

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL MISCELLANEOUS APPEAL NO.532 OF 2014

JUDGMENT:

This is an appeal by the unsuccessful petitioner/plaintiff under Order XLIII Rule (1) of the Code of Civil Procedure, 1908 ('the Code' for short) assailing the orders of dismissal dated 27.01.2014 passed by the learned II Additional District Judge, Ranga Reddy in IA.No.1905 of 2011 in OS.No.711 of 2008 filed under Order IX Rule 9 read with Section 151 of the Code requesting to restore the suit to file after setting aside the order of dismissal for default dated 13.06.2011 passed in the above suit.

2. I have heard the submissions of the learned counsel for both the sides. I have perused the material record.

3. The basic facts, in brief, are as follows: 'The plaintiff brought a suit against the defendants for cancellation of an agreement of sale-cum-GPA executed by defendants 1 and 2 in favour of the 3rd defendant in respect of an immovable property. The defendants 1 and 2 had remained *ex parte* and the third defendant is alone contesting the suit. At the commencement of the trial, the affidavit in lieu of examination in chief of PW1 was filed on 01.04.2011 and the matter was adjourned to 31.05.2011 for exhibiting the documents by the said witness. As the plaintiff and his counsel were not present and as there was no representation, the trial Court had adjourned the matter to 13.06.2011 for recording the further evidence of PW1. Even on 13.06.2011, the plaintiff was absent and there was no representation by his counsel and hence, the trial Court had dismissed the suit for default. Therefore, the plaintiff had filed the interlocutory application for setting aside the dismissal order for default made in the suit and for restoring the suit to file *inter alia* submitting that his counsel has wrongly noted the date of adjournment of the suit and, therefore, neither the plaintiff nor his counsel attended before the Court on 13.06.2011 when the matter was called and that

the absence is only on account of the wrong noting of the date of adjournment by the counsel for the plaintiff and that, therefore, the absence of the plaintiff and his counsel before the Court on the above said date is neither wilful nor wanton and that if the order dismissing the suit for default is not set aside, the plaintiff would suffer serious loss. The said application was resisted by the 3rd defendant by *inter alia* contending in his counter that the explanation offered in the affidavit of the plaintiff is false and that the present suit is of the year 2008 and that the plaintiff is harassing this defendant by not proceeding with the trial of the suit and by way of filing criminal complaints utilising his caste and that the present petition is only a half-hearted attempt without mentioning valid reasons for setting aside the default order and that basically the suit is a false suit. On merits, the trial Court had dismissed the petition of the plaintiff. Therefore, the plaintiff is before this Court.'

4. At the time of hearing, the learned counsel for the plaintiff while re-iterating the facts, which lead to the dismissal of the suit for default and also the explanation offered for the absence of the plaintiff and his counsel before the trial Court on the aforementioned date, had *inter alia* contended that the trial Court did not consider the fact that the mistake is that of the counsel and that even that mistake is neither wilful nor wanton and that purely on account of the counsel noting the wrong date of adjournment, neither the plaintiff nor his counsel were present before the Court on 13.06.2011 and that on coming to know of the dismissal of the suit, the present application is filed on 08.07.2011 seeking restoration of the suit and that the trial Court did not take notice of the fact that valuable rights in respect of immovable property are involved in the suit and that the trial Court had erroneously taken into consideration the aspect of non appearance of the plaintiff on the previous date of adjournment and had stretched the matter to cover a circumstance which had occurred prior to the date of dismissal of the suit on 13.06.2011 and that the said conduct prior to the said date should not have been taken into consideration as the same stands over looked and condoned. He had further contended that as substantive rights of the plaintiff are involved and as a reasonable and plausible explanation was offered, an

opportunity may be given to the plaintiff to have the suit decided on merits and that refusal to set aside the dismissal order may result in the plaintiff's matter being thrown out at the very threshold and that if the suit is restored for disposal on merits after full trial, the highest that can happen is that the cause would be decided on merits after full fledged trial.

5. On the other hand, the learned counsel for the 3rd defendant while supporting the impugned order had reiterated the contentions in the counter of the 3rd defendant which are stated supra and had submitted that even on merits the plaintiff has no case and that, therefore, he is dragging on the matter and harassing the 3rd defendant.

6. I have given earnest consideration to the facts and the submissions. In the first place, as rightly contended, while considering the merits of the application filed for the restoration of the suit that was dismissed for default the Court has to only consider the valid reason, if any, for non appearance of the plaintiff on the day the suit was dismissed for default, but the Court cannot take into consideration the aspect of non appearance of the plaintiff on previous date/s of adjournment/s and cannot stretch the matter to cover circumstances which had occurred prior to the date of dismissal of the suit on 13.06.2011 as the said conduct prior to the said date stands over looked and condoned. Coming to the explanation, the plaintiff submits that the counsel had wrongly noted the date of adjournment and that lead to the non appearance of the plaintiff and his counsel on the above said date and that the absence is not for any wilful or wanton reasons and that for a mistake of a counsel the party cannot be penalised. I see acceptable merit in the contentions of the plaintiff. Further, when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. In the instant case, neither the explanation can be termed as casual nor can the absence of the plaintiff and the counsel before the trial Court on the aforementioned date be termed as deliberate. There is no reason to accept the contention of the 3rd defendant that the absence of the plaintiff and his counsel before the trial Court on 13.06.2011 was on

account of culpable negligence and *mala fides* on their part. In the facts and circumstances, this Court is of the well considered view that the cause, which was shown for the absence of the plaintiff on the said date before the trial Court can be accepted as a sufficient cause. Hence, I see no tenable objections in the counter and the submissions of the 3rd defendant, which call for dismissal of this petition. Having regard to the facts and the submissions of both the sides, this Court considers that the dismissal order for default can be set aside and the suit can be restored to file, as such a course sub-serves the ends of justice. However, the relief can be granted only after imposition of adequate terms to compensate the loss and hardship that may be caused to the 3rd defendant on account of the consequential delay in the trial of the case.

7. In the result, the Civil Miscellaneous Appeal is allowed without costs and the impugned order is set aside, and the application in IA.No.1905 of 2011 in OS.No.711 of 2008 on the file of II Additional District Judge, Ranga Reddy is allowed and the said suit is restored to file subject to deposit of costs of Rs.2,000/- (Rupees Two Thousands only) by the plaintiff in the Court below on or before 22.07.2015, failing which the said petition shall stand dismissed. It is made clear that no extension of time would be granted for making the said deposit. On such deposit of costs, the trial Court shall dispose of the suit on merits and in accordance with the procedure established by law. The 3rd defendant is at liberty to withdraw the costs now imposed without furnishing any security.

Miscellaneous petitions, if any pending in this CMA, shall stand closed.

M. SEETHARAMA MURTI, J

24th June 2015
Vjl

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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24.06.2015

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