

(1925) 01 MAD CK 0068
In the Madras High Court

N.M. Khajamyan Rowther

APPELLANT

Vs

Appavu Pillai (dead) and Others

RESPONDENT

Date of Decision : 30-01-1925

Acts Referred:

Citation : AIR 1926 Mad 126

Judgement

1. We deal first with the preliminary point raised in the ground of Appeal No. 21, that the action of the lower Court in allowing the plaintiff at a late stage in argument to withdraw his claim for melvaram, and in having permitted him to bring a fresh suit thereon was altogether illegal and unjust.

2. The facts, as we have ascertained them, are that after a prolonged trial, in the course of the plaintiff's arguments after the defendant had been heard, the plaintiff on 25th September, 1920, presented a petition asking for permission to withdraw this claim in respect; of the melvaram right in the suit lands with liberty to file a fresh suit in respect of the same, and that the petition was granted. In the plaint the claim had been stated in very general language and the relief asked for was a decree for partition and possession and a permanent) injunction restraining the defendant from entering on the plaintiff's share. In the body of the plaint, however, the plaintiff's right is described very generally. In paragraphs 3 and 4, for instance, there are references to his ownership or acquisition of shares in both the melvaram and kudivaram of the suit lands. The defendant in his written statement met him in respect of both. The issues again are very general, there being but a general reference in them to the nature and extent of the interest acquired by the plaintiff. In the judgment, paragraph 5, however, we have the lower Court's own statement as to what it understood was the real scope of the suit. It stated clearly that the plaintiff was claiming melvaram as well as kudivaram, In the plaintiff's petition and affidavit already referred to there was no suggestion that the suit was not for melvaram or that it had not been tried in respect of the claim to melvaram as well as to kudivaram.

3. Turning to the ground on which the plaintiff asked for permission to withdraw

the suit and to sue again we find nothing alleged at all except that he preferred for the time being to confine himself to the claim to kudivaram and that a decision as to melvaram in the present suit was unnecessary. There is no further explanation of any sort for this change in his attitude and something was necessary to justify it, beyond his mere preference. It has to be observed that this was announced after the defendant had been put to the trouble and expense of the trial, which was almost completed. In these circumstances there can be no doubt that the lower Court used its discretion wrongly in permitting the withdrawal and granting leave. The only remaining question is whether the defendant is at liberty to make that a ground of appeal. It is possible that speaking strictly we ought not to allow him to do so. There is, however, no doubt that it is his duty to have an order such as this vacated without delay and that it is not for him to wait until the suit in respect of melvaram is actually filed and then to plead that this permission was given wrongly-- Tuljaram Row Vs. Gopala Aiyar and Others, The question is then only whether he is at liberty to advance this objection in an appeal against this decree or should have made it in a revision petition. In view of the fact that no question of delay or limitation arises and of the obvious advisability of an early disposal of this matter, we think ourselves justified in treating this portion of the appeal as a revision petition. In doing so we hold that the lower Court had no jurisdiction to permit the withdrawal and grant leave on the sole ground that the party did not prefer to proceed with his litigation. We, therefore, set aside the order of the lower Court, dated 30th September, 1920.

4. The result is that this portion of the plaintiff's suit has not been disposed of. We, therefore, call on the lower Court for findings on the issues already framed so far as they relate to the plaintiff's claim to melvaram. The findings will be recorded on the evidence on record. They are due in this Court within six (6) weeks and seven (7) days will be allowed for objections.