

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16 - 09 - 2015

Coram

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 642 of 2009

V. P. Venkatachalam

.. Appellant/Plaintiff

vs.

N. Venkatachalam

.. Respondent /Defendant

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 29.09.2008 in A.S. No. 70 of 2008 on the file of the Court of Subordinate Judge, Tiruchengode, reversing the judgment and decree dated 18.08.2005 made in O.S. No. 217 of 2004 on the file of the District Munsif, Tiruchengode.

For Appellant : Mr. C. Kulanthaivel

For Respondent : Mr. T.L. Thirumalaisamy

JUDGMENT

Aggrieved by the judgment and decree dated 29.09.2008 passed by the Subordinate Judge, Tiruchengode, in A.S. No. 70 of 2008 wherein and by which the judgment and decree dated 18.08.2005 passed by the District Munsif, Tiruchengode, in a suit for recovery in O.S. No. 217 of 2004 were reversed allowing the First Appeal at the instance of the defendant, the plaintiff has preferred the instant Second Appeal.

2. The relevant facts necessary for disposal of this second appeal would run thus:

(a) The narration of brief facts as found set out in the plaint would be to the effect that the defendant borrowed a sum of Rs.45,000/- agreeing to repay with interest at the rate of Rs.1.50/- on demand and executed Ex. A.1 suit promissory note dated 07.9.1997. Since there was default in repaying the debt, the plaintiff issued pre-suit notice Ex. A.2 dated 15.02.2000 for which the defendant replied with false allegations on 04.3.2000. Hence, the suit was filed.

(b) Written statement was filed resisting the claim.

(c) Whereupon, the trial court framed the issues and ultimately decreed the suit.

(d) Being aggrieved by and dissatisfied with the judgment and decree of the trial court, appeal was filed by the defendant on various grounds including the one relating to limitation. The First Appellate Court, viz., Learned Subordinate Judge, Tiruchengode, while upholding the liability of the plaintiff, observed that the plaintiff has paid the Court Fee with a delay of nearly four months and further, has also not filed an application as per Section 149 of the Code of Civil Procedure to condone the delay and accordingly, allowed the appeal reversing the judgment and decree of the trial court.

(e) Challenging and impugning the same, this second appeal has been filed by the plaintiff.

3. At the time of admission of this Appeal, the following substantial questions of law were formulated for consideration:-

(a) Whether the suit in O.S. No. 217 of 2004 is barred by limitation for having failed to file an application by the plaintiff u/s 149 of CPC?

(b) Whether the Lower Appellate Court is right in holding that the defendant can raise the objections even in the appeal stage in respect of delay in paying the deficit Court fee?

4. Heard Mr. C. Kulanthaivel, learned counsel appearing for the appellant / plaintiff and Mr. T.L. Thirumalaisamy, learned counsel for the respondent / defendant and perused the records.

5. Both the Courts below, on appreciation of the evidence and the documents placed thereon, while concurrently holding the liability of the defendant, have expressed divergent opinions on payment of deficit Court fee. Therefore, the points to be considered by this Court are whether the findings of the Courts below with regard to deficit Court are based on evidence and can the Court exercise the power to hold that the appellant is entitled to condonation of delay for non-payment of Court fee.

6. Learned counsel for the appellant / plaintiff urges before this Court that when the appellant / plaintiff has paid the deficit Court fee and has complied with the directions of the trial Court in time and re-presented the plaint, then, it is not open for the Lower Appellate Court to reject the plaint by observing that application/petition under Section 149 of the Code of Civil Procedure has not been filed and that too, when the trial Court has exercised its discretionary power as per Section 149 of the Code of Civil Procedure.

7. Per contra, learned counsel for the respondent / defendant submitted before this Court that since the plaintiff had failed to pay sufficient Court fee, it is mandatory that he should have taken out an application under Section 149 CPC. He further submitted that the Lower Appellate Court had gone into the said aspect and rightly dismissed the suit and according to him, the same requires no interference.

8. Before going into the issue involved, it would be relevant to refer to the provisions of Sections 148 and 149 of the Code of Civil Procedure Code in this regard and the same are extracted hereunder for easy reference and understanding:-

"148. Enlargement of time.-- Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period not exceeding thirty days in total, even though the period originally fixed or granted may have expired.

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149. Power to make up deficiency of court-fees.-- Where the whole or any part of any fee

prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as is such fee had been paid in the first instance."

9. From a bare perusal of the above provisions made under the Code of Civil Procedure, 1908, it could be seen that the Courts are empowered in their discretion to allow the payment of deficit court fee at any stage of the proceedings by exercising their power under Section 149 of the Civil Procedure Code. If such person pays the deficit court fee as allowed by the Court and upon such payment, the document shall have the same force and effect as if such fee has been paid at the first instance. Thus, the reading of Section 149 CPC further makes one to understand that the question of limitation cannot be put against once the payment of deficit Court fee is made as allowed by the Court under Section 149 CPC.

10. In this regard, it would be relevant to refer to the order of this Court in Mahalingam vs. K. Krishnasamy Naidu [2009 (6) CTC 92] wherein on analysing various judgments, this Court had laid down certain principles relating to the point in issue and the same may be usefully re-produced below:-

- "1. The power exercised by a Court under Section 149 is very wide and the discretion shall be exercised in favour of the plaintiff in the normal circumstances.
2. The power under Section 149 of C.P.C. can be exercised by the Court concerned 'at any stage' of the suit.
3. When the Court exercises the power under Section 149 of C.P.C. before numbering the plaint, the Court is not required to issue notice to the proposed defendant in the suit, since it is a matter between the Court and the plaintiff.
4. Once, the Court exercise the power under Section 149 of C.P.C., the same relates back with the presentation of the plaintiff at the first instance and therefore, the question of

limitation does not arise.

5. When the power is exercised by the Court on an application filed under Section 151 of the Code of Civil Procedure, it is deemed to have been in exercise under Section 149 of the Code of Civil Procedure.
6. The Court can exercise its power under Section 149 of C.P.C. either with or without an application by the party concerned.
7. An order passed or deemed to have been passed under Section 149 of the Code of Civil Procedure, cannot be challenged and decided in a revision or at the time of final hearing in the normal circumstances, until and unless mala fide is raised and proved.
8. The onus of proving lack of bonofides or mala fides is heavily on the person who alleges the same.
9. The power exercised by the Court can also be challenged on the ground that the Court below has not followed the proviso to Order VII, Rule 11, of C.P.C.
10. The power under Order VII, Rule 11 of C.P.C. cannot be invoked when the plaintiff pays the amount as per the order of the Court as directed under Order VII, Rule 11 (b) and (c) of C.P.C."

11. During the course of argument, learned counsel for the respondent / defendant placed reliance on the decision of the Hon'ble Supreme Court in Tajender Singh Ghambhir and another vs. Gurpreet Singh and others [(2014) 10 SCC 702].

12. In the very same judgment relied on by the learned counsel for the respondent / defendant, in paragraphs 11 and 12, Their Lordships have observed as under:-

Para 11: "..... appeal is continuation of suit and the power of the appellate court is co-extensive with that of the trial court. It failed to bear in mind that what could be done by the trial court in the proceeding of the suit, can always be done by the appellate court in the interest of justice.

Para 12:

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The above provision clearly empowers the appellate court to direct a party to make up deficit court fee in the plaint at the appellate stage. The power exercised by the first appellate court can be traced to clause (ii) of Section 12 of 1870 Act as well."

13. In view of the above said proposition, it is not necessary for a party to make an application for the payment of deficit Court fee and in view of the specific provisions contained in Section 149 C.P.C. stating that an order permitting the payment of Court fee would relate back to the presentation of the plaint, the question of limitation would not arise for consideration. The question of limitation would come when the plaint is presented after the period of limitation as prescribed by law. Inasmuch as the power exercised under Section 149 C.P.C. is procedural in nature and also in view of the fact that an order providing for payment of Court fee would relate back to the date of the plaint, the question of limitation does not arise.

14. Admittedly in this case, the appellant / plaintiff has filed the suit with deficit court fee. No doubt, it is true that the Court has returned the plaint by granting time for payment of the said Court fee and accordingly, the plaintiff also paid the deficit Court fee in pursuant to which the suit was taken on file. It is seen that the respondent in his written statement, did not raise any objection in respect of payment of deficit Court fee of Re. 1 and no issues were framed in this regard.

15. In such circumstances and in view of the settled legal position, this Court is of the opinion that the Lower Appellate Court was wrong in accepting the stand of the defendant / respondent. In the light of the above discussion, this Court comes to an inevitable conclusion that the Lower Appellate Court dismissed the suit without considering the reasons given by the trial Court thereby leading to perverse finding. The questions are answered materially and substantially in favour of the plaintiff / appellant. As such, the rejection of the suit by the Lower Appellate Court, is to be held as not based on correct reasoning.

In the light of the foregoing discussion, the Second Appeal

succeeds and stands allowed and the judgment and decree of the trial Court dated 18.08.2005 passed in O.S. No. 217 of 2004 are restored decreeing the suit in favour of the plaintiff. Consequently, the judgment and decree passed by the Lower Appellate Court are set aside. However, in the circumstances of the case, there shall be no order as to costs.

-Sd/-

Assistant Registrar

//True copy//

Sub Assistant Registrar

gri

To

1. Subordinate Judge
Tiruchengode
2. District Munsif
Tiruchengode

+1 cc to Mr.T.L.Thirumalaisamy,Advocate(sr.50625)

+1 cc to Mr.C.Kulanthaivel,Advocate(sr.50643)

svi(co)
cp 20/10/2015

S.A. No. 642 of 2009

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