



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON: 16.11.2017
PRONOUNCED ON: 29.01.2018
CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU
C.R.P.(MD).No.1941 of 2015 (PD)

AND

M.P.(MD).No.1 of 2015

Rajamanickam ... Petitioner / Appellant / Plaintiff

Vs.

Sethuramakrishnan ... Respondent/Respondent/ Respondent

Prayer: Petition is filed under Section 115 of Code of Civil Procedure against the fair and decreetal order made in CMA No.16 of 2010, dated 12.12.2014, on the file of 1st Additional District Judge, Madurai.

For Petitioner : Mr.S.A.Ajmal Khan
For Respondent : Mr.V.Nagendran

ORDER

The revision petitioner is the plaintiff and the respondent is the defendant. The revision petitioner / plaintiff filed a suit for permanent injunction against the respondent / defendant in O.S.No.103 of 1999 before the learned District Munsif, Melur. The learned District Munsif, Melur, by judgment dated 27.07.2000, dismissed the suit, against which the revision petitioner / plaintiff had filed an appeal in A.S.No.14 of 2001 before the I-Additional Sub Court, Madurai. Thereafter, the revision petitioner / plaintiff had also filed an interlocutory application in I.A.No.375 of 2002 in A.S.No.14 of 2001 for stay. While so, on 15.06.2006, A.S.No.14 of 2001 was dismissed for default. Thereafter, the revision petitioner / plaintiff had filed a petition in I.A.No.4 of 2009 in A.S.No.14 of 2001 for condoning the delay of 837 days in filing the restoration petition. However, the said petition was also dismissed for default on 23.06.2009. Subsequently, within 7 days of the said dismissal order, the revision petitioner herein filed a restoration petition in I.A.No.40 of 2009 in I.A.No.4 of 2009 under Order IX Rule 9 and under Section 151 of C.P.C. But, the learned Subordinate Judge dismissed the said restoration application on 08.12.2009, against which the revision petitioner filed an appeal in Civil Miscellaneous Appeal No.16 of 2010 before the learned I-Additional District Judge, Madurai. The learned appellate Judge has dismissed the above appeal on the ground of maintainability. Aggrieved by the said judgment, the revision petitioner is before this Court with the present Civil Revision Petition.



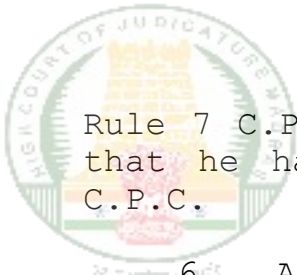
appellate Court ought to have allowed the restoration application and given an opportunity to the petitioner to contest his case on merits, as no prejudice would cause to the respondent in allowing the restoration petition, which was filed immediately i.e. within 7 days from the date of dismissal order. Further, he would submit that the lower appellate Court dismissed the appeal only on the technical ground that as against the dismissal order of restoration application, the appeal does not lie, which is not correct. He would also submit that the lower appellate Court failed to consider as per Order 43 Rule 1(c) C.P.C., the appeal is maintainable against the dismissal order passed in the petition filed under Order 9 Rule 9 of C.P.C. In support of the above submission, the learned counsel for the revision petitioner relied on the following judgments :-

- i) AIR 1976 Madhya Pradesh 136 (Nathu Prasad v. S.Kapurchant)
- ii) AIR 1959 Patna 121 (V 46 C30) (Doma Choudhary v. Ram Naresh Lal (FB)
- iii) AIR 2007 Jharkhand 45 (Rajeshwar Singh v. Dashrath Rai)
- iv) 2000 (IV) CTC 48 (Arumaga VELar v. Arulmigu Kuzhavar St.Mariamman Koil).

3. The learned counsel for the respondent / defendant would submit that after the dismissal of the condone delay petition for non prosecution, the petitioner had filed a petition to restore the same in I.A.No.40 of 2009 under the provisions of Order 9 Rule 9 C.P.C. r/w under Section 151 of C.P.C., which is illegal and the learned appellate Judge has rightly rejected the appeal holding that as against the order passed in the petition filed under Order 9 Rule 9 of C.P.C., the appeal does not lie. Therefore, he prays for dismissal of this revision petition.

4. Heard the learned counsel appearing for both sides and perused the materials available on record.

5. In this case, the appeal suit filed by the revision petitioner / plaintiff was dismissed for default on 15.06.2006. The revision petitioner / plaintiff has filed a petition under Section 5 of the Limitation Act in I.A.No.4 of 2009 in A.S.No.14 of 2001 for condoning the delay of 837 days in filing the restoration petition, which was dismissed for default on 23.06.2009. Within 7 days of the said dismissal order, the revision petitioner / plaintiff has filed a petition in I.A.No.40 of 2009 under Order IX Rule 9 C.P.C. r/w Sections 104 and 151 C.P.C. for restoration of the petition in I.A.No.4 of 2009. I.A.No.40 of 2009 was dismissed by the Court below stating that the revision petitioner / plaintiff is not interested in prosecuting the matter. As against that order, the revision petitioner / plaintiff has filed an appeal in C.M.A.No.16 of 2010 under Order 43 Rule 1 r/w Sections 104 and 151 C.P.C. which was dismissed, by the impugned judgment dated 22.12.2014, on the ground that the appeal does not lie as against the order made under Order IX Rule 9 C.P.C. Though the learned appellate Judge has held that the said interim application has been filed under Order IX



Rule 7 C.P.C., it is stated by the revision petitioner / plaintiff that he has filed the said petition only under Order IX Rule 9 C.P.C.

6. A perusal of Order 43 Rule 1(c) C.P.C. would go to show that there is no distinction between the rejection of application on merit or rejection thereof for default and as such, even if an application under Order IX Rule 9 C.P.C. is dismissed / rejected for default, there is no legal impediment in preferring an appeal against such order. The very same view has been portrayed in the decisions relied on by the learned counsel for the revision petitioner. The sole ground on which the Civil Miscellaneous Appeal was dismissed by the learned appellate Judge is not legally sustainable and hence, the impugned judgment is liable to be set aside.

7. In the result, this Civil Revision Petition is allowed and the judgment passed in C.M.A.No.16 of 2010 is set aside and the matter is remitted back to the file of the learned I-Additional District Judge, Madurai, for fresh consideration on merits and in accordance with law, within a period of four weeks. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar

To

1.The I-Additional District Judge,
Madurai.

+1cc to M/S.V.Nagendran, Advocate SR.No. 44405

Order made in
C.R.P. (MD) .No.1941 of 2015 (PD)
29.01.2018

gcg

JM/JC/SAR 3/12.02.2018/3P/3C