

HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No.1099 of 2018

ORDER :

This Civil Revision Petition, under Section 115 of C.P.C., is preferred by the petitioner/plaintiff aggrieved by the order dated 30.10.2017 in I.A.No.312 of 2017 in I.A.No.247 of 2016 in O.S.No.82 of 2014 passed by the Senior Civil Judge, Rajam, Srikakulam District (Court below) dismissing the application as infructuous.

The petitioner is plaintiff and the respondent is defendant in the suit O.S.No.82 of 2014. For the sake of convenience, the parties are referred to as they were arrayed in the suit before the Court below.

The plaintiff filed the aforesaid suit in O.S.No.82 of 2014 to declare the Settlement Deed dated 01.12.2011 executed by him in favour of the defendant in respect of the suit schedule property as null and void and also sought for grant of temporary injunction restraining the defendant and her agents from entering into the plaintiff schedule property. The said suit was posted to 29.02.2016 for filing chief affidavit of the plaintiff on payment of costs. However, as his counsel did not intimate about the same, the plaintiff could not file his chief affidavit and also pay costs, due to which the Court below dismissed the suit for default vide order dated 29.02.2016. On coming to know about the default order dated

29.02.2016 belatedly, the plaintiff filed an application in I.A.No.247 of 2016 under Order 9, Rule 9 of C.P.C., seeking to set aside the default order dated 29.02.2016 along with an application under Section 5 of the Limitation Act, to condone the delay in filing petition to set aside the said default order. When the said application in I.A.No.247 of 2016 was posted on 06.06.2016 for hearing, as the counsel for the plaintiff went to another Court and could not represent the matter, the Court below dismissed I.A.No.247 of 2016 for default. Therefore, the plaintiff filed an application in I.A.No.312 of 2017 in I.A.No.247 of 2016 in O.S.No.82 of 2014 to set aside the said default order dated 06.06.2017 in I.A.No.247 of 2016 and restore the application in I.A.No.247 of 2016 to file. However, the Court below, vide impugned order dated 30.10.2017 dismissed I.A.No.312 of 2017 as infructuous, on the ground that the petition filed by the plaintiff under Section 5 of the Limitation Act to condone the delay in filing petition under Order 9 Rule 9 C.P.C. was already dismissed for default and thereby this petition became infructuous. Hence the present Civil Revision Petition.

Heard learned counsel for the petitioner/plaintiff. Though notice is served on the respondent/defendant and proof of service has been filed, none appears for the respondent/defendant. Perused the impugned order and the material on record.

The petitioner has filed this revision petition to revise the order dated 30.10.2017 in I.A.No.312 of 2017 filed under Order IX Rule 9 and Section 159 of CPC; to set aside the default order dated 06.06.2017 in I.A.No.247 of 2016.

The said petition was dismissed as infructuous by the trial Court. The petitioner has filed I.A.No.247 of 2016 under Section 5 of the Limitation Act, to condone the delay in filing the petition under Order IX Rule 9 of CPC. I.A. was posted for counter filing on 01.04.2017 and the respondent reported no counter. On 6.6.2017, the petitioner was called absent and as there was no representation, the petition was dismissed. On the one hand, the docket shows that the petition was coming up for counter on 06.06.2017, in spite of reporting of respondent that there was no counter. This is an obvious mistake committed by the trial Court. On the other hand, the petition was dismissed as there was no representation on 06.06.2017. As the matter was posted for counter, the petitioner might have been absent. Therefore, there are no valid grounds for dismissing the petition merely because the petitioner was called absent and there was no representation on that day though the matter was coming up for counter of the respondents. Therefore, the non-speaking order passed by the trial Court is liable to be set aside.

As a matter of fact, the docket order shows that I.A.No.312 of 2017 was coming up for filing counter by the defendant. In spite of the fact that the defendant reported no

counter for the said application, the Court below dismissed the said application as delay condone petition filed by the plaintiff to condone the delay in filing petition under Order 9 Rule 9 C.P.C. was dismissed for default. There are no justifiable grounds for the Court below to dismiss the application filed to set aside the default order. Further, the only ground mentioned by the Court below to dismiss the suit was that the costs were not paid and chief affidavit was not filed by the plaintiff. For non-communication of information by the counsel about filing of chief affidavit and payment of costs, the plaintiff cannot be penalized by dismissing the suit. Therefore, the impugned order is liable to be set aside.

Accordingly, this Civil Revision Petition is allowed, setting aside the impugned order dated 30.10.2017 in I.A.No.312 of 2017 in I.A.No.247 of 2016 in O.S.No.82 of 2014 passed by the Court below. No order as to costs.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

GUDISEVA SHYAM PRASAD, J

20.04.2018.
Msr / ksm

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Msr