

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09.2017

CORAM

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

CMA.NO.1331 of 2017

N.A.Selvarasu

..Appellant/Plaintiff

.Vs.

1.R.Palanivel Gounder

2.P.Muthusamy

3.P.Loganathan

..Respondents/ Defendants

PRAYER:- Appeal filed under Order 43 Rule 1(C) of Civil Procedure Code, to set aside the order dated 24.06.2015 made in I.A.No.132 of 2014 in O.S.No.4 of 2013 on the file of Additional District Judge, Namakkal.

For Appellant : Mr.P.Jagadeesan

For Respondents : Mr.T.Dhanya Kumar

JUDGEMENT

This appeal is filed against an order dismissing the application in I.A.No.132/2014 in O.S.No.4/2013 filed under Order 9 Rule 9 of the Code of Civil Procedure, seeking to set aside the dismissal of the suit for default.

2 The appellant, as plaintiff, filed a suit in O.S.No.4/2013, seeking Specific Performance of the Contract. Pursuant to the said contract, he has paid a sum of Rs.38,00,000/- [Rupees Thirty Eight Lakhs Only] to the defendants. The fact that a sum of Rs.38,00,000/- has been paid as advance by the plaintiff is not in dispute. When the suit was in the course of the trial, the plaintiff did not appear for cross examination and hence the suit came to be dismissed for default on 29.10.2014. Immediately on 26.11.2004, the petitioner had filed the present application in I.A.No.132/2014, seeking to set aside the order of the dismissal and to restore the suit.

3 The reason adduced for the absence is that the petitioner was suffering from jaundice and he was advised bed rest.

4 The respondents filed counter primarily contested the application on the ground that the petitioner has been irregular in appearing for cross examination earlier. Hence, he does not deserve any indulgence.

5 The learned Additional District Judge, Namakkal, after hearing the application, took note of the conduct of the petitioner in not appearing on the earlier occasions and held that in the absence of any documentary evidence to prove that the petitioner was affected by jaundice, this application cannot be allowed.

6 I do not think, that the approach of the learned Additional District Judge is correct. This Court, as well as the Hon'ble Supreme Court had held that while considering the application seeking restoration of the suit, the previous conduct of the party should not be looked into. The Court should look into the reason assigned by the party for non appearance on a particular date and the question that should be decided is as to whether the party had given sufficient cause for non-appearance on a particular date.

7 The petitioner had filed this application within the time prescribed under the Limitation Act seeking restoration of the suit. The affidavit filed in support of the application avers that he suffered from jaundice and was advised bed rest. When such a reason was assigned availability of documentary evidence as proof of the fact that he suffered from jaundice is very rare as normally native medicines are taken by jaundice patients. The past conduct and the ground, that the petitioner has not produced the documentary evidence in proof of his illness, cannot be a reason for dismissing the application. Yet another fact is that the suit is for Specific Performance, admittedly the appellant had paid a sum of Rs.38,00,000/- [Rupees Thirty Eight Lakhs Only] towards advance which is not disputed. Therefore, interest of justice will be met by allowing this application and affording an opportunity to the petitioner to prosecute the suit on merits.

8 This appeal is allowed and the order of the trial Court is set aside. The dismissal of the suit dated 29.10.2014 is set aside and the suit is restored. The trial Court is directed to dispose of the suit in O.S.No.4/2013 as expeditiously as possible within a period of six months from the date of receipt

of a copy of this Judgment. There will be no order as to costs in this appeal. Report such disposal to this Court.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

KP

To

1. The Additional District Judge,
Additional District Court,
Namakkal

2. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.T.Dhanyakumar, Advocate Sr. 65559

+1cc to M/S.P.Jagadeesan, Advocate Sr. 65320

CMA.No.1331 of 2017

SV(CO)
VR(12/10/2017)

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