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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.03.2022

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

CMA.No.1326/2017 and CMP.No.6875/2017

M.Kripanithi

... Applicant /
Petitioner / Plaintiff

Versus

1.P.Anbumani
2.V.Murugesan
3.V.Nagappan
4.N.Sankar

Respondents 1 o 4 represented
through their power agent S.Uthamchand & Dhanapal.

5.S.Utham Chand
6.D.Dhanapal
7.P.S.M.Ahamed Abdul Kadar

... Respondents/
Respondents/Defendants

Prayer : -

Civil Miscellaneous Appeal filed under under Order 43 Rule 1 of CPC, preferred this Memorandum of Civil Miscellaneous Appeal against the fair and final order dated 13.08.2014 made in I.A.No.13231/2012 in O.S.No.3180/2005 on the file of the learned III Additional Judge, City Civil Court, Chennai.

For Appellant	:	Mr.G.Ethirajulu
For R1 to R6	:	No appearance
For R7	:	Mr.V.Raghavachari

JUDGMENT

- (1) The plaintiff in OS.No.3180/2005 which suit was pending on the file of the learned III Additional Judge, City Civil Court, Chennai, is the appellant herein.
- (2) OS.No.3180/2005 had been filed by the plaintiff seeking specific performance of 1/10th share with respect to the



suit property consequent to an Agreement of Sale dated 08.06.1995. The suit property is land and building measuring 2 grounds and 1299 sq.ft., in Mahalakshmi Street, T.Nagar, Chennai.

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- (3) The suit had been instituted against 7 defendants. The said suit, unfortunately, did not proceed in its normal way and owing to various reasons, when it was posted in the special list, owing to non appearance of the plaintiff, had been dismissed for non prosecution on 12.09.2007. The plaintiff then appears to have filed an Interlocutory Application under Order 9 Rule 9 of CPC in SR.No.46167/2007 and a perusal of the original records shows that it had been presented in the office on 22.10.2007. This would indicate that the application had been presented well after thirty days which is the time prescribed within which an application under Order 9 Rule 9 of CPC should be filed. Since it had been filed after expiry of thirty days, an application to condone the delay under Section 5 of the Limitation Act should have been filed. It was not filed. The fact that it was not filed and that it was prerequisite to file the application under Order 9 Rule 9 of CPC was also not pointed out either by the Registry in the City Civil Court or by the learned Judge who subsequently took it up for consideration. This particular Interlocutory Application in IA.SR.No.46167/2007 also did not proceed in a normal manner.
- (4) The records reveal that it was returned for compliance, namely, to give the correct date of the exparte order on 24.12.2012. It was represented on the very same day and correction has been made in the affidavit with respect to the date on which the suit was dismissed for non prosecution. The said correction in the affidavit had also not been attested by the advocate who had attested the affidavit as required under the Civil Rules of Practice. At any rate, the Interlocutory Application was assigned a number as IA.No.13231/2012. That came up for hearing for at least two years and finally, it was dismissed by an order dated 13.08.2014. Questioning that particular order, the present Appeal had been filed by the plaintiff.
- (5) Heard Mr.G.Ethirajulu, learned counsel for the appellant and Mr.V.Raghavachari, learned counsel appearing for the 7th respondent.
- (6) In view of the fact that there was no clarity with respect to the actual date on which the Interlocutory Application under Order 9 Rule 9 of CPC has been presented before the City Civil Court, both the learned counsels had stated that



it would only be appropriate that this Court examines the original records and I should be grateful for that particular suggestion given by the learned counsels and accordingly, the original records were summoned.

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- (7) A perusal of the same would show that though the affidavit and petition, which are both dated 19.09.2007, had been presented in the City Civil Court only on 22.10.2007. It was returned only on 24.08.2012 and it was represented on the same day. A further aspect which now comes to the notice of this Court is that it was returned for giving the correct date on which the suit was dismissed for non prosecution and the date had been corrected in the affidavit, but the said correction had not been attested or verified. The Rules of Practice states that any correction in an affidavit should be attested by the Advocate, who attested the affidavit when it was originally filed. This would also indicate that the correction carried out in the affidavit with respect to the date itself was improper.
- (8) At any rate, this fact was not noticed by the learned III Additional Judge, City Civil Court, Chennai. In the course of the order, the learned Judge had, in paragraph No.3, stated that the petition and the affidavit had been filed on 19.09.2007. But, later had also observed that it was presented only on 22.10.2007 and also observed that it had been presented after the period of limitation and the actual word used by the learned Judge was ' ' காலதாமதமாக ' '. Thereafter, in the order now questioned in this appeal, the learned III Additional Judge, City Civil Court, Chennai, has again observed that the application was presented before the Registry only on 22.10.2007 and it also noticed the seal of the Registry bearing that particular date and had finally dismissed the application stating that it was not maintainable.
- (9) Mr.G.Ethirajulu, learned counsel for the appellant had stated that the appellant cannot be faulted for the manner in which the Interlocutory Application stuttered in its progress since it has been filed on 22.10.2007 and if on that particular day, there had been a delay apparent on the face of the record, then the Registry in the City Civil Court, should have returned the application and should have put the appellant on notice, that there was a delay and that an application seeking condonation of delay should have been filed.
- (10) It was also seen that the application which had been filed on 22.10.2007, was actually considered by the Registry or by the Court official only on 24.08.2012, nearly about five



years later.

(11) When the application was presented before the Registry on 22.10.2007, the counsel or the appellant cannot plead ignorance of a basic principle of law that it had been presented after thirty days after the dismissal of the suit and therefore, an application to condone the delay should have been filed. The Registry in the City Civil Court had kept it pending in their office for about five years and thereafter, made a cursory return stating that the date of dismissal of the suit had not been correctly mentioned. That date had been corrected without the correction being attested by the Advocate who had attested the affidavit and therefore, there is a violation of the rules as prescribed under the Civil Rules of Practice.

(12) An order had been finally passed stating that the application is not maintainable. But in the order, the learned Judge should have stated that the application is not maintainable owing to the fact that it should have been accompanied by another application to condone the delay in filing the said application. To that limited extent alone, let me interfere with the order passed and set aside the same.

(13) But, this does not mean that the application is allowed. The order passed in non est only because the learned Judge should have been insisted that an application under Section 5 of Limitation Act should have been filed and overlooking that particular basic fact, passing an order in the application under Order 9 Rule 9 of CPC either dismissing it or allowing it would render the order non est and will necessarily have to be interfered with by this Court.

(14) Let the appellant now file an application seeking to condone the delay in filing an application to set aside the dismissal of the suit for non prosecution dated 12.09.2007. If there had been any intervening holidays, the learned counsel for the appellant can take advantage of the same. If such application is filed, let it be decided on merits and thereafter, let IA.SR.No.46167/2007 which had been assigned IA.No.13231/2012 be examined. The order is set aside as being non est and the Civil Miscellaneous Appeal is allowed. But, this does not give any vested right to the appellant herein. The suit will remain dismissed for non prosecution. It is for the appellant to work out his remedy in manner known to law, first by filing an



application under Section 5 of the Limitation Act. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

AP

To

1. The III Additional Judge,
City Civil Court, Chennai.
2. Copy to :-
The Section Officer
VR Records, High Court
Madras.

+1cc to Mr.V.Raghavachari Advocate, S.R.No.19209
+1cc to Mr.G.Ethirajulu, Advocate, S.R.No.19356

CMA.No.1326/2017

AK-II(CO)
CT 24/05/2022