

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **20.03.2023**

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1276 of 2015

Yahappan @ Thiyaharajan

... Appellant/Petitioner/
Plaintiff

Vs.

1.Anthoniammal

2.Rayammal

3.Gannammal

4.Irundayam alias Devendran

5.Pakkiyam

6.M/s.Shubh Reality (South) Pvt.Ltd.,
Valliyoor,
Through Power Agent Iyyakutty.

7.M/s.Suzlon Engitech Ltd.,
Pune,
Through its Power Agent Gopalakrishnan.

8.Mariya Sornam

... Respondents/ Respondents/
Defendants

PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of Code of Civil Procedure, to set aside the orders passed in I.A.No.29 of 2014 in O.S.No.36 of 2011 on the file of I Additional District and Sessions Judge, Tirunelveli dated 10.07.2015 and thereby direct the trial Court to restore the above suit.

For Appellant : Mr.M.P.Senthil

For R1 – R5 & R8 :No Appearance

For R6&R7 : Mr.T.Antony Arulraj

JUDGEMENT

The present appeal has been filed by the plaintiff in a suit for partition challenging an order of dismissal of an application to restore the suit.

2. When the suit was posted for trial on 27.08.2013, the plaintiff has not appeared and the suit was dismissed for default on the said date. The plaintiff had filed I.A.No.29 of 2014 seeking to restore the suit on the ground that he was affected with Jaundice and he was taking herbal medicine and therefore, he was not able to appear before the Court on the said date.

3. The 8th defendant had filed a counter contending that the application to restore the suit was filed on the last date of limitation without serving upon the other side. The application was returned for rectifying certain defects and again, the case was represented only on the last date of limitation. Therefore, there are no bona fides on the part of the plaintiff to conduct the trial of the suit.

4. The learned trial Judge who considered the submissions on either side, had dismissed the application on the ground that filing of an application for restoration of the suit on the last day of limitation would reflect the conduct of the plaintiff and dismissed the said application. Challenging the same, the present appeal has been filed by the plaintiff.

5. According to the learned counsel appearing for the plaintiff, the suit is for partition and it has got recurring cause of action and therefore, the dismissal of a suit for default cannot be a bar for filing a fresh suit. In such an event, the suit ought to have been restored by the trial Court.

6. Per contra, the learned counsel appearing for the contesting defendants had contended that the suit has been filed by the plaintiff in collusion with the co-sharers, from whom he has purchased the property and therefore, the only intention of the plaintiff is to drag on the proceedings and he prayed for confirmation of the order passed by the trial Court.

7. I have carefully considered the submissions made on either side.

8. There is no dispute that the suit for partition has been dismissed for default and the application filed in time to restore the same has been dismissed. Considering the fact that it is a partition suit and a fresh suit is maintainable, even if the first suit is dismissed for default, this Court is of the considered opinion that the trial Court ought to have allowed the application to restore the suit.

9. In view of the aforesaid facts, the order impugned in the appeal is set aside. I.A.No.29 of 2014 is hereby allowed and the suit is restored to file. The parties on either side are directed to cooperate for the early disposal of the suit. The learned trial Judge is directed to dispose of the

partition suit on or before 31.12.2023.

10. With the above said observations, this Civil Miscellaneous Appeal stands allowed. No costs.

20.03.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To

- 1.The I Additional District and
Sessions Judge,
Tirunelveli.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

R.VIJAYAKUMAR ,J.

C.M.A(MD)No.1276 of 2015

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Order made in
C.M.A(MD)No.1276 of 2015

20.03.2023