

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.12.2016

(Judgment Reserved on : 09.11.2016)

CORAM

THE HON'BLE MR.JUSTICE G.CHOCKALINGAM

C.M.A.No.2875 of 2003

Haris .. Appellant/Plaintiff

... Vs ...

1. Deensa Begam
2. Sajar Banu
3. Humayun Ali
4. Akbar Ali
5. Thasmin Ali
6. Raj Mohammed
7. Ushar Thamkar
8. Nowsath Ali .. Respondents/Defendants

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (C) of CPC, against the Order and Decreetal order of the Court of the Sub Judge, Thiruvarur, in I.A.No.446 of 2002 in O.S.No.143 of 2001, dated 25.09.2003.

For Appellant : Mr.V.Raghavachari
For Respondents : Mr.Srinath Sridevan

JUDGMENT

This civil miscellaneous appeal is directed against the Order and Decreetal order passed by the learned Sub Judge, Thiruvarur, in I.A.No.446 of 2002 in O.S.No.143 of 2001, dated 25.09.2003.

2. In this case, the appellant has filed a suit in O.S.No.143 of 2001 before the Sub Court, Thiruvarur, and the said suit was dismissed for default on 06.09.2002 and to restore the said suit, the appellant/plaintiff has filed an application under Order 9 Rule 9 and Section 151 of CPC, and the said application was taken on file as I.A.No.446 of 2002. The learned Sub-Judge, Thiruvarur, after hearing the arguments of both sides, dismissed the said application on 25.09.2003. Aggrieved by the said dismissal order passed by the learned Sub-

Judge, Thiruvarur, the present appeal is filed by the appellant/plaintiff before this Court.

3. The learned counsel for the appellant/plaintiff would mainly contend that the trial Court, without considering the facts and circumstances of the case, erroneously dismissed the application filed by the appellant and the order of the trial Court is erroneous and not maintainable in law. It is further contended that the trial Court has failed to consider the fact that the wife of the plaintiff has filed supporting affidavit and she is a competent witness. Hence, the trial Court, ought to have allowed the application filed by the plaintiff for restoration of the suit, but, erroneously dismissed the said application. Hence, the learned counsel for the appellant prayed that the order passed by the trial Court has to be set aside and the civil miscellaneous appeal has to be allowed.

4. The learned counsel for the respondents/defendants would mainly contend that the trial Court, after considering the entire facts and circumstances of the case, correctly dismissed the application filed for restoration of the suit by holding that since the wife is not a recognized power of attorney, she is not entitled to file an application for restoring the suit. Therefore, there is no illegality or infirmity in the order passed by the trial Court and hence, the learned counsel prayed that the order passed by the trial Court has to be confirmed and the civil miscellaneous appeal has to be dismissed.

5. This Court has considered the submissions made by the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and perused the entire records.

6. On perusal of the records, it is seen that the appellant herein has filed a suit in O.S.No.143 of 2001 before the Sub Court, Thiruvarur, on his personal capacity. It is admitted by both sides that the said suit was dismissed for default on 06.09.2002 and to restore the said suit, the wife of the plaintiff viz., Mrs.Bargis Banu has filed an application in I.A.No.446 of 2002 and in her affidavit filed in support of the application, she has stated that after filing of the suit, her husband gone to abroad and she only conducting the case on behalf of her husband. Further, on reading of the entire affidavit, it is clearly seen that the plaintiff has not given any power to his wife to conduct the case. In view of this, the argument of the learned counsel for the appellant that the deponent is the power agent of her husband is not at all acceptable. In this case, the deponent can adduce evidence to support the case of the plaintiff. But, since the suit filed by the plaintiff was dismissed for default, the plaintiff alone has

to file an application for restoring the suit. No person other than the plaintiff not holding any power of attorney of the plaintiff is not entitled to file an application for restoring the suit which was dismissed for default. In this case, the deponent has not produced any documents to show that she is entitled to file an application for restoring the suit under Order 9 Rule 9 of CPC. On reading of the affidavit filed by the wife of the plaintiff, it is seen that on the side of the plaintiff, they have filed a petition in I.A.No.154 of 2002 seeking interim injunction and the said application was posted on 06.09.2002 and the suit was also posted on 06.09.2002. Further, it is admitted that due to stomach pain, the wife of the plaintiff was not able to attend the Court on 06.09.2002. Except that, there was no acceptable reason put forth on the side of the plaintiff to restore the suit which was dismissed for default on 06.09.2002. Hence, this Court is of the considered view that there is no illegality or infirmity in the order passed by the trial Court in dismissing the application filed under Order 9 Rule 9 of CPC and this Court finds no reason to interfere with the order passed by the Tribunal which does not warrant any interference by this Court and hence, the civil miscellaneous appeal deserves to be dismissed.

7. In the result, the civil miscellaneous appeal is dismissed by confirming the Order and Decreetal order passed by the learned Sub-Judge, Thiruvarur, in I.A.No.446 of 2002 in O.S.No.143 of 2001, dated 25.09.2003. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
The Sub Judge,
Thiruvarur.

+1cc to Mr.V. Raghavachari, Advocate, S.R.No.73075

rk(CO)
md(15/02/2017)

C.M.A.No.2875 of 2003