

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **30.11.2016**

CORAM:

THE HONOURABLE MR.**JUSTICE K.K.SASIDHARAN**

C.R.P.(P.D.) No.1060 of 2016

T.Elumalai : Petitioner

versus

1.M/s.National Pharma Distributors,
by its Partner Prakash Chand

2.Jayaraman : Respondents

PRAYER: Revision filed against the fair and decretal order in I.A.No.264 of 2013 in I.A.No.9 of 2004 in O.S.No.9 of 2004 on the file of the Principal District Judge, Villupuram.

For petitioner :: Mr.N.Suresh

For respondents :: Mr.A.Thiagarajan, Senior counsel,
for Mr.A.Ramesh Kumar, for R-1

Mr.S.Mukunth
for M/s.Sarvabhauman Associates, for R-2

ORDER

The petitioner filed an application in I.A.No.264 of 2013 to restore the application in I.A.No.9 of 2004 which was dismissed for default on 23 March 2009. The learned Principal District Judge, Villupuram, while considering the restoration application, observed that there is no need for filing an application to condone the delay in filing the application to restore

the interlocutory application. The learned Judge however dismissed the application on the ground that the petitioner has not given sufficient reasons for his absence on 23 March 2009 before the Trial Court. The order dated 15 February 2016 is under challenge in this civil revision petition.

Brief facts:-

2. The first respondent filed the suit in O.S.No.134 of 1990 before the Subordinate Court, Villupuram, praying for a decree of specific performance on the strength of the agreement executed by the petitioner. During the currency of the original suit, the parties entered into a memorandum of compromise. Since the first respondent failed to adhere to the terms and conditions of the compromise deed dated 11 August 1996, the petitioner filed an application before the Trial Court in I.A.No.641 of 1997, to record the compromise under Order 23 Rule 3 CPC. . The application was later renumbered as I.A.No.9 of 2004. The application was opposed by the first respondent.

3. The Trial Court recorded the evidence of the petitioner in I.A.No.9 of 2004. The matter was thereafter adjourned periodically for enquiry. The hearing was at times adjourned on account of the absence of the Presiding

Officer. The matter was ultimately posted for enquiry on 23 March 2009. The petitioner was called absent and the interlocutory application was dismissed for default.

4. The petitioner was set *exparte* in the civil suit. The application filed by the petitioner in I.A.No.533 of 2009 to set aside the *exparte* order was dismissed by the Trial Court. The said order was challenged before this Court in C.M.A.No.3656 of 2010. This Court allowed the civil miscellaneous appeal, by setting aside the *exparte* order passed against the petitioner. Thereafter, the petitioner filed an application to restore the interlocutory application in I.A.No.9 of 2004.

5. Before the Trial Court the petitioner contended that the application in I.A.No.9 of 2004 was kept pending for a period of five years. According to the petitioner, he failed to file application to restore the interlocutory application as he was under the impression that in case the suit is revived, all the interlocutory applications would also be revived.

6. The interlocutory application is opposed by the first respondent by filing counter affidavit. According to the first respondent, it was only after

commencement of trial, the petitioner filed the application in I.A.No.9 of 2004.

7. The learned Principal District Judge, Villupuram, agreed with the petitioner that separate petition to condone the delay is not necessary. The learned Trial Judge was of the view that the petitioner has to explain sufficient cause to restore the interlocutory application which was dismissed for default. Since no such explanation was given, the restoration application was dismissed.

Submissions:-

8. The learned counsel for the petitioner contended that there was no need for the personal appearance of the petitioner before the Trial Court. The petitioner has already marked documents on his side. The Trial Court was therefore expected to consider the application on merits even if the petitioner was absent on 23 March 2009. According to the learned counsel, the learned District Judge was not correct in dismissing the application, notwithstanding the fact that materials were produced before the Trial Court to decide the application on merits.

9. The learned Senior counsel for the first respondent while justifying the order passed by the Trial Court contended that it was only after five years, the petitioner filed application to restore the application in I.A.No.9 of 2004. According to the learned counsel, the petitioner miserably failed to plead and prove that he was prevented by sufficient cause from appearing before the Trial Court on 23 March 2009. The Trial Court was therefore perfectly correct in dismissing the application.

Discussion:-

10. The suit in O.S.No.134 of 1990 was filed by the first respondent before the Subordinate Court, Villupuram, on the strength of a sale agreement dated 25 January 1990, executed by the petitioner. The first respondent wanted a decree directing execution of the sale deed conveying the suit properties after receiving the balance sale consideration.

11. The petitioner filed written statement and contested the civil suit in O.S.No.134 of 1990. The petitioner specifically contended that the first respondent is not entitled to the discretionary remedy of specific performance.

12. The parties to the civil suit thereafter entered into a compromise on 11 August 1996 in the presence of a mediator. The first respondent agreed to revise the consideration @ Rs.4,500 per cent for the entire property and to make payment after deducting Rs.21,000/- paid as advance earlier. The first respondent agreed to pay the entire amount within a period of one month for the purpose of executing the sale deed by the petitioner.

13. The first respondent issued a lawyer notice to the petitioner on 4 September 1996 calling upon him to produce income tax clearance certificate for paying the balance sale consideration. The petitioner through his lawyer issued a reply notice on 10 September 1996, denying the statements made in the lawyer's notice and contended that the first respondent has been postponing the matter under the guise of producing documents by the petitioner, which was not a term in the agreement dated 11 August 1996.

14. The first respondent filed application in I.A.No.681 of 1996 to amend the plaint. The first respondent claimed that there is novation of contract and as such, amendment is absolutely necessary. The application for amendment was allowed.

15. The petitioner filed a comprehensive application in I.A.No.641 of 1997, invoking Order 23 Rule 3 CPC. The suit was subsequently transferred to the District Court, Villupuram. The suit was renumbered as O.S.No.9 of 2004. The application filed by the petitioner in I.A.No.641 of 1997 was renumbered as I.A.No.9 of 2004.

16. The petitioner in his affidavit filed in support of the application in I.A.No.9 of 2004 contended that in view of the compromise, the first respondent is obliged to make a statement before the Court that the suit is settled. Since there was a substitution of the earlier agreement, which is in the nature of novation of contract, the suit, as filed, is not maintainable. The petitioner therefore wanted the Trial Court to pass an order under Order 23 Rule 3 CPC.

17. The first respondent filed counter and opposed the application. According to the first respondent, by way of compromise, the rate originally agreed upon was enhanced. Since there was a violation of clause (2) of the Compromise deed, it is not open to the petitioner to invoke Clause (3). According to the first respondent, the petitioner is not entitled to an order under Order 23 Rule 3 CPC.

18. The notes paper produced by the petitioner in respect of the application in I.A.No.9 of 2004 indicates that the Trial Court adjourned the matter on multiple occasions for filing counter. Thereafter, it was posted time and again for enquiry. It was adjourned on few occasions as the Trial Judge was on leave. In fact, the learned District Judge, Villupuram, granted interim stay of all further proceedings in Tr.O.P.No.7 of 202. The application was therefore adjourned periodically on account of the pendency of the transfer petition. Even after the transfer of suit, the application was adjourned from time to time. The petitioner marked the documents on his side. Thereafter, it was posted for arguments on 28 January 2009. The dates and events would indicate that after 28 January 2009, it was posted mainly for enquiry and at times for the appearance of the parties. Finally, on 23 March 2009, the application was dismissed for default, with an observation that there was no representation on behalf of the petitioner. The petitioner thereafter, filed the application in I.A.No.284 of 2013 to restore the interlocutory application in I.A.No.9 of 2004.

19. The learned Senior Counsel for the first respondent contended that the petitioner failed to file application to condone the delay. There is no merit in the said contention. The learned Principal District Judge

considered the issue as to whether there is any requirement to file application to condone the delay. There is a finding given by the learned District Judge that no such application for condonation of delay is necessary. The first respondent has not challenged the said finding. The finding has thus become final. It is not open to the first respondent now to contend that the petitioner ought to have filed an application under Section 5 of the Limitation Act to condone the delay.

20. The core issue is as to whether the learned Principal District Judge was correct in dismissing the application on the ground that the petitioner failed to account for his absence on 23 March 2009.

21. The application filed by the petitioner in I.A.No.9 of 2004 was only to record compromise. The petitioner has already marked documents on his side. There was no need for the personal appearance of the petitioner to argue the matter. Even without arguments, the Trial Court could have decided the application on the basis of the available materials on record. The compromise deed was very much before the Trial Court. It is part of records. In fact, even the first respondent was not present on 23 March 2009. However, the Trial Court dismissed the application only on the ground that the petitioner was absent.

22. The learned District Judge dismissed the application filed by the petitioner to restore the earlier application only on the ground that sufficient reasons were not given, justifying his absence on the date of hearing. Since the matter was posted primarily for enquiry, the Trial Court was not correct in insisting the personal appearance of the petitioner. Even otherwise, the Trial Court was not correct in dismissing the application solely on the ground that the petitioner was absent. It is not as if in case the petitioner is absent, the Trial Court is bound to dismiss the application for default.

23. The Trial Court has to consider the entire background facts in a matter like this. The parties have entered into a fresh contract during the currency of the suit filed for specific performance, on the strength of the agreement executed earlier. Even according to the first respondent, there was a novation of contract. Therefore, it is clear that earlier contract was substituted by a new contract. Whether on account of the subsequent contract, the Court has to pass an order under Order 23 Rule 3, is essentially an issue to be decided in the application filed by the petitioner in I.A.No.9 of 2014. When there is a substantial application filed by a party to a suit contending that certain orders required to be passed on account of

the subsequent events, and more particularly, on account of the execution of the subsequent agreement, the Trial Court ought to have considered the application on merits, rather than by dismissing it on the ground of absence of petitioner. The learned Principal District Judge, Villupuram, appears to have not considered the application in the light of the factual matrix. I am therefore of the view that the impugned order is liable to be set aside.

24. In the result, the order dated 15 February 2016 is set aside. The application in I.A.No.264 of 2013 is allowed. The learned Principal District Judge, Villupuram, is directed to consider the application in I.A.No.9 of 2004 on merits and as per law. The question of taking up the suit for disposal on merits would depend on the orders to be passed in I.A.No.9 of 2004.

25. In the upshot, I allow the civil revision petition. No costs. Consequently, C.M.P.No.5872 of 2016 is closed.

30.11.2016

Index:Yes/no
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To

The Principal District Judge, Villupuram

K.K.SASIDHARAN, J.

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C.R.P.(P.D.) No.1060 of 2016

30.11.2016
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