

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.3825 OF 2014

ORDER:

Heard both sides.

2. Perused the grounds of Revision and the impugned order of the lower appellate Court in C.M.A. No.12 of 2013, confirming the order of the trial Court in I.A. No.291 of 2012 in O.S. No.97 of 2007 of dismissal of the application to restore the suit dismissed for default *vide* O.S. No.97 of 2007, and other material on record including the trial Court's dismissal order and the petition and counter in I.A. No.291 of 2012.

3. No doubt, the counter of the defendants in opposing the I.A. No.291 of 2012 before the trial Court shows several adjournments taken and lack of due diligence on the part of the minor plaintiff, represented by next friend, in prosecuting the suit. However, the docket also reflects even the suit filed in 2007, several adjournments taken and written statement not even filed till 25.08.2011 and only subsequent thereto the dismissal of the suit was on 25.07.2012. Pursuant to the earlier direction dated 17.07.2012 saying the documents petition in I.A. No.225 of 2012 dismissed, counsel for plaintiff called absent even till 05:00 p.m. even the matter passed over, stay order not filed by plaintiff of the revision stated to be filed against the said document petition dismissal order in I.A. No.225 of 2012 and thereby directed to proceed with by filing chief-affidavit and the chief-affidavit not filed even the matter passed over.

4. In fact, the suit is filed on behalf of the minor represented by next friend and mother. One of the contentions including in the order of the lower Court shows that, particularly, at Para 10 from the contest of the 1st defendant was that earlier on behalf of the minor, the next friend father

filed a claim Petition in E.A. No.171 of 2006 in E.P. No.177 of 2004 and it was dismissed and the decree holder is the purchaser of the property and the sale was confirmed and the E.P. No.177 of 2004 filed for delivery of the property and at that stage filed the suit O.S. No.97 of 2007 and filed I.A. No.272 of 2007 for stay of the execution proceedings and it is therefrom in the written statement of the suit sought for dismissal of the suit and the injunction petition and the record also shows several adjournments therefrom given, ultimately suit dismissed. Thereby, the trial Court observed of no grounds to restore the suit dismissed for default and lower appellate Court on the same say of the plaintiffs confirmed the same.

5. The only thing to be considered is the Suit to be restored or not?

6. The trial Court and the lower appellate Court went beyond in saying on maintainability of the suit from the earlier claim petition filed and ended in dismissal. If at all the suit is not maintainable and liable to be dismissed from the earlier claim petition, if at all adjudicated on merits and the suit is barred by *res-judicata*, then even it is a mixed question of fact and law and requires adjudication including if at all as a preliminary issue before deciding the other issues and thus that is not a ground to dismiss the application for restoration of the suit by going into those merits. The Courts below went beyond thereby in considering the scope of the application for restoration of the suit or not. No doubt, a perusal of the counter filed before the lower Court by the defendants in opposing the petition in I.A. No.291 of 2012 sought for restoration by reflecting the trial Court's docket orders of plaintiff despite direction to file chief-affidavit not chosen to get ready. As referred *supra*, the written statement of the defendants filed only after August, 2011. It is subsequently plaintiff filed a document petition in I.A. No.225 of 2012; that petition was dismissed by

trial Court and a Revision is maintained. Even the trial Court's docket order shows the plaintiff could not show about the stay order in force in the Revision, maintained against document received dismissal application; thereby, in directing to proceed with trial and that the cause shown is that the Advocate of plaintiff could not attend the Court because attended the obsequies of one of the relatives.

7. Having regard to the above, the dismissal, that too the suit is that of the minors, of the application seeking for restoration by the trial Court and confirmed by the lower appellate Court is unsustainable. Thereby, the suit is restored to the file of the trial Court with a direction to the plaintiffs to file within one week from the date of receipt of a copy of the order chief-affidavit for the Court to proceed as expeditiously as possible, thereafter. If no chief-affidavit is filed within the stipulated time, the order of the lower appellate Court holds good for all purposes.

Accordingly, the Civil Revision Petition is allowed conditionally. As a sequel, miscellaneous petitions, if any, pending in this Revision shall stand closed. No order as to costs.

Dr. B. SIVA SANKARA RAO, J

Date: 28.12.2017.
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