



C.M.A(MD)No.867 of 2022

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 04.11.2022

PRONOUNCED ON: 20.01.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.867 of 2022

P.Shanmugavel : Appellant/ Petitioner

Vs.

G.Ismail Thamby : Respondent / Respondent

PRAYER:- Civil Miscellaneous Appeals filed under Order XLIII Rule 1(c) of the Code of Civil Procedure, to set aside the impugned order dated 04.07.2022, passed in I.A.No.1 of 2022 in O.S.No.83 of 2016, on the file of I Additional District Court, Tirunelveli.

For Appellant : Mr.R.Narayanan

For Respondent :Mr.S.Mani



C.M.A(MD)No.867 of 2022

WEB COPY

JUDGMENT

The Civil Miscellaneous Appeal is directed against the order passed in I.A.No.1 of 2022 in O.S.No.83 of 2016, dated 04.07.2022, on the file of I Additional District Court, Tirunelveli, dismissing the petition filed under Order 9 Rule 9 C.P.C.

2. The petitioner/plaintiff has filed a suit for recovery of Rs.43,71,600/- with interest and costs from the defendant in O.S.No.83 of 2016 and the same was pending on the file of I Additional District Court, Tirunelveli. It is not in dispute that when the suit was posted for trial on 09.02.2018, since the petitioner/plaintiff's Counsel reported no instructions and the plaintiff was also called absent, the suit was dismissed for default. The above petition came to be filed under Order 9 Rule 9 C.P.C., for setting aside the order of dismissal for default dated 09.02.2018 and to restore the suit to file.

3. The petitioner's case is that he suffered with jaundice from the last week of December 2017 and was taking native medicine for the



C.M.A(MD)No.867 of 2022

same, that due to his illness, he was unable to contact his Counsel and to follow the case, that since the petitioner failed to contact his Counsel, the Counsel reported no instructions and he was called absent and finally, the suit was dismissed for default, that after initial recovery, he contacted his Counsel in the first week of March 2018 and came to know about the dismissal order, that the petitioner's inability to attend the Court and to contact his Counsel during the interregnum period is neither wilful nor wanton and that serious loss and hardship would be caused to the petitioner, if the suit is not restored.

4. The respondent/defendant has filed a counter statement stating that the petitioner filed the above petition within the time and got it returned, that this strategy was practised by the petitioner for nearly more than 4 years and finally represented the petition in the year 2022, that the petitioner did not explain each and every day's delay, that there is a delay of more than 1500 days delay in filing the petition, that the petitioner's contention that he was affected by jaundice is not true and that therefore, the petition is liable to be dismissed.



C.M.A(MD)No.867 of 2022

WEB COPY

5. The learned I Additional District Judge, after enquiry, has passed the impugned order dated 04.07.2022, dismissing the said petition.

6. The learned Counsel for the appellant would submit that the trial Court ought to have considered that the restoration petition was returned after nearly four months, without any time limit for representation, that the pandemic tough times intervened in the meantime and the period of limitation was excluded by the Hon'ble Supreme Court, that the said petition was represented and considering the circumstances, the same was numbered, that the trial Court ought to have considered that the restoration petition was filed within 30 days since the date of dismissal and that therefore, the Civil Miscellaneous Appeal is liable to be allowed.

7. The points that arise for consideration are

(1) Whether the trial Court erred in giving a finding that the restoration petition filed on 12.03.2018 was barred by time, despite showing that the petition was filed within the time limit prescribed by the Limitation Act?



C.M.A(MD)No.867 of 2022

WEB COPY

(2) Whether the Civil Miscellaneous Appeal is to be allowed?

Points 1 and 2:

8. The main reason assigned by the trial Court for dismissing the restoration petition is that the petitioner has filed the restoration petition on 12.03.2018, which is not within the time, as the petitioner ought to have filed the petition on or before 09.03.2018 as per the limitation fixed for Order 9 Rule 9 C.P.C., petition, and that since the petitioner has failed to file any application under Section 5 of the Limitation Act to excuse the delay in filing the restoration petition, the above petition is legally unsustainable.

9. Admittedly, the suit was dismissed for default on 09.02.2018 and the restoration petition came to be filed on 12.03.2018. The learned Counsel for the appellant has also produced a copy of the calender for the months of February 2018 and March 2018. As per Section 12(1) of the Limitation Act, the day from which the period of limitation is to be reckoned while computing the period of limitation shall be excluded. As per the above provision, if we exclude 09.02.2018, the thirty days period



C.M.A(MD)No.867 of 2022

WEB COPY

of limitation was expired on 11.03.2018. Section 4 of the Limitation Act contemplates that where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. As rightly pointed out by the learned Counsel for the petitioner, the petitioner by invoking Section 4 of the Limitation Act, has filed the restoration petition on 12.03.2018, ie., the next working day. Considering the above, this Court has no hesitation to hold that the restoration petition was filed in time and the finding of the trial Court that the same was not filed within the period of limitation is not proper.

10. It is evident from the records that the restoration petition was returned on 02.07.2018 and the same was represented on 22.01.2022 and the petition was again returned on 27.01.2022 and the same was represented again on 02.02.2022. The main objection of the respondent is that there is a delay of more than 1500 days in filing the petition and that the petitioner has adopted strategy in representing the petition again and again and after the lapse of more than four years, the petition was represented finally in the year 2022.



C.M.A(MD)No.867 of 2022

WEB COPY

11. As rightly observed by the learned trial Judge, the trial Court has not fixed any time limit for representing the petition which was returned by the Court. But at the same time, the petitioner should have represented the petition within a reasonable time and since because the Court has not specified any time limit, it cannot be taken as licence to file the petition after several years, considering the above, this Court has no other option, but to say that the petitioner is also at fault. Hence, this Court concludes that the petitioner should be given an opportunity to prosecute the suit, but at the same time, taking note of the delay caused by him and his conduct, this Court further decides that the petitioner must be mulcted with costs.

12. In the result, the Civil Miscellaneous Appeal will be allowed on payment of cost of Rs.5,000/-(Rupees Five Thousand only) to the respondent on or before 06.02.2023, failing which this Civil Miscellaneous Appeal shall stand dismissed.



C.M.A(MD)No.867 of 2022

13. List the matter on 07.02.2023 for reporting compliance.

20.01.2023

Index : Yes : No

Internet : Yes : No

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To

I Additional District Court, Tirunelveli.



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C.M.A(MD)No.867 of 2022

K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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20.01.2023