

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:27.01.2016

CORAM:

THE HONOURABLE MR. JUSTICE T.RAJA

CMA.No.262 of 2010

P.Anand Palanikumar

... Appellant/Plaintiff

Versus

1.P.Periyasamy  
2.P.Amirthavalli  
3.D.Latha Lavanya  
4.P.Indira Priyadharshini  
5.N.Sivakumar  
6.V.Vasantakumar  
7.The Sub Registrar,  
Sub Registrar Office,  
Kangeyam

... Respondents/Respondents

This civil Miscellaneous appeal is filed under Order 43 Rule 1 ( C) of C.P.C. against the fair and decreetal order dated 16.12.2009 made in I.A.No.84 of 2009 in O.S.No.29 of 2007 on the file of the Additional District Court/Fast Track Court No.III, Dharapuram.

For Appellant : Mr.N.Manokaran  
for Mr.R.Marudhachalamurthi

For Respondents : Mr.P.Jagadeeswaran for R1  
Mr.D.Krishnakumar for RR 5 & 6  
: No. appearance for R2 to 4 and 7

J U D G E M E N T

This civil miscellaneous appeal has been directed against the decreetal order passed in I.A.No.84 of 2009 in O.S.No.29 of 2007 dated 16.12.2009 in and by which, the learned Trial Court refused to set aside the order dismissing the suit for default took place on 13.7.2009.

2. The learned counsel appearing for the plaintiff/appellant would submit that the original suit was filed for partition on 25.7.2007 seeking decree for partition of the suit properties to be divided by metes and bounds into four

equal shares and allot each share to the plaintiff; for future mesne profits; for declaration declaring the decree and judgement dated 21.04.1998 in O.S.No.74 of 1998 on the file of the Subordinate Judge, Dharapuram was obtained by playing fraud and collusion and not binding upon the plaintiff and also for declaration declaring that the sale deed dated 02.04.2007 in Document No.1725/07 registered with Sub-Registrar, Kangeyam is shame and nominal.

3. The suit was dismissed for default on 14.5.2008. The plaintiff filed I.A.No.34 of 2008 to restore the suit and the same was allowed on 03.02.2009. Subsequently, the suit was taken on file. Thereafter, during the pendency of the suit, the plaintiff was compelled to return to Canada for urgent purpose and could not attend the Trial Court on 13.7.2009. For his non appearance, again the suit was dismissed for default. Thereafter, I.A.No.84 of 2009 has been filed to restore the suit to file and the same was dismissed by the impugned order. Therefore, the present appeal.

4. The learned counsel appearing for the appellant would submit that it is the case between father and mother on one side and the son on the other side and huge agricultural works are involved. If the suit is restored to file, no one would be put to any prejudice. Adding further, taking support of the judgement of the Apex Court in the case of G.P.Srivatasava vs. Shri R.K.Raizada & Others reported in 2009 (II) CTC 27, he would submit that when sufficient cause has been shown, the Court may exercise its discretion to decide the matter ignoring the provision if any. On that basis, learned counsel appearing for the appellant would further submit that although the suit was dismissed on 14.5.2008, subsequently it was restored to file.

5. Adding further he would submit that the suit records would clearly show that the plaintiff had promptly appeared in chief on 31.3.2009 and the chief examination was over on 2.4.2009. Continuously, D2 and D4 have also cross-examined the plaintiff as PW1 on 16.4.2009. Later also the plaintiff had appeared on 8.5.2009. However, the matter was adjourned after summer holidays. Thereafter, as the plaintiff was compelled to go to Canada, he was unable to appear on 13.7.2009.

6. The previous counsel for the plaintiff namely, Mr.C.Kumarappan, who was handling the case before the Lower Court was later appointed as District Judge on direct recruitment. Subsequently, Mr.N.Panneerselvam, who was handing the case in the Lower Court was also appointed as Judicial Magistrate and he is presently working at Madurai. These facts would show that the plaintiff/appellant had engaged the

responsible counsels who would not adopt any delaying tactics. Therefore, he prays that the plaintiff/appellant may be given a lost chance so that he is able to go into the merit of the suit and prove that the prayer in the suit is genuine and bonafide.

7. Learned counsel appearing for the first respondent, objecting the above request would submit that it is an usual style being adopted before the Court. He would further submit that when the suit was dismissed for default as early as 14.5.2008 and restored to file, once again after keeping the matter at rest almost one year, the plaintiff allowed the suit to be dismissed for default on 13.7.2009 and therefore, the Trial Court has rightly dismissed the suit for default. Meanwhile, the suit property has been sold away creating third party interests and therefore, if the suit is restored to file again, it would not only cause prejudice to the defendants but also cause prejudice to the rights of third parties.

8. Mr.D.Krishnakumar, learned counsel appearing for the respondents 5 and 6 would submit that without knowing the fact that the suit property belongs to the fighting parties, they purchased the property on paying huge sale consideration. Now, in view of unnecessary fight taking place between the father and son, they are not able to make use of the suit property. Therefore, he prays this Court to dismiss the appeal confirming the order of dismissal of the suit.

9. This Court is not able to accept the contention made by the learned counsel appearing for the respondents. The plaintiff and D1 are father and son. Since, the plaintiff has been living in Canada since 1996, he has executed a power of attorney to his mother, wife of D1. Taking advantage of husband and wife relationship, the suit property has been alienated without the consent of the plaintiff. Moreover, the plaintiff's father has contested the suit through his wife.

10. The plaintiff was examined in chief before the trial court on 31.3.2009 and the chief examination was over on 2.4.2009 and subsequently D2 and D4 had cross-examined the plaintiff. Thereafter, since the plaintiff was compelled to return to Canada due to unavoidable reason, the suit was dismissed for default. Considering the fact that the plaintiff and one of the defendants are father and son, this Court is not able to sustain the impugned order. If the plaintiff is carrying on any business, certainly, this court will not consider the request for entertaining the present appeal.

11. As the appellant is a permanent employee in Canada, due to permanent placement in Canada, he was unable to present before the trial court on 13.7.2009. Therefore, considering the matter pending for a long time, it is deemed fit to restore the

suit to file and hence, the Trial Court is directed to dispose of the suit on merits and in accordance with law within six months from the date of the receipt of a copy of the order. It is made clear that both the parties are directed to cooperate with the trial court for early disposal of the suit on merits. The appellant/plaintiff is directed to pay cost a total sum of Rs.50,000/-, out of which Rs.25,000/- has to be paid to the defendants 5 and 6, who have appeared before this Court, within two weeks.

12. Accordingly the civil miscellaneous appeal is disposed of. No costs.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

The Additional District Judge/  
Fast Track Court No.III, Dharapuram.

+1ccs to M/s. M. Guruprasanth, Advocate, S.R.No.5265  
+1cc to Mr.D. Krishnakumar, Advocate, S.R.No.5045  
+1cc to Mr.M. Guruprasad, Advocate Sr.4856  
+1cc to Mr.P. Jagadeeswaran S.R.No.4766

UG(CO)  
EU(04/04/2016)

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C.M.A.No.262 of 2010

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