

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.03.2021

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

C.M.A.No.2002 of 2017
and
C.M.P.No.10807 of 2017

N.Farida Azizullah

.. Appellant

Vs.

K.Meikandan

.. Respondent

PRAYER : Civil Miscellaneous Appeal (CMA) is filed under Order 43 rule 1(d) r/w Section 104 of Civil Procedure Code, against the appeal to set aside the order dated 19.04.2017 made in I.A.No.196 of 2016 in O.S.No.1741 of 2013 on the file of the learned XVIII Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.V.Manisekaran

For Respondent : No appearance

J U D G M E N T

The appellant herein is the defendant in O.S.No.1741 of 2013 on the file of the learned XVIII Additional Judge, City Civil Court, Chennai filed by the respondent / plaintiff filed a suit for declaration and other consequential reliefs.

2. The appellant / defendant also contested the case by filing his written statement.

3. When the suit was posted for trial, P.W.1 was partly cross-examined on the side of the defendant and posted for further consideration of the cross-examination on 05.12.2016. Since that day, as her counsel failed to appear before the Court, the evidence of P.W.1. was closed. Thereafter, she remained absent and subsequently ex-parte decree was passed on 07.12.2016. On verifying the A-Register she came to know that the ex-parte decree has been passed, as she had valid defence and due to her counsel's absence she was not able to cross examine P.W.1 on that day. So she filed a petition to set aside the ex-parte decree in I.A.No.196 of 2016 under Order 9 Rule 13

of CPC and the same was contested by plaintiff.

4. On enquiry the trial Judge concluded that the defendant's contentions are false and even on previous occasions she remains absent and to set aside the ex-parte decree the I.A.No.150 of 2015 and the same was allowed with the condition to cross examine the plaintiff's witness, but again she failed, so the trial Judge concluded that without reasonable cause she preferred these types of vexatious applications. Aggrieved by the order, the appellant / defendant has preferred this appeal.

5. The question of law that arise for consideration is as to

"whether the trial Judge without giving opportunity to defend her case erroneously dismissed the petition filed by the appellant under Order 9(13) of CPC to set aside the ex-parte decree and to defend the case?"

6. At the time of arguments the learned counsel for appellant submits that she was not willfully absent on that day due to the illness of her counsel's daughter her counsel was absent. The trial Judge without giving one more opportunity to defend her case closed the evidence of P.W.1 immediately on the next hearing itself.

7. On perusal of the records the suit was filed by the plaintiff in the year 2013 for declaration and for further consequential reliefs. At that time she was aged about 63 years. Now the learned counsel for the appellant reported that during the pendency of the CMA the plaintiff passed away and the suit was posted in the year 2015 for trial, but the appellant remained ex-parte on two occasions. So the trial Judge dismissed her petition concluding that the reason stated by her is not justifiable one. Now before this Court she prayed one more opportunity to defend her case.

8. Considering the facts and circumstances she is also entitled to put her defence, but on considering her conduct due to her absence only the proceedings were dragged on till date without reaching finality. Hence, she is directed to deposit 50 % of the suit cost i.e, a sum of Rs.50,000/- before the trial Court and on such deposit of the cost, the petition will be allowed, failing which, the petition stands dismissed.

9. The appellant is directed to deposit a sum of Rs.50,000/- in O.S.NO.1741 of 2013 on or before 07.06.2021. On such deposit being made the order dated 19.04.2017 made in I.A.No.196 of 2016 in O.S.No.1741 of 2013 by the learned

XVIII Additional Judge, City Civil Court, Chennai is set aside and the I.A.No. 196 of 2016 in O.S.No.1741 of 2013 shall be allowed by the learned XVIII Additional Judge, City Civil Court, Chennai, failing which, the order dated 19.04.2017 made in I.A.No.196 of 2016 in O.S.No.1741 of 2013 shall stand unaltered. The parties are directed to take steps to implead the legal heirs of the plaintiff before the trial Court for conducting further proceedings.

10. In view of the above, this Civil Miscellaneous Appeal is ordered accordingly. Consequently connected Civil Miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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To

The XVIIIth Additional Judge,
City Civil Court, Chennai.

Copy to:
The Section Officer,
VR Section,
High Court, Madras.

+lcc to Mr.V.Manisekaran, Advocate, S.R.No.20531

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and
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KV(CO)
CB(17/04/2021)

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