

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/12/2003

CORAM

THE HONOURABLE MR.JUSTICE A.KULASEKARAN

CRP (PD) No. 1417 of 2003  
and CRP (PD) Nos., 1418 and 1421 of 2003  
and  
C.M.P. No. 9936 of 2003

CRP PD No. 1417 of 2003

Subban ... Petitioner

-Vs-

1. Varadarajan
2. Dhanaraj @ Kannaiyan
3. Prakash
4. Santhi
5. Kaveri Ammal
6. D. Jayaraman ...Respondents

CRP PD No. 1418 of 2003

Subban ... Petitioner

Versus

1. Kaveri Ammal
2. D. Jayaraman
3. Varadarajan
4. Dhanaraj
5. Prakash
6. Santhi ...Respondents

CRP PD No. 1418 of 2003

1. Kaveri Ammal
2. D. Jayaraman ...Petitioners

Versus

1. Subban
2. Santhi ...Respondents

Revisions under Section 115 CPC against the Order dated 25-11-2002 made in I.A. No. 489 of 2000, I.A. No. 1124 of 1998 and I.A. No. 1162 of 2002 in O.S. No. 361 of 1994 on the file of District Munsif Court, Thiruchengode.

!For Petitioner : Mr. Valliappan for M/s. Sarvabhauman Associates in CRP 1417 & 1418/2003

Mr. Malaisamy for Mrs. Mythuily Suresh in CRP 1421/03

^For Respondents: Mr. R. Jagadeesan for RR1 to 3 in CRP No. 1417 of 2003

No appearance for other respondents

:COMMON ORDER

The defendants 1 and 2 in O.S. No. 361 of 1994 are the revision petitioners in CRP No. 1421 of 2003. The first Plaintiff in the said suit is the revision petitioner in CRP No. 1417 & 1418 of 2003. The Plaintiffs have filed the suit for declaration to declare that the first plaintiff is entitled to take his tractors, lorries and bullock carts through the suit cart track portion marked as ABCDEFGH in yellow colour running in the suit S.No. 159 of Bommanpatti Village, Thiruchengode Taluk to reach his portion of lands situate in the suit S.NO.159 shown in the plaint rough plan and for other reliefs.

2. Pending suit, the plaintiffs filed I.A. No. 1124 of 1998 to withdraw the suit as against the defendants 3 to 5 which was opposed by the defendants 3 to 5. Later, the defendants 3 to 5 filed I.A. No. 489 of 2000 seeking permission of the Court for filing additional written statement/cross objection. The Plaintiffs filed another I.A. No. 1162 of 2002 for recording the compromise entered into between them with defendants 1 and 2. All the applications were taken up for hearing together by the trial court, common arguments were advanced by the counsel for both sides, however, the trial court, on 25-11-2002 passed separate orders dismissing the application I.A. No. 1124 of 1998 and I.A. No. 1162 of 2002 and allowed the application I.A. No. 489 of 2000 as prayed for with costs. Aggrieved by the orders passed in the above said three applications, the above revisions are filed.

3. The learned counsel appearing for both sides in the above revisions advanced common arguments, hence this common order is passed. For the sake of convenience, the parties are referred as arrayed in the suit.

4. CRP No. 1417 of 2003 is directed against the order allowing the application I.A. No. 489 of 2000 which was filed by the defendants 3 to 5 under Order 8 Rule 9 CPC seeking permission of the Court to receive additional written statement. The reasons adduced by the defendants 3 to 5

was that the suit was filed in respect of the cart track existing in Survey No.159 and in the said cart track they and the other defendants namely defendants 1 and 2 have a right to use. They have jointly opposed the plaintiffs from using the said cart track. Later the defendants 1 and 2 have colluded with the plaintiffs and created an alleged compromise with an intention to deprive of the defendants 1 and 2, hence the additional written statement is warranted. The trial court allowed the said application on the ground that 1 + cents land belonged to the defendants 3 to 5 is part and parcel of 0.91 cents allegedly belonged to the defendants 1 and 2 wherein the cart track is located as such the additional written statement is required for effective adjudication. The trial court also permitted the defendants 3 to 5 to make a counter claim along with the written statement and accordingly a court fee of Rs.61/- was also paid by them.

5. CRP No. 1418 of 2003 relates to I.A. No. 1124 of 1998 which was filed by the Plaintiffs under Order 23 Rule 1 CPC seeking permission of the Court to withdraw the suit in O.S. No. 361 of 1994 in so far as the defendants 3 to 5 are concerned. It is stated in the said I.A. that after filing the suit, the Plaintiffs and defendants 1 and 2 have entered into a compromise and laid a new cart track in their lands after removing the standing trees thereon as such the defendants 3 to 5 are not necessary parties. The trial court dismissed the said application on the ground that no new cart track was laid as alleged and the cart track in dispute is running through their land hence they are necessary parties.

6. CRP No. 1421 of 2003 is directed against the Order passed in I.A. No. 1162 of 2002 filed by the plaintiffs for recording compromise on the ground that after filing the suit, the plaintiffs and defendants 1 and 2 have laid a new cart track after removing the standing trees and entered into a compromise and prayed the Court to pass a decree in terms of the compromise. The said I.A. was dismissed by the trial court on the ground that I.A. No. 489 of 2000 was allowed and I.A. No. 1124 of 1998 was dismissed, hence the compromise cannot be recorded until all the defendants file a compromise memo duly signed.

7. The Plaintiffs filed I.A. No.1124 of 1998 to withdraw the suit against the defendants 3 to 5, which were opposed by the defendants 3 to 5 by filing necessary counter. The defendants 3 to 5 thereafter filed I.A. No. 489 of 2000 for reception of additional written statement/cross objection. Subsequently, the plaintiffs filed I.A. No. 1162 of 2002 for recording compromise. Hence, it is relevant to look into the corresponding provisions of law governing the issues in all the three interim applications.

8. The relevant provision to withdraw the suit is Order 23 Rule 1 (1) which runs as follows:-

"Order 23 Rule 1. Withdrawal of suit or abandonment of part of claim. - (1)  
At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the

Court.

9. Filing of additional written statement is governed by Order 8 Rule 6-A, 6-D and 9 which runs as follows:-

"Order VIII Rule 6-A. Counter claim by Defendant: (1) A defendant in a suit may, in addition to his right of pleading a set off under Rule 6, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not.

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.

(3) The Plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

6-D. Effect of discontinuance of suit - If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

9. Subsequent pleadings. - No pleading subsequent to the written statement of a defendant other than by way of defence to a set off (or counter-claim) shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

10. The relevant provision relating to recording of compromise is Order 23 Rule 3 CPC which runs as follows:-

"Compromise of suit. - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.

Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding

the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

11. Under Order 23 Rule 1 CPC, a plaintiff can abandon a suit or abandon part of his claim as a matter of right without the permission of the Court. In such case, he will be precluded from suing again on the same cause of action. He cannot abandon a suit or abandon part of his claim reserving to himself a right to bring a fresh suit. The question of permission comes in only when the plaintiff seeks permission to sue afresh on the same cause of action. Different consideration may arise where a set-off may have been claimed under Order 8 CPC or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.

12. In the decision reported in (M/s. Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co.) AIR 1968 Supreme Court 111, in para-2 it was held that there is no provision in the Code of Civil Procedure, which requires the Court to refuse permission to withdraw the suit, but it is possible in different consideration where a set-off have been claimed under Order 8 CPC or a counter-claim have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.

13. In the case on hand, the defendants 3 to 5 have filed I.A. No. 489 of 2000 under Order 8 Rule 9 CPC after filing the written statement. Rule 6-A of Order 8 confers a statutory defence of set-off to a plaintiff's action. A counter-claim is substantially a crossobjection. A set-off is an answer to the plaintiff's claim, wholly or protanto. The defendant may either before or after filing of the suit, but before he has delivered his defence or before the time limited for delivering his defence has expired file his counter-claim. In such an event, a counter-claim is treated as a plaint and is governed by the Rules applicable to Plaint.

14. Under Rule 6-D of Order 8 CPC, even if the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with as in the case of a counter claim, written statement is really in the nature of a plaint. In such event, if the plaintiff's suit is not pressed or given up or withdrawn or breaks down for any reason whatsoever, the defendant has still a right to get a decree of a counter-claim as claimed in the written statement. If a defendant want to enjoy such right, he is allowed to make his counter-claim either before or after filing of the suit, but before he has delivered his defence or before the time limited for delivering his defence has expired.

15. In this case, the defendants 3 to 5 have filed the written statement on 22-01-1996. After lapse of about four years from the date of filing the written statement, they have filed the application I.A. No. 489 of 2000 without proper explanation for such delay, which is against the provisions of Rule 6-A of Order 8. The trial court erroneously allowed the said application without considering the above said aspects.

16. A conjoint reading of Order 23 Rule 1 (1) and Order 8 Rule 6-A, 6-D and 9 CPC makes it clear that the plaintiff cannot be prevented from withdrawing the suit, if the counter-claim / set off has been filed in terms

of the procedural law. In this case, the counter-claim is not filed in terms of the procedural law, hence the trial court is not correct in dismissing application I.A. No.1124 of 1998 filed by the plaintiffs to withdraw the suit as against the defendants 3 to 5.

17. The Plaintiffs and defendants 1 and 2 said to have entered into compromise and they sought for a decree in terms of the compromise, which resulted in filing the I.A.No. 1162 of 2002. It is also their case that after the suit, they have laid a new cart track in their land, which is comprised in Survey No.159. The trial court dismissed the said application on the ground that the defendants 3 to 5 have not signed the compromise memo, besides that I.A.No. 489 of 2000 and I.A. No.1124 of 1998 were dismissed. No doubt, under Order 23 Rule 3 CPC, the compromise must be between the parties to the litigation. A compromise to which some of the parties to a suit alone are parties is not necessarily invalid. A compromise between some parties alone cannot affect the position of other parties to the suit since they are neither bound by it nor are entitled to enforce it.

18. In the case on hand, it is pleaded by the plaintiffs and defendants 1 and 2 that they have laid a new cart track in their land subsequent to the suit. Where a party has no further interest in the suit property, his consent is not necessary for the compromise of a suit. The records placed before me by the defendants 3 to 5 are not sufficient to disprove the contention of the plaintiffs and defendants 1 and 2. No clear finding given by the trial court pertaining to the said aspect. Hence, I have no hesitation in setting aside the order passed by the trial court in I.A. No. 1162 of 2002. However, when the right of the defendants 3 to 5 is affected by the act of laying new cart track by the plaintiffs and defendants 1 and 2, certainly they are entitled to file a fresh suit to seek their remedy. In view of the above said observation, the trial court is directed to refund the court fee paid by the defendants 3 to 5, if any, forthwith.

19. For the foregoing reasons, all the revisions are allowed. No costs. Consequently, connected CMP is closed.

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