

Vasantha Vs. Ramar

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Court : Chennai

Decided On : Nov-03-2011

Judge : M.Jaichandren, J.

Acts : Code of Civil Procedure (CPC) - Order 23 Rules 3, 1

Appeal No. : C.R.P.PD(MD).1099 of 2009 and M.P.No.1 of 2009

Appellant : Vasantha

Respondent : Ramar

Judgement :

1. This Civil Revision Petition has been filed against the order, dated 4.2.2009, made in I.A.No.87 of 2008, in A.S.No.30 of 2008, on the file of the Subordinate Court, Virudhunagar.

2. The petitioner in the present civil revision petition, who is the appellant in the appeal, in A.S.No.30 of 2008, had filed an interlocutory application, under Order XXIII Rule 3 of the Civil Procedure Code, 1908, in I.A.No.87 of 2008, praying for the withdrawal of the suit, in O.S.No.250 of 2001, on the file of the District Munsif Court, Virudhunagar, with liberty to file a fresh suit, with a proper description of the suit property.

3. The petitioner had filed the suit, in O.S.No.250 of 2001, for declaration of title and for injunction, in respect of the suit property. The petitioner had stated that she

would wish to withdraw the suit, as the measurements, extent and the boundaries of the suit property had not been given correctly. The respondent herein had objected to the request made by the petitioner stating that the petitioner is not clear about the description of her property for which she had claimed title in the suit, in O.S.No.250 of 2001. She had already made two amendments in the plaint, before the trial Court. The petitioner had not made an attempt to withdraw the suit, when it was pending on the file of the trial Court, for nearly eight years. Since, the suit had been dismissed by the trial Court, the petitioner had filed an appeal, on the file of the Subordinate Court, Virudhunagar, in A.S.No.30 of 2008.

4. The First Appellate Court, by its order, dated 4.2.2009, had stated that the petitioner would be entitled to withdraw the suit only if there is a formal defect. Further, the petitioner would not be entitled to withdraw the suit, as a matter of right, especially, if the effect of such withdrawal would cause harm or injury to the defendant. The First Appellate Court had also pointed out that a formal defect means a defect of form, as prescribed by the rules or procedure. A defect which goes to the root of the petitioner's claim is not a formal defect. It may be an omission to obtain permission of the Court to file the suit, for misjoinder of parties or a failure to disclose the cause of action for the filing of the suit, erroneous valuation of the subject matter of the suit and the institution of a suit in a Court which does not have the necessary jurisdiction to entertain the suit. Further, the description must not be due to the plaintiff's own fault.

5. The first Appellate Court had pointed out that the petitioner had not shown sufficient grounds to show that there was a formal defect in the suit, which was not due to his fault. It had also noted that the particulars regarding the suit property had not been given, correctly, in the plaint. Therefore, the petitioner had been permitted to amend the plaint on two occasions. Even thereafter the petitioner had not described the suit property, correctly. Even though the suit had been pending on the file of the trial Court, for nearly eight years, the petitioner had not been in a position to give the correct description of the suit property. Even after the filing of a report by the advocate commissioner the petitioner had not given the correct extent of her property. In such circumstances, the interlocutory application filed by the petitioner, belatedly, had no merits. Accordingly, the first Appellate Court had

dismissed the interlocutory application filed by the petitioner, in I.A.No.87 of 2008, by its order, dated 4.2.2009.

6. The main contention of the learned counsel appearing for the petitioner is that the first Appellate Court has the power, as per order XXIII Rule 3 of the Civil Procedure Code, 1908, to permit the petitioner to withdraw the suit, with liberty to file a fresh suit, if it is satisfied that there are proper reasons for doing so, especially, when the Court concerned is satisfied that a suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject- matter of a suit, or part of the claim.

7. The learned counsel appearing on behalf of the petitioner had relied on the decision of this Court, in *Duraikannu and others Vs. Malayammal* (2003-4-L.W. 453), to show that a Court of appeal has the power to grant permission to withdraw a suit, with liberty to file a fresh suit, as per order XXIII Rule 3 of the Civil Procedure Code, 1908.

8. The learned counsel had further submitted that serious prejudice would be caused to the petitioner, who is the plaintiff in the suit, in O.S.No.250 of 2001, if she is not permitted to withdraw the suit, and with liberty to file a fresh suit, by giving proper description of the suit properties. It had also been stated that no prejudice would be caused to the defendant in the suit, who is the respondent in the present Civil Revision Petition, if such permission is granted, as prayed for by the petitioner. The delay in the filing of the interlocutory application, in I.A.No.87 of 2008, is neither willful nor wanton and it has been filed only with the bona fide intention of obtaining the necessary relief in the suit in question and in order to avoid multiplicity of proceedings.

9. Per contra, the learned counsel appearing on behalf of the respondent had stated that the order passed by the Subordinate Court, Virudhunagar, in I.A.No.87 of 2008, in A.S.No.30 of 2008, rejecting the request of the petitioner to withdraw the suit, in O.S.No.250 of 2001, with liberty to file a fresh suit, cannot be said to be invalid in the eye of law. The first Appellate Court had rightly held that the petitioner had filed the interlocutory application at the stage of the first appeal, before the Subordinate Court, Virudhunagar, only with the mala fide intention of

prolonging the proceedings before the said Court.

10. Even though the petitioner had amended the plaint on two occasions, the petitioner had filed the interlocutory application before the first Appellate Court, for a similar relief, which cannot be granted. Serious prejudice would be caused to the respondent if the relief sought for by the petitioner is granted by this Court. Further, the petitioner has not been in a position to show that the interlocutory application had been filed in a bona fide manner. Therefore, the present Civil Revision Petition is liable to be dismissed.

11. The learned counsel had relied on the decision of this Court, reported in Velusamy Vs. Chenniappan (2010 (5) CTC 330), wherein it has been held that Order XXIII Rule 1 of the Civil Procedure Code, 1908, is an exception to the common law principle of non-suit. The grant of leave, under Order XXIII Rule (1)(3), is at the discretion of the Court concerned. However, such a discretion must be exercised by the Court with care and circumspection. While granting leave, the Court of law should give an express finding that a suit would fail by reason of some formal defect or that there are sufficient reasons for granting leave to file a fresh suit.

12. The learned counsel had also relied on the decision, reported in Somalraju Vs. Samanthu Sivaji Ganesh (AIR 2009 Andhra Pradesh 12), wherein it has been held that the expression 'formal defect' in Order XXIII Rule (1) (3)(a) connotes defects of various kinds, not affecting the merits of the case. Thus, a formal defect is 'a defect of form' unrelated to the claim of the plaintiff, on merits.

13. In view of the averments made by the learned counsel appearing on behalf of the petitioner, as well as the respondent, and on a perusal of the records available and in view of the decisions cited supra this Court does not find sufficient cause or reason to interfere with the order, dated 4.2.2009, made in I.A.No.87 of 2008, in A.S.No.30 of 2008. The first Appellate Court had rightly held that the petitioner is not entitled to the relief sought for in the interlocutory application, in I.A.No.87 of 2008.

14. It is noted that the petitioner, who is the plaintiff in the suit in O.S.No.250 of 2001, had already been permitted to amend the plaint filed in the suit, in O.S.No.250 of 2001, on two occasions. After the suit had been pending for nearly eight years, on the file of the trial Court, it is not open to the petitioner to make a request to the first Appellate Court, by way of an interlocutory application, to permit the petitioner to withdraw the suit, with liberty to file a fresh suit. Even if it can be held that the relief sought for by the petitioner is only to cure a `formal defect', such a relief cannot be granted to the petitioner in the facts and circumstances of the present case. On the other hand, if the petitioner is permitted to withdraw the suit with liberty to file a fresh suit, it would cause grave prejudice and serious hardship to the respondent, who is the defendant in the suit, in O.S.No.250 of 2001. In such view of the matter, this Court finds it appropriate to dismiss the Civil Revision Petition. Accordingly, the Civil Revision Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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