

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **21.02.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD.No.187 of 2014
and
M.P.No.1 of 2014

V.Arunagiri

.. Petitioner

vs

M/s.Oriental Bank of Commerce
TTK Road Branch
No.6, Sriram Nagar South Street
Alwarpet, Chennai 600108
rep.by its Senior Manager

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the ex parte order dated 08.11.2013 passed by the learned XVIII Assistant Judge, City Civil Court, Madras in I.A.No.18569 of 2012 in O.S.No.2567 of 2011.

For Petitioner : Mr.K.Ashok Kumar

For Respondent : Mr.L.Ramshankar

ORDER

The defendant has come up with the revision, challenging

the order dated 08.11.2013 passed by the learned XVIII Assistant Judge, City Civil Court, Madras in I.A.No.18569 of 2012 in O.S.No.2567 of 2011 in allowing the application filed under Order 9 Rule 9 of the Code of Civil Procedure filed by the plaintiff/respondent to restore the suit that was dismissed for non-prosecution on 20.03.2012.

2. The respondent/plaintiff filed the suit as against the defendant for recovery of money. The case was listed for hearing on 20.03.2012 and as there was no representation, the suit was dismissed for default. An affidavit was filed on behalf of the plaintiff by his counsel stating that the bundle was misplaced and the diary could not be updated and the said mistake had happened inadvertently without any intention. Therefore, accepting the above reasons given by the plaintiff, the trial court has restored the suit in the absence of the defendant. The Court below has further stated that despite service of notice, the defendant had not appeared, hence the suit was restored in his absence. Aggrieved by the said order, the revision is preferred.

3. Heard both sides.

4. It is the contention of the revision petitioner/defendant that the notices were not sent to the recent address and it was sent to the old address and hence, the same was not served on the defendant. It is further contended that the affidavit filed by the Advocate cannot be accepted, as the party also has an equal responsibility to attend to the Court.

5. The Court below having considered the fact that the plaintiff counsel is the person, who is having first hand knowledge of what is happening in the Court and that he was present, has restored the suit back to file.

6. The application for restoration was filed, by the counsel for the party, for the reason that for the fault of the Advocate, the plaintiff should not be jeopardized. Though in some of the decisions, filing of an affidavit by a counsel has been deprecated by this Court, in later decisions filing of an affidavit by the

counsel has been accepted.

7. In this regard, this Court in the judgment reported in **2007-3-LW 1044 [R.M.Bedi vs. M/s.Vijayeswari Textiles Ltd., and another]** after referring to the earlier judgments of this Court, viz.,

(i) 2004(2) MLJ 111=2004-2-L.W.239 [Antony Devaraj and another vs. Aralvaimozhi (Kurusadi Devasahayam Mount Dor and Thuya Viagula, Annai Church, represented by the Trustee and others];

(ii) 2000(1) L.W.130 [L.C.Saptharishi vs. E.D.Balasubramaniam], has held as follows:

"17. Order 9 Rule 8 C.P.C. applies when a suit is dismissed for default for non-appearance of the counsel and the party, the suit can be restored on the plaintiff establishing a good cause for his non-appearance. When a suit is dismissed for non-prosecution and absence of plaintiff's Counsel, the remedy open to him is to file an application for restoration. In a given case, where the plaintiff instructs his lawyer to seek for an adjournment for some reasons, such as sickness, bereavement in his family

or he is unable to attend the Court for some bonafide reason, the party should not suffer for non-appearance of his counsel. If a Counsel files an affidavit, he takes the risk of exposing himself as a witness to the case. The legal practitioners are certainly the agents of the parties in a case and for the fault of the agents, the clients should not suffer. It is the duty of the counsel engaged for conducting a case on behalf of the party to appear on that day, when the matter is listed for hearing. Once the Counsel is engaged as a pleader by his client, the authority to represent his client continues to remain in force.

18. In the instant case, the Lower Court has dismissed the interlocutory application merely on the ground that the application itself is not maintainable in law, since the advocate on record has filed the affidavit. In my opinion, the application cannot be disposed of as not maintainable, but the Counsel can be called upon to explain or he can recuse himself from the case.

19. In the instant case, the affidavit filed by the advocate discloses the fact that the plaintiff is an old man living in Germany. It is further stated in the affidavit that he has travelled to India to attend the Court on many occasions, but the suit was not taken up for trial. The Counsel on record has stated in her affidavit that before she could step in to the Court, the matter was called and dismissed for default, for non-appearance of the plaintiff

and the Counsel. This fact has not been specifically denied by the respondents.

20. Facts of the present case disclose that the Counsel could not represent the matter. Therefore, as a person who is conversant with the facts of the case, it is open to her to explain to the Court for her non-appearance, by filing an affidavit."

8. In the instant case also, the affidavit is filed by the Advocate admitting his mistake of misplacing the bundle and not noting the date of hearing. Though his affidavit cannot be accepted as gospel truth, as a person who is conversant with the facts of the case and who is representing the plaintiff before the Court, he is competent to file the affidavit.

9. It is of course the duty of the Advocate not to absent himself from the Court when the case of his client is called. Even if he is unable to attend the Court, he should make alternate arrangement to represent to the Court on behalf of his client. However, when the client had done everything required to be

done on his part he cannot be penalised for the absence or default or carelessness or even negligence of his lawyer.

10. In the present case, the plaintiff is a bank and the suit is for recovery of money. A counsel engaged by a party is an agent and for the fault of the agent, the client should not be allowed to suffer. The trial court in exercise of discretionary power has allowed the application.

11. In view of the above, this Court is of the view that trial Court being the best person to see the demeanour of the parties has exercised its discretion and allowed the application filed by the plaintiff's counsel, warranting no interference in this revision.

12. Accordingly, the revision fails and the same is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

21.02.2017

vj2

Index : Yes/No

Internet: Yes

To

The XVIII Assistant Judge, City Civil Court, Madras

PUSHPA SATHYANARAYANA,J.,

vj2

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