

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.4720 of 2019

R.Ganesan

.. Appellant

-vs-

1. The State of Tamil Nadu
rep by the District Collector
Salem, Salem 636 001
 2. Chairman
Salem Local Planning Authority
O/o Joint Director of Town and Country Planning
No.136, Neduchalai Nagar
Kasakaranur Main Road
Salem 636 005
 3. Member Secretary
Salem Local Planning Authority
O/o Joint Director of Town and Country Planning
No.5/601-B, Balaji Nagar
Subramania Nagar, First Gate
Suramangalam, Salem 636 005
 4. The Commissioner of
Corporation of Salem
Salem 636 001
 5. The Commissioner of Police
Bretts Road, Salem 636 007
 6. The Tahsildar, Salem Taluk
Cherry Road, Salem 636 001
- .. Respondents

Memorandum of Grounds of Civil Miscellaneous Appeal filed under Order XLIII, Rule 1(c) read with Section 104 of the Code of Civil Procedure, against the fair and decretal order dated 12.09.2019 made in unnumbered I.A..../2019 in O.S.No.142 of 2010 on the file of the Court of the III Additional District Judge, Salem.

For Appellant ::Mr.M.V.Karunakaran

For Respondents::Mr.Y.T.Anand Gosh
Additional Government Pleader (CS)

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous appeal has been directed against the impugned fair and decretal order dated 12.9.2019 made in unnumbered I.A..../2019 in O.S.No.142 of 2010 on the file of the learned III Additional District Judge, Salem, whereby the prayer of the appellant/plaintiff to restore the suit filed by him as forma pauperis - indigent person, which was dismissed for default on 26.10.2018 for his non-appearance, has been rejected holding that the appellant/plaintiff has filed the unnumbered application without paying the Court fee as per the direction dated 26.10.2018.

3. Mr.M.V.Karunakaran, learned counsel appearing for the appellant/plaintiff argued that when the suit in O.S.No.142 of 2010 was filed after obtaining the order dated 7.6.2010 passed in P.O.P.No.111 of 2009 by the learned Additional District Judge, Salem under Rules 1 to 3 of Order XXXIII of C.P.C., permitting the appellant/plaintiff to sue the suit as an indigent person, although the suit was dismissed for default on 26.10.2018 for his non-appearance, his status as an indigent person has not changed and continues to be an indigent person, therefore, there is no need for paying the Court fee. Secondly, the order dated 7.6.2010 passed in P.O.P.No.111 of 2009 adjudging the appellant/plaintiff as an indigent person, has not been recalled at any point of time. Therefore, he pleaded that when the order dated 7.6.2010 passed in P.O.P.No.111 of 2009 continues even today, the impugned decretal order rejecting the unnumbered application filed by the appellant/plaintiff under Order IX, Rule 9 read with Section 151 of C.P.C., to restore the suit, on the ground that the appellant/plaintiff failed to pay the Court fee is unjustified and the same is liable to be set aside.

4. Mr.Y.T.Anand Gosh, learned Additional Government Pleader (CS) appearing for the respondents, correctly taking the Court to the provision of Order XXXIII, Rule 11 of C.P.C., which reads as follows,

"Procedure where indigent person fails:--
Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where

the suit is withdrawn or dismissed,--

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person."

argued that since the suit of the appellant/plaintiff was dismissed for default for his non-appearance, his case is covered by Order XXXIII, Rule 11(b) of C.P.C., therefore, he cannot appear without even restoring the suit by paying the requisite Court fee. He also placed reliance on the judgment of the Kerala High Court in the case of Dev v. Chief Secretary, Government of Kerala, AIR 2004 Kerala 11 in support of his contention.

5. Having heard learned counsel for the parties, this Court is of the considered view that the issue raised in this appeal is squarely covered by the judgment of the Kerala High Court in the case of Dev v. Chief Secretary, Government of Kerala, AIR 2004 Kerala 11, wherein it has been observed as follows:-

"18. It is clear from the above rulings of the various High Courts and this, Court that a person who is permitted to sue as indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue as indigent person, if he fails in the suit after trial or without trial since the ultimate decision or the result of the suit and not the manner or mode in which the decision is arrived is envisaged under Rule 11 of Order XXXIII of the Civil Procedure Code.

19. The counsel for the petitioner submitted that in view of the scheme of Order 33 of the C.P.C., failure in a suit cannot be equated with the dismissal of the suit since dismissal has been dealt with separately under Clauses (a) and (b) of Rule 11. According to him, failure should be a total

failure of the entire claim in the suit and the suit should be devoid of any merit, any rhyme or reason without possessing a modicum of success. He argued that in this case the petitioner-appellant failed in the suit due to lack of evidence and since the suit is dismissed for insufficiency of evidence, it cannot be treated as failure as contemplated in Rule 11 of Order 33 of the C.P.C. He further argued that in the judgment passed by this Court in appeal this Court merely dismissed the appeal and has not held that the plaintiff has failed in the suit. Therefore, according to him, Rule 11 of Order 33 is not attracted at all in this case.

20. The above submissions made by the counsel for the petitioner though attractive, cannot be countenanced. It is clear from the decisions referred to above that failure of the suit contemplated in Rule 11 of Order 33 of the C.P.C. take in the dismissal of the suit. Therefore, the above submissions made by the counsel for the petitioner are devoid of any merits."

Secondly, this Court could see that it is not the case of dismissal of the suit for default for non-appearance of the appellant/plaintiff on a single day, because, it could be seen from the records that on the following three occasions, namely, 22.10.2018, 24.10.2018 and 26.10.2018, the appellant/plaintiff repeatedly failed to appear. Therefore, the Court below has dismissed the suit for default on 26.10.2018 and his subsequent prayer to restore the suit has also been rightly rejected by the impugned decretal order. In view thereof, finding no infirmity with the impugned decretal order, the civil miscellaneous appeal stands dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

ss

To

1. The III Additional District Judge
Salem

Copy To:

The District Collector
Salem, Salem 636 001

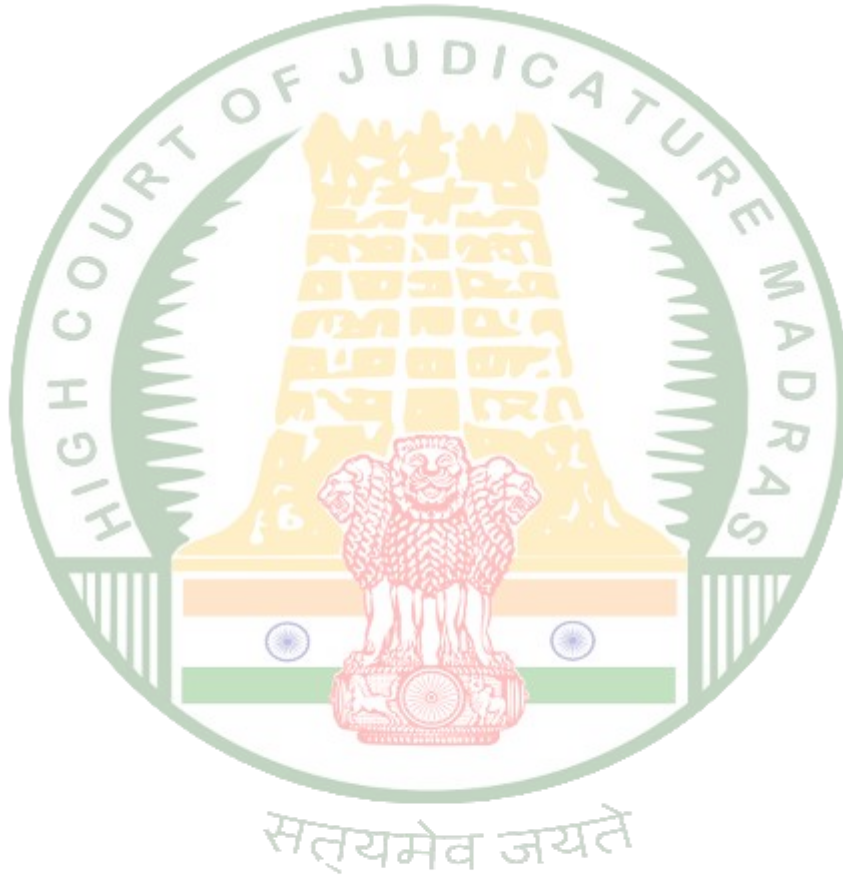
+2cc to M/s.K.Vennila, Advocate, Sr.No. 42694

+1 cc to The Government Pleader Sr.No. 42981

C.M.A.No.4720 of 2019

VSNII (CO)

RMP (15/04/2021)



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