

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

CMA NO.3057 OF 2018
AND CMP NO.23142 OF 2018

Mohammed Haniffa

... Appellant

Vs.

1.Secretary to Government
Home Department
St. George,
Chennai - 9.

2.Director General of Police
Kamarajar Salai,
Chennai - 600 004.

3.Assistant Commissioner of Police
D.C.S. Madurai City.

4.Jeyakumar

5.Arumugam

6.Kaja Mohideen

.... Respondents

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (C) read with Section 104 of Civil Procedure Code against the order and decree dated 14.03.2018 passed in I.A.No.6663 of 2016 in O.S.No.13796 of 2010 on the file of the IV Additional Judge, City Civil Court, Chennai.

For Appellant

:

Mr.J.R.K.Bhavanantham

For Respondents

:

Mr.A.Dev Narendran

1- to 3

Government Advocate (CS)

J U D G M E N T

This Civil Miscellaneous Appeal is directed against the order dated 14.03.2018 passed in I.A.No.6663 of 2016 in O.S.No.13796 of 2016 by the learned IV Additional Judge, City Civil Court, Chennai.

2. The appellant / plaintiff filed an application under Order IX Rule 9 read with Section 151 of Civil Procedure Code to set aside the ex parte order of dismissal dated 05.08.2013 and restore the suit against the respondents 1 to 3 / defendants 1 to 3. The Trial Court dismissed the application on the ground that it was not filed along with an application to condone the delay in filing the petition.

3. The brief facts of the case is that originally the suit was filed before the Original Side of this Court. Later, due to amendments in the pecuniary jurisdiction, the suit was transferred to Civil Civil Court. The City Civil Court issued notice, after renumbering the suit, to both the parties. The appellant / plaintiff received the notice and appeared before the Court, whereas the respondents 1 to 3 / defendants 1 to 3 viz., official respondents have not appeared before the Court. The City Civil Court posted the matter for taking steps to respondents 1 to 3 / defendants 1 to 3. Since no steps were taken, the suit was dismissed as against the respondents 1 to 3 / defendants 1 to 3. The fact came to the knowledge of the appellant / plaintiff at the time of trial and therefore, he was constrained to file an application under Order IX Rule 9 of the Civil Procedure Code.

4. The learned counsel appearing for the appellant would contend that summons were served on the respondents 1 to 3/defendants 1 to 3 even when the matter was pending before this Court. The respondents 1 to 3 / defendants 1 to 3 have also filed their written statement. Thereafter, when the matter was transferred, the appellant / plaintiff received notice and he promptly appeared before the Court. He was under the bonafide impression that notice will be served and the respondents 1 to 3/defendants 1 to 3 will appear and contest the case. But the case was dismissed against the respondents 1 to 3/defendants 1 to 3 for non service of summons. The appellant / plaintiff was not at fault and therefore, the filing of the petition itself is only to cure the technical defect and there is no duty cast upon the appellant / plaintiff to take any steps after the summons were served on the respondents 1 to 3 / defendants 1 to 3. Further, learned counsel would contend that the learned Judge has applied a judgment, which is not applicable to the case on hand. As per Article 122 of the Limitation Act, where a suit or application or appeal is dismissed for default or for want of prosecution or for failure to pay cost for service or process or to furnish security, an application shall be filed within 30 days from the date of dismissal. Therefore, Article 122 of the Limitation Act will apply only in the cases of dismissal for default and not in the present case.

5. The learned Government Advocate for the respondents 1 to 3/ defendants 1 to 3 would contend that despite the notice issued by the Court, the appellant / plaintiff failed to take steps and therefore, for failure to pay cost of service or process, the case was dismissed as against the defendants 1 to 3. Therefore, when the plaintiff filed an application under Order IX Rule 9 of the Civil Procedure Code, it is incumbent upon on him to file the petition along with a petition to condone the delay in filing the same. The order of the Trial Court is correct and justified.

6. Heard the submissions made on either side and perused the materials available on record.

7. Admittedly, Article 122 of the Limitation Act will apply when the case is dismissed for default for failure to pay cost of service of process. In the instant case, the fact remains that summons were served on the respondents 1 to 3 / defendants 1 to 3, even when the matter was pending before this Court. Further, respondents 1 to 3 / defendants 1 to 3 have already filed their written statements. In that event, the objection that the appellant / plaintiff did not even taken any steps for serving of summons to the respondents 1 to 3 / defendants 1 to 3 that the suit is pending in the same stage for more than three years, is not sustainable. The suit was transferred on amendment of the provision with regard to the pecuniary jurisdiction. In that event, it is only an administrative transfer. The City Civil Court has rightly issued notice to the parties.

8. From the facts, it is seen that the appellant / plaintiff has promptly appeared before the Court and the suit was pending at the stage of framing issues. But the respondents 1 to 3 / defendants 1 to 3, have not appeared before the Court. In that event, it is the requirement of the Court to inform the defendants and not the plaintiff. Once summons were served, again the plaintiff shall not be forced to serve summons on the defendants, who have already filed written statement. Therefore, there is no failure on the part of the appellant / plaintiff to pay cost of service of process, for, process has already been completed. In fact, if at all the defendants did not appear, despite service of notice by the Court, they should have been set exparte rather than dismissing the suit for default against the defendants 1 to 3 for no fault on their side. The other contesting defendants also appeared before the Court and the matter was taken up for trial. The appellant / plaintiff also cooperated in the progress of the trial. In such an event, not taking steps for serving summons on the respondents 1 to 3 / defendants 1 to 3, cannot be a valid reason for dismissing the case against the respondents 1 to 3 / defendants 1 to 3. In that event, the appellant / plaintiff need not file any application

to restore the suit against the respondents 1 to 3 / defendants 1 to 3, much less to file a condone delay petition in support of the petition. It is only to cure the technical error committed by the Court. Therefore, this Court is inclined to restore the suit in respect of respondents 1 to 3 / defendants 1 to 3.

9. Accordingly, the suit in O.S.No.13796 of 2010 on the file of IV Additional Judge, City Civil Court, Chennai, is restored in respect of respondents 1 to 3 / defendants 1 to 3 and the Trial Court is directed to proceed to take evidence of respondents 1 to 3 / defendants 1 to 3 giving opportunity to all the parties.

10. In fine, the Civil Miscellaneous Appeal is partly allowed. No costs. Consequently, connected civil miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

TK

To

1. The IV Additional Judge
City Civil Court, Chennai.

Copy To: The Section Officer,
V.R.Section, High Court, Madras. (2 Copies)

+1 cc to Mr.J.R.K.Bhavanantham, Advocate, Sr.No. 19835

+1 cc to The Government Pleader, Sr.No. 19959

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CSL/27.06.2019

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