

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.1866 of 2013
and M.P.No.1 of 2013

K. Gandhi ... Appellant/Petitioner

Vs.

1. M. Syed Yusuf
2. Jayagopal Chettiar ... Respondents

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (t) of Civil Procedure Code, against the fair and decretal orders dated 30.01.2013 passed in I.A.No.32 of 2012 in A.S.No.10 of 2012 on the file of the Principal District Judge, Krishnagiri.

For Appellant : Mr.P.Mani

For R2 : Mr.N.E.A.Dinesh

For R1 : No appearance

J U D G M E N T

The appellant has preferred this Civil Miscellaneous Appeal against the fair and decretal order dated 30.01.2013 passed in I.A.No.32 of 2012 in A.S.No.10 of 2012 on the file of the Principal District Judge, Krishnagiri.

2. The appellant had preferred an appeal before the District Court, Krishnagiri, against the judgment and decree dated 03.11.2011 passed in O.S.No.112 of 2016. Since he failed to appear for arguing the matter on 15.06.2012, 04.07.2012, 26.07.2012 and 28.08.2012, and since the learned counsel, who appeared for him has reported no instructions, the matter was posted in the special list on 12.09.2012. Since no instructions was reported by the learned counsel for the appellant, it was dismissed for default. Thereafter, the appellant filed an application in I.A.No.32 of 2012 to set aside the order dismissing the appeal for default.

3. The Lower Appellate Court finding that the appellant has not set out the case for illness by producing suitable medical certificates and specific details of treatment taken by him, however, considering the hardship caused to the appellant, decided to dispose of the matter on merits and gave an opportunity to the appellant to contest the case on merits. However, costs of Rs.10,000/- was awarded for the purpose of restoring the appeal and take it on file. Challenging the said order dated 30.01.2013, the appellant has come up before this Court.

4. The learned counsel appearing for the respondents would contend that the appeal itself is not maintainable as the consequential order was passed on a later date. Secondly, the appellant has deliberately delayed the proceedings and therefore, the appeal needs to be dismissed.

5. Heard the contentions made by the learned counsel appearing for both parties.

6. On considering the materials available before this Court, it is seen that considering the merits of the petition, the Lower Appellate Court passed the order dated 30.01.2013. By virtue of the said order, the appellant was given an opportunity to contest the case and the appeal was restored on condition that he pays a sum of Rs.10,000/- toward costs.

7. According to the appellant, the costs imposed is very high. The order passed in the petition on merits is a subject matter to be appealed against and the consequential order recording the legal position in the event of non-fulfillment of the condition imposed is not appealable. This Court, in the case of Ramayya Vs. Lakshmayya reported in AIR 1944 Madras 383, has clarified the decision and the same is followed in the subsequent judgment reported in AIR 1949 Madras 469 (Kommineni Kotaiah Vs. Muvva Narasimham). The relevant portion of the said judgment reads as under:-

4. To return for a moment to the judgment, that is 'exactly how the learned Judge appreciated the situation. He points out that the defendants are not there, that the plaintiffs are ready, that the defendants have not complied with the condition and that as the directions have not been obeyed, the order operates and the decrees passed already stand. It seems to be nothing more than the recording of the legal position, which had arisen from the non-fulfilment of a condition precedent by the appellants. We have perused the interlocutory applications and there was merely a reference to this judgment, which seems to be

nothing more than an intimation to the clerical staff as to what had happened then. But, in my view, no further order was passed at all and the reason, as I have indicated, is what no further order as required. It must naturally be a matter of difficulty to construe such orders as this, whether they are final or whether they require a second order to complete them. I personally am glad to give a liberal construction to these matters and not by extreme technicality to shut out an appellant from being heard; for after all that is all that he asks for. It certainly seems to me that the order of 5th July concluded the matter and I do not suppose that either the Court or the parties had any other idea in their minds. I therefore hold that as the order of 5th July was the one and only order in this case and as an appeal has been filed against it, the preliminary objection must fail. I will now deal with the suit on the merits. This case is similar to another which has recently come before us for the grant of leave, where the rights to have a suit restored have been accompanied by conditions that would appear to be unreasonable, because they are impossible of achievement. The land of the defendants had been attached before judgment and they claim that by ordering the costs of the suit to be deposited as a condition precedent, which amount to a very large sum, they have been put on terms which they cannot possibly carry out. I therefore propose to substitute what I consider to be a reasonable order for the order which has been passed. The lower Court's order is set aside and instead the following order is passed: The appellants will pay to the respondent the sum of Rs.425 altogether, which sum is made up of Rs.100 in each of the suits and the costs of these appeals which have been estimated at Rs.125. The amount will be paid within 14 days of today, 2nd March. If the amount is not paid within the time then without any further order being passed, this appeal will stand dismissed, with the result that the application to restore the suits will be taken to have been dismissed and the decrees passed already will stand.

8. Therefore, I hold that the appeal against the decreetal order dated 30.01.2013 passed in I.A.No.32 of 2012 in A.S.No.10 of 2012 is maintainable. While allowing the petition the Court has imposed the costs of Rs.10,000/-, which appear to be on the higher side. However, six years have passed by. In the

meanwhile, it is submitted by the learned counsel for the respondents that the property has already been sold as there was no impediment due to the dismissal of suit. But, still the appellant insists that he shall be permitted to contest the case on merits rather than dismissing the same on technicalities. The issue as to whether the appeal has become infructuous or not due to sale during the interregnum period is left open to the Lower Appellate Court.

9. Therefore, the appeal filed by the appellant is allowed and the costs imposed by the Lower Appellate Court is reduced as Rs.7,500/- (Rupees Seven thousand and five hundred only). The appellant is directed to pay the costs to the respondent within a period of two weeks from the date of receipt of a copy of this order and on such payment, the Lower Appellate Court is directed to dispose of the appeal on merits within a period of one month thereafter. If the order is not complied with, the order of the Lower Appellate Court dated 30.01.2013 passed in I.A.No.32 of 2012 in A.S.No.10 of 2012 shall stand confirmed.

10. In the result, this Civil Miscellaneous Appeal is allowed with the above directions. No costs. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar(CS VII)

True Copy

Sub-Assistant Registrar

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To

The Principal District Judge
Krishnagiri.

Copy to

The Section officer
VR Section, High Court, Madras.

+1 CC to Mr.V. Nicholas, Advocate sr 19185

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VGII(CO)
SP(17/04/2018)