

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL MISCELLANEOUS APPEAL No.795 of 2014

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JUDGMENT:-

This Civil Miscellaneous Appeal, under Order XLIII Rule 1 of Code of Civil Procedure by the unsuccessful plaintiff, is directed against the order dated 19.06.2014 of the learned VI Additional District Judge, Kakinada of East Godavari District, passed in I.A.No.181 of 2013 in O.S.No.40 of 2007 filed by the plaintiff under Order IX Rule 9 of the Code requesting to set aside the order of dismissal for default dated 04.04.2012 passed in the suit and to restore the suit to file.

2. I have heard the submissions of the learned counsel for the appellant/plaintiff ('the plaintiff', for brevity) and the learned counsel for the contesting respondents/defendants ('the defendants', for brevity). I have perused the material record.

3. On the dismissal of the suit for default on 04.04.2012, the plaintiff had got filed the aforementioned interlocutory application seeking restoration of the suit to file after setting aside the order of dismissal for default. That application was supported by the affidavit of the son-in-law of the plaintiff, who, according to the plaintiff, is looking after the affairs of the plaintiff. In his said affidavit it is stated as follows:-

“The plaintiff is not keeping good health; the suit was posted to 04.04.2012 for filing the affidavit in lieu of examination in chief of the plaintiff; on that day, the plaintiff was unable to attend before the Court as he was suffering with Asthama, B.P., and heart ailments for the last one and half years; however, due to his absence on the said date, the trial Court had dismissed the suit for default; there are no wilful laches on the part of the plaintiff in not appearing before the Court and in not filing the affidavit in lieu of examination in chief on the above said date.”

4. Resisting the said application, on behalf of the defendants 1 to 3, who are contesting the suit, a counter affidavit was filed stating that the affidavit of the plaintiff is not filed in support of the petition and that the affidavit of the petitioner's son-in-law is filed and that he is not an agent or a G.P.A. holder of the plaintiff and that, therefore, the application is liable for dismissal *in limine* and that the pleading that the plaintiff was unwell and thus could not attend before the Court is false and that there are no grounds to set aside the order of dismissal for default dated 04.04.2012 and restore the suit to file.

5. After hearing the learned counsel for both the sides, the trial Court had dismissed the petition mainly on the ground that the affidavit of the party i.e., the plaintiff is not filed in support of the petition. The trial Court had placed reliance on the decision of this Court in ***Pasupuleti Subba Rao Vs. Nandavarapu Anjaneyulu***^[1].

6. The learned counsel for the plaintiff would contend that even before the interlocutory application was dismissed by the trial Court, the affidavit of the plaintiff was filed into the Court on 20.03.2014, after the recovery of the plaintiff from illness and that the said affidavit was not taken into consideration by the Court below and that the Court below ought not to have relied upon the ratio in the decision in ***Pasupuleti Subba Rao*** (supra), which is no longer good law, in view of the decision of the Division Bench of this Court in ***G.Krimana Murthy Vs. Hemalatha Chit Fund Pvt Ltd.***^[2], wherein, this Court had held to the effect that an interlocutory application can be supported by an affidavit of a person other than the party, provided such person has knowledge of the relevant matters of the case.

7. During the course of hearing, when a doubt was expressed as to whether the order impugned was passed after the filing of the affidavit of the plaintiff into the Court below and whether notice on the said affidavit was served on the learned counsel for the contesting defendants, before filing the same into Court, this Court has called for the relevant record from the Court below. The record received from the Court below revealed that the affidavit of

the plaintiff was filed before the Court below on 20.03.2014 after service of notice on 18.03.2014 on the said affidavit on the learned counsel for the contesting parties. Therefore, as rightly contended by the learned counsel for the appellant/plaintiff, though originally the application seeking to set aside the order of dismissal for default was filed with an affidavit of the son-in-law of the plaintiff, the plaintiff had later filed his affidavit before the Court below after the plaintiff was said to have recovered from illness and before the impugned order was passed. However, while passing the impugned orders, the Court below had not taken note of the fact that the affidavit of the plaintiff was filed into Court.

8. The only contention in the counter of the respondents is that the affidavit of the plaintiff is not filed and the averment that the plaintiff was unwell is not correct. Admittedly, the plaintiff was aged about 62 years as on the date, the suit was dismissed for default by the Court below and it was urged before the Court below that he was suffering from Asthama, B.P., and heart ailments for the last one and half years and that due to his illness he could not appear before the Court below on the date the suit was dismissed for default. According to the learned counsel for the plaintiff, substantive rights concerning immovable property are involved in the suit and that if the suit is dismissed on technical grounds, the plaintiff would suffer serious and irreparable loss.

9. I have given detailed and thoughtful consideration to the facts and the submissions. The objection that the affidavit of the plaintiff is not filed is untenable; in view of the fact that plaintiff's affidavit was also filed into the Court below before the impugned order was passed. It is also the submission that the affidavit in lieu of examination in chief of the plaintiff was also filed into the Court below. The Law is well established that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. If the order of dismissal for default is set aside, the plaintiff gets an opportunity to have his suit decided on merits and such a course sub-serves the ends of justice.

Viewed thus, this Court finds that there is merit in the appeal and the impugned order deserves to be set aside.

10. Accordingly, the appeal is allowed and the order dated 19.06.2014 of the learned VI Additional District Judge, Kakinada of East Godavari District passed in I.A.No.181 of 2013 in O.S.No.40 of 2007 is hereby set aside and the said application is allowed and the suit is restored to file. However, since the suit is a sufficiently old suit and the plaintiff is of advanced age, the Court below is directed to dispose of the suit as expeditiously as possible and preferably within a period of two (02) months from the date of the receipt of a copy of this judgment. It is needless to mention that the plaintiff shall appear before the Court below for his cross-examination on the day, which the Court below may fix within two (02) weeks from today. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal, shall stand dismissed.

M. Seetharama Murthi, J

23rd July, 2015
Bvv

Note:-

Furnish C.C. by 29.07.2015
(B/o) Bvv

[\[1\]](#) (2003) 3 ALT 816

[\[2\]](#) AIR 2006 AP 398