

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 5TH DAY OF JANUARY 2017

THE HON'BLE MR. JUSTICE P.VELMURUGAN

A.No.2631 of 2016
in
C.S.No.652 of 2004

Mr.Mukunchand Bothra
S/o.Late.Srichand Bothra,
No.44, Veerappan Street,
Sowcarpet,
Chennai-79. ..Plaintiff

Vs

1. Rajiv Gandhi Memorial Educational Charitable Trust,
Rep.by its Managing Trustee,
No.36, Anjaneyar Koil Street,
Chennai-56.

2. Mr.R.Anbarasu,
S/o.Sri Raju Gonder,
No.36, Anjaneyar Koil Street,
Chennai-56.

3. Mr.P.Mane,
S/o.Sri S.Paramasivam Pillai,
No.16-B, Rajarathinam Street,
Kilpauk
Chennai-10

4. Mrs.A.Kamala,
W/o.Mr.R.Anbarasu,
No.36, Anjaneyar Koil Street,
Chennai-56.

5. Mr.S.Paramasivam Pillai,
S/o.Sri Shankaa Narayana Pillai,
No.16-B, Rajarathinam Street,
Kilpauk,
Chennai-10

6.Mr.T.K.T. Nathan,
S/o.T.R.Kumaraswamy Pillai,
No.16-B, Rajarathinam Street,
Kilpauk,
Chennai-10

7. Mr.M.Shanmuga Selvi,
W/o.Sri P.Mane,
No.16-B, Rajarathinam Street,
Kilpauk,
Chennai-10

8. Mr.M.Paramasivam,
S/o.Sri P.Mane,
No.16-B, Rajarathinam Street,
Kilpauk,
Chennai-10

9. M/s.Udayam Engineering College,
Nemilli Road, Chowkkanthangal Village,
Valarpuram Post,
Sriperumbudur.

..Defendants

A.No.2631 of 2016

S.Mukanchand Bothra
S/o.Srichand Bothra
No.44, Veerappan Street,
Chennai-600 079

...Applicant/1st respondent/plaintiff
VS

1.Rajiv Gandhi Memorial Educational Charitable Trust
Rep.by its Managing Trustee,
36,Anjaneyar Koil Street,
Chennai-600 056

...Contesting Respondent/Applicant/Defendant

2.R.Anbarasu
S/o.Shri Raju Gounder
36,Anjaneyar Koil Street,
Chennai-600 056

..2nd respondent/2nd defendant

3.P.Mane,
S/o.Paramasivam Pillai
No.16-B, Rajarathinam Street,
Kilpauk, Chennai- 600 010 ..3rd respondent/3rd defendant

4.Mrs.A.Kamala
W/o.R.Anbarasu
36,Anjaneyar Koil Street,
Chennai-600 056 ..4th respondent/4th defendant

5.S.Paramasivam Pillai
S/o.Shankara Narayana Pillai
No.16-B, Rajarathinam Street,
Kilpauk, Chennai- 600 010 ..5th respondent/5th defendant

6.T.K.T.Nathan,
S/o.T.R.Kumaraswamy Pillai
No.16-B, Rajarathinam Street,
Kilpauk, Chennai- 600 010 ..6th respondent/6th defendant

7.Mrs.M.Shanmuga Selvi,
W/o.P.Mani,
No.16-B, Rajarathinam Street,
Kilpauk, Chennai- 600 010 ..7th respondent/7th defendant

8.M.Paramasivam
No.16-B, Rajarathinam Street,
Kilpauk, Chennai- 600 010 ..8th respondent/8th defendant

9.M/s.Udayam Engineering College,
Nemili Road, Chowkkanthangal Village,
Valarpuram, Sriperumbudur
..Contesting Respondent/9th Applicant/9th defendant

Application praying that this Hon'ble Court be pleased to set-aside the order Dt.02.06.2016 in A.No.1646 of 2016 in C.S.No.652 of 2004 passed by the learned master.

This Application coming on this day before this court for hearing the Court made the following order:

This application is filed by the applicant/plaintiff to set aside the order dated 02.06.2016 made in A.No.1646 of 2016 in CS.No.652 of 2004 passed by the Master.

2. The averments made in the A.No.1646 of 2016 is that

the plaintiff filed the summary suit against the defendants 1 and 9 on the basis of the promissory note dated 03.04.2002 executed by the 3rd defendant. The 3rd defendant authorised to borrow any amount on behalf of defendants 1 and 9. The 3rd defendant in his individual capacity colluded with plaintiff and executed the said promissory note dated 03.04.2002. The 3rd defendant is not a trustee, any promissory note executed by the 3rd defendant is not binding on the defendants 1 and 9. During 2004, the defendants 1 and 9 have not received any summons and no summons were served on them. The defendants 1 and 9 have not pressed a leave petition in A.No.4682 of 2004. Subsequently, one R.T.Chidambaram in collusion with the plaintiff seems to have filed vakalat for defendants 1 and 9 and not filed any petition for grant of leave, later the said vakalat was returned. Thereafter, Mr.Margabandhu was engaged as counsel for D1 and D9 as he was not informed about the non filing of the petition for grant of leave.

3. On 27.03.2012, after service of summons, Mr.R.T.Chidambaram returned vakalat with no objection, then Mr.Margabandhu is engaged as their counsel. Neither the counsel nor the parties were not aware of non-filing of the petition for grant of leave. Then the application was filed to condone the delay of 653 days in filing the written statement in A.No.2597 of 2014, when the application was taken up it was found leave was not granted to defendants 1 and 9, as the service of notice was not completed and pleased to dismissed the application as not maintainable. The application should have been filed within 10days from the date of receipt of summons i.e, 07.04.2012,

due to change of circumstances, grant leave petition was not filed. The application was dismissed on the ground that leave was not granted. Hence, the applicants filed this application with an delay of 1446 days in filing the application for leave to defend the suit in CS.No.652 of 2004.

4. In the counter filed by the first respondent/plaintiff it is stated that second application seeking the same relief is barred by law and is clear resjudicata. A.No.4300 of 2004 seeking prayer to condone the delay to defend the application, the applicants have suppressed the fact and in the light of the similar application, this is the second application seeking the same prayer by the same set of persons before the same Court is clear abuse of process of law and resjudicata. When the application was taken up for hearing during 2004, the counsel who then appeared for the applicants was the same counsel who is now appearing for the applicants did not press the said application so far as the applicants are concerned and restricted the relief only to defendants 2 and 4. The present application is a second application which is clearly barred by law and it is not maintainable and the issue is already concluded by this Court and after lapse of nearly 11 years, the applicant cannot contend that they did not press in respect of defendants 1 and 9 as no summons were served. Thus the applicant have no locus standi to file this application.

5. After hearing the arguments of both sides, the learned Master passed the order on 02.06.2011, by condoning the delay of 1446 days in filing the application for leave

to defend the suit in CS.No.652 of 2004 and by stating that in order to give an opportunity to contest the suit and no prejudice will be cause to the respondent/plaintiff and allowed the application by imposing a cost of Rs.5,000/- to be paid to the respondent/plaintiff on or before 10.06.2016, failing which the application will be dismissed automatically. Against which, the applicant/plaintiff filed the present application to set aside the order dated 02.06.2016 made in A.No.1646 of 2016 in the present suit.

6. The ground raised in the present application is that the Master failed to answer the question of law raised by the applicant as to whether A.No.1646 of 2016 comes within the purview of resjudicata. The Master has simply allowed the application on the sole ground that no prejudice would be caused to the respondents and allowed the application on payment of cost of Rs.5,000/-. The second application seeking the same relief which is barred under law and no sufficient reasons has been assigned for condonation of delay. A.No.4682 of 2004 is dismissed as withdrawn in respect of defendants 1 and 9 on 22.02.2005. The present application is filed only after 11 years for the same relief.

7. Heard the rival submissions made on both sides and perused the records.

8. The applicant would submit that earlier application in A.No.4682 of 2004 was filed by defendants 1, 2, 4 and 9. Since, summons were not served to the defendants 1 and 9, that application was dismissed as not pressed against the defendants 1 and 9. After lapse of 11 years the defendants 1 and 9 have come with another application for the same

relief, but to condone the delay of 1446 days in filing the application to grant leave to defend the suit. The counsel who then appeared for the defendants 1, 2, 4 and 9 was the same counsel who is appearing for the defendants 1 and 9 did not press for the said application and restricted to the defendants 2 and 4. During the course of arguments, the Master found that no application was filed for leave to sue, the application filed to condone the delay of 653 days in filing the written statement in A.No.2597 of 2014, was not granted to defendants 1 and 9, as the service of notice was not completed and dismissed the application as not maintainable. Neither the applicant counsel nor the applicant were aware of non filing of petition to grant leave. One Mr.R.T.Chidambaram seems to have filed vakalat, later the said vakalat was returned, after service of summons on 27.03.2002, the applicant then engaged Mr.R.Margabandhu as counsel for defendants 1 and 9 as his counsel, he was not informed about non filing the petition for grant of leave.

9. The applicant would further submit that the application in A.No.1646 of 2015 is not maintainable, the learned Master ought to have dismissed the application as not maintainable on two grounds (i) second application seeking the same relief is barred by law and is a clear resjudicata and (ii) after lapse of 11 years the application is filed by the same set of parties for the similar relief. The learned Master has not assigned any reasons and simply allowed the application on the sole ground that no prejudice would be caused to the respondent and allowed the application on payment of cost of Rs.5,000/- to be paid to the respondent/plaintiff on or

before 10.06.2016, failing which the application will be dismissed automatically. Hence, the order passed by the Master is liable to be set aside.

10. On perusal of the counter filed in A.No.1646 of 2015, the first respondent/plaintiff vehemently objected that knowingly fully aware and knowledge of the pending suit, even after 11 years to engage the very same counsel, the defendants restricted their relief in respect of defendants 2 and 4 and withdrawn in respect of defendants 1 and 9, the same is barred by law and it is a clear resjudicata, the reasons stated in the delay in filing the application to condone the delay as well as leave to sue is purposely to drag on the suit proceedings, prays for dismissal of the application.

11. The main contention raised on the side of the plaintiff/party in person in this application is that the A.No.1646 of 2015 is barred by resjudicata. The Master has not given any answer for the question regarding resjudicata. It is well settled proposition of law that the resjudicata debars a Court from exercising its jurisdiction to determine the lis if it had attained finality between the parties. But in this case, this is only an application seeking the same prayer as made in the earlier application filed before this Court by the respondents/defendants 1 and 9 along with other defendants 2 and 4 in A.No.4682 of 2004 which was dismissed as not pressed on 22.02.2005, by the Master.

12. The present application is filed to condone the delay in filing the written statement and also to condone

the delay in granting leave petition. It is pertinent to refer the case of **Bhanu Kumar Jain V. Archana Kumar** reported in **AIR 2005 SC 626** wherein it is held that an interlocutory application has been dismissed for non prosecution or dismissed as withdrawn when no merits have been discussed thereon, a subsequent petition for the same reliefs is not at all barred by law, bar of resjudicata would not apply. Thus for the contentions raised by the applicant in this application, that this application is barred by resjudicata is not acceptable as laid down in the above said decisions.

13. Further, the main contention raised by the applicant/party in person is that the learned Master has not assigned any reason to allow this application, simply it is stated that if the petition is allowed no prejudice will be caused to the respondent/plaintiff and imposed a cost of Rs.5,000/- to be paid to the respondent/plaintiff on or before 10.06.2016. In A.No.2597 of 2014, no proper reasons has been assigned to condone to the delay of 653 days in filing the written statement, the Master has not considered the said aspect that the delay has to be explained for each and every day.

14. This Court, finds that the learned Master has taken lenient view in condoning the delay of 1446 in filing the application for leave to defend the suit. This Court by ignoring the entire facts and circumstances of the case to condone the delay of 1446 days in filing the application for leave to defend the suit. In that application, the applicants have stated that the summons were served on 27.03.2012, even assuming even after service of summons

they have not filed any application within the stipulated period of time and filed A.No.2597 of 2014 to condone the delay of 653 days in filing the written statement, the same was dismissed as not maintainable, on the ground that leave was not granted to defendants 1 and 9. The respondents/defendants 1 and 9 stating that neither the counsel, nor the applicants were aware of the non filing of the petition to grant leave is not acceptable one, it is the duty of the parties and also bounden duty of the respective counsel who is filing vakalat/change of vakalat on behalf of the parties should follow the applications filed before the Court, without clarifying the above aspects, the applicants have filed application in A.No.2597 of 2014 which was dismissed on merits, without challenging the said order, the applicant have filed A.No.1646 of 2016, which is the subject matter of the present A.No.2631 of 2016. The Master has not given any reason that whether the applicants in A.No.1646 of 2016 has sufficiently explained for the delay in filing the application, even after receipt of the suit notice.

15. Considering the above facts and circumstances and on bare perusal of entire records, the suit has not taken up for trial and the trial has not yet been commenced with. The order passed by the Master in A.No.1646 of 2016 dated 02.06.2016 is liable to be set aside and the same is hereby set aside.

16. In the result, this application is allowed by setting aside the order passed by the learned Master in A.No.1646 of 2016 dated 02.06.2016 and the same is restored on file.

17. Registry is directed to list the application in A.No.1646 of 2016 before the Master for fresh consideration, the Master is directed to take up the said application and dispose of the same within a period of one month, in accordance with law, after assigning valid reasons and whether the delay has been properly explained by the applicants/defendants 1 and 9 in the application.

sd/.P.V.M.J

05.01.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/01.03.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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