



CMA.(MD)No.538 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 10/06/2024

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The Hon'ble Mr.Justice **G.ILANGOVAN**

CMA (MD) No. 538 of 2021

N.G.Leela : Appellant/Petitioner/
Plaintiff

Vs.

1.M.K.Jagadeesh Chandra Babu
2.M.K.Premkumar Babu : Respondents/Respondents/
Defendants

PRAYER:- Civil Miscellaneous Appeal is filed under Section 104 r/w Order 43 Rule 1 of CPC, to set aside the fair and executable order, dated 07/11/2020 passed in IA No.640 of 2019 in OS No.80 of 2009 on the file of the IV Additional District Judge, Madurai and readmit the suit.

For Appellant : Mr.Mr.Arjun
for Mr.N.Vallinayagam

For Respondents : Mr.S.Subbaih
Senior counsel
for Mr.S.Mahesh Babu

JUDGMENT

This Civil Miscellaneous Appeal is filed seeking an order to set aside the fair and executable order, dated 07/11/2020 passed in IA No.640 of 2019 in OS No.80 of 2009 by the IV Additional District Judge, Madurai.



2. The facts in brief:-

Suit in OS No.80 of 2009 was filed seeking the relief preliminary decree for partition and separate possession of the 1/3rd share of the plaintiff, permanent injunction, etc. The defendants entered appearance filed written statement. After framing the relevant issues, trial started. Midway, a petition was taken out in IA No. 192 of 2019 to take the disputed document for sending comparison. With the above said direction, the case was periodically adjourned to 11/03/2019 and 24/04/2019. On that date, the defendants 1 and 2 were present. But the petitioner herein failed. So, it was dismissed for default on 24/04/2019.

3.To restore the suit, the present IA was taken out namely IA No.640 of 2019 by the appellant stating that she could not produce the document to the Advocate since she required the same to keep along with the current Passport. So, she requested her Advocate to get adjournment till June, so that she can return to India and produce the same.

4.Later she came down to India. At that time, she was informed that the suit was dismissed for default for non-production of the original passport.



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5.A detailed counter was filed by the defendants setting out the dates and events.

6.The trial court also by elaborately setting out the dates and events, dismissed the petition stating that the petitioner is not a bona-fide person.

7.Against which, this civil miscellaneous appeal is preferred.

8.Heard both sides.

9.At the outset, the learned Senior Counsel appearing for the respondents would take this court through the plaint as well as the written statement averments. He would submit that 'A' schedule property was completely sold out; Now it is not available for partition; 'B' schedule was partitioned in 1984; After a lapse of several years, the suit is filed seeking the relief of partition only to keep the respondents herein under the threat of continuous litigation.

10.Apart from that, it is also submitted that this is the third application in succession. According to him, he thrice failed to appear before the trial court and



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thrice, it was dismissed. Several applications were filed even to implead the tenant. In short, he tries to impress upon the court that the plaint itself is devoid of merits and the merit-less plaint should not be ordered to be tried to its conclusion.

11.Per contra, the learned counsel appearing for the appellant would submit that the merit of the suit cannot be gone into in this petition; The reason for non-production of the document is sufficiently explained by the appellant. So opportunity must be given to the appellant to see that the suit is to its logical conclusion. Further submitted that the case is in the part-heard stage. Mere non-production of the records directed by the trial court is not a valid ground to dismiss the suit for default. If at all, at best the trial court may take adverse inference against the plaintiff at the time of conclusion of the trial. Except that, no power is available. But the trial court dismissed the suit for default. He would rely upon the judgement of the Hon'ble Supreme Court reported in **G.P. SRIVASTAVA Vs.SHRI R.K. RAIZADA & ORS [(2000) 3 SCC 54]** to impress upon the court that sufficient cause is shown by the appellant.



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12. Reading of the judgment of the trial court shows that the case was called on 24/04/2019. The defendants and their counsel present. But the plaintiff did not produce the document. So the suit was dismissed for default. The stage of the suit also requires to be taken note of.

13. The 'B' diary of the trial court shows that the evidence on the side of the plaintiff was over and DW1 chief in affidavit was also filed. Later IA No.411 of 2019 was filed. That was allowed. Thereafter, petition filed for sending the document for forensic science examination. Later, it was adjourned for production of the original Passport by the plaintiff. On 24/04/2019, she failed to appear and produce the document. So the suit is dismissed for default.

14. The point arises for consideration is whether the default on the part of the plaintiff to produce the document will entail the dismissal of the suit without advertent to the merits. Failure to produce the document will entail either dismissal or striking of the defence is available to the trial court only in case of an order passed under Order 11 Rule 12 CPC.



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15. Here, the impugned order is not passed by exercising the power under Order 11 Rule 12 CPC. But here, the document ordered to be produced for the purpose of sending the same to the expert for comparison. This document is not a title document. So as rightly pointed by the appellant's counsel, non-production of the document, if at all, at best can be taken as a point to draw adverse inference, at the time of conclusion of the trial process. The document can be examined with the available records. But here, it appears that it was not send to the lab. So passing the present order not proper and legal also.

16. To the query made by this court, the learned counsel appearing for the appellant submitted that the original document is available with him, but could not produce since it was required for renewal of the Passport. Now whatever it may be, here the document is available with the him. He has to necessarily produce the same before the trial court. If in-spite of this order the appellant failed to produce the document, then adverse inference can be drawn by the trial court. But on the legal ground, I am of the considered view that the order passed by the trial court is not proper and legal, which requires interference.



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17.In the result, this Civil Miscellaneous Appeal is **allowed** on payment of cost of **Rs.10,000/-** (Rupees Ten Thousand only). The cost must be deposited before the trial court within a week from the date of receipt of a copy of this order. On deposit is made, the trial court is directed to restore the suit on its file. The trial court is also directed to send notice to both parties on restoration of the suit and proceed in accordance with law, from the stage where it was closed. The respondents are at liberty to withdraw the amount by filing proper application before the trial court. Further, considering the oldness of the matter and also considering the fact that the parties are dragging on the matter endlessly, there shall be a direction to the trial court to follow the directions issued by this Court in R.O.C.No. 984/2015/RG/B5 dated 25.02.2016 wherein this Court directs the trial Courts to expedite the trial process in the matters pending for more than 5 years.

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Internet:Yes/No
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To,

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1.The IV Additional District Judge,
Madurai.

2.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGOVAN, J

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