The words ""sufficient grounds"" would cover a wider field

and not restricted to formal defect or similar defect.

11. Let me now consider whether the trial court has granted the permission to withdraw O.S.No.300/2000 and to file a fresh suit in the light of the

above statutory provisions.

12. The reason given by the plaintiff in I.A.No.508/2004 is that the suit property has not been properly valued and already technical ground has

been taken by the defendants in this regard and if that technical objection is sustained the suit filed by him would fail. Therefore the plaintiff wanted

to withdraw the suit and to file a fresh suit on the same cause of action after correcting the defects on record of the valuation of the suit property.

13. It is true that already an amendment petition was filed in I.A. No. 285/2004 by the plaintiff to amend the valuation of the suit property wrongly

mentioned in the plaint. Learned Counsel for the revision petitioner submitted that in view of I.A.No.285/2004, the plaintiff should only be

permitted to amend the plaint and not otherwise.

14. I am unable to accept this contention for the reason that even if the amendment petition is allowed and the amendment is carried out, the suit

has also to be returned by the District Munsif court to be presented before the District Court. This particular aspect was properly considered by

the trial court and permission was granted keeping in mind about the complications and multiplications of the proceedings like amending the

petition, enquiry about the market value of the property, deciding the pecuniary jurisdiction, returning the plaint to re-present before the proper

court, etc. Therefore I find no illegality nor infirmity in the order of the trial court to be interfered with by this Court under Article 227 of the

Constitution of India. No manifest injury has resulted to the revision petitioner on account of the permission granted to the plaintiff to file a fresh

suit. The trial court has also rightly imposed a cost of Rs. 1,000/- on the plaintiff.

15. In Ramrao Bhagwantrao Inamdar Vs. Babu Appanna Samage, , the Full Bench of the Bombay High Court held that the expression ""formal

defect"" in R.1(2)(a) must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the

merits of the case, whether the defect is fatal to the suit or not. However details of defect which does not affect the merit of the case, whether the

defect is fatal to the suit or not.

16. In this judgment the Bombay High Court held that the plaintiff could not withdraw the suit in appeal in order to file another suit claiming title to

the site in the suit on the ground of adverse possession as there was no defect of form in the suit but a defect of substance arising out of his inability

to prove the title on which he has based his claim. The facts in the above judgment are totally different from the one in hand and it is not helpful to

the revision petitioner.

17. In AIR 1953 Bhopal 32 cited supra, the Madhya Pradesh High Court held that

failure to claim proper relief is not a formal defect within the meaning of O.23, R.1 and so also where the plaint does not give full and clear statement of facts so as to ascertain the exact relief desired by the plaintiff the defect is not formal but one of substance. In such circumstances, leave to withdraw suit should not be granted if the defect could have been amended by amendment of plaint. The facts in the above judgment are totally different from the facts in hand.

18. In the case on hand the plaintiff did not plead that he failed to claim proper relief but only submitted that the suit schedule property was not properly valued as shown in the plaint and if proper value is shown in the plaint, the trial court would lose its jurisdiction and the plaint has to be returned to be presented before the District Court.

19. Considering the entire facts and law, I am of the considered view that the trial court has rightly allowed I.A.No.508/2004.

20. It is also brought to my notice that subsequent to the orders of the trial court dated 17.12.2004, the suit papers were collected by the plaintiff and a fresh suit was already instituted in O.S.No.56/20 05 on the file of the Sub Court, Salem.

21. In the light of the above, there are no merits in the two Civil Revision Petitions. Consequently they are dismissed. No costs.