(2010) 11 MAD CK 0196

Madras High Court

Case No: C.R.P.PD. No. 1044 of 2005 and C.M.P. No. 12428 of 2008

Saraswathi, Kulanthasami Gounder, Rajendran and Marisami @ Marappa Gounder	APPELLANT
Vs	
Myli and Manivel	RESPONDENT

Date of Decision: Nov. 30, 2010

Citation: (2010) 11 MAD CK 0196

Hon'ble Judges: V. Periya Karuppiah, J

Bench: Single Bench

Advocate: N. Manokaran, for the Appellant; K. Soundararajan, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V. Periya Karuppiah, J.
This Revision Petition has been filed against the order passed by the lower Court in I.A. No. 32 of 2005 in O.S.

No. 80 of 2002 dated 21.02.2005, an application to restore the suit filed, which was dismissed for default on 01.10.2004.

2. Heard Mr. N. Manokaran, learned Counsel for the Petitioners and Mr. K. Soundararajan, learned Counsel for the Respondents.

3. The learned Counsel for the Petitioners would submit in his argument that the Petitioners were the Defendants in the suit in O.S. No. 80 of 2002

filed by the Respondents for declaration of title to the suit properties and for permanent injunction and costs and the said suit was contested by the

Defendants, and the same was dismissed for default on 01.10.2004 and the Plaintiff had filed a petition within time on 05.10.2004 but presented

the affidavit duly signed on 01.12.2004 which is not correct. He would further submit in his argument that the affidavit was subsequently filed by

the Respondents therefore, the petition filed on 05.10.2004 was not a proper presentation. He would further submit in his argument that the lower

Court had not considered that point but had come to the conclusion that the reasons mentioned in the affidavit filed long back are acceptable and it

had also found that no prejudice would be caused to both sides in ordering restoration of the suit. He would therefore, request the Court to

interfere and set aside the order in restoring the suit and consequently to dismiss the restoration application and thus the revision may be allowed.

4. The learned Counsel for the Respondents would submit in his argument that the lower Court was correct in finding the fact that the petition was

filed on 05.10.2004 within time as allowed by law and the subsequent filing of the affidavit on 01.12.2004 is only towards curation of defects and

therefore, there is no reason to interfere with the order passed by the lower Court. He would also submit that the lower Court had passed an order

of payment of cost of Rs. 5,00/- and the same was paid and it was received by the Petitioners and hence, there is no need for interfering with the

orders passed by the lower Court. Therefore, he would request the Court to dismiss the revision petition.

5. I have given anxious thoughts to the arguments advanced on either side. The admitted facts are that the suit was filed by the

Respondents/Plaintiff on 05.10.2004 and subsequently, an affidavit was incorporated on 01.12.2004 with a petition and the said application was

allowed by the lower Court, accepting the reasons mentioned therein. The contentions raised by the Petitioners would be that the filing of the

affidavit on 01.12.2004 would make the petition already filed by the Respondents correct and therefore, the date of filing of the affidavit should

have been taken as the correct date of the filing. If the presentation of the date of affidavit is taken as the date of filing, the application filed by the

Respondents to restore the suit is not within time and it should have been rejected.

6. The petition to set aside the exparte order of dismissal was admittedly filed on 05.10.2004 within four days from the date of dismissal of the suit.

But, it depends upon the facts and circumstances of the case to pass an order on the petition itself even without requiring an affidavit. Whenever

the suit was dismissed for default of non-payment of batta, the mere petition filed by the Plaintiff or restoration of the suit can also be ordered by

the Courts, even without ordering notice. In this case, the Petitioners have entered appearance and filed their written statement and thereafter, their

suit was dismissed for default. Therefore, the petition was presented on 05.10.2004 was numbered only after the affidavit has been incorporated

with the said petition. It is only a curation of the defect caused in filing the petition. Therefore, there is no infirmity in the presentation of the said

petition, without filing of the affidavit and there is no infirmity for numbering the application by the lower Court. The lower Court has also

considered the reasons submitted in the restoration application and exercised its discretion to allow the said petition by awarding a compensation

of Rs. 500/-. Such a discretion exercised by the lower Court cannot be interfered with, since it has exercised its judicial discretion and had come

to a conclusion of allowing the restoration application. However, the cost levied by the lower Court is concerned, it is too small when compared

with the inconvenience caused to the Petitioners/Defendants. The cost of Rs. 1000/- should have been ordered for allowing the said application for

restoration but the lower Court had ordered only a sum of Rs. 500/- only for the restoration of the suit. Therefore, it has become necessary for this

Court to modify the orders passed by the lower Court for payment of cost of Rs. 1000/- in stead of Rs. 500/-. It has been brought to the notice of

this Court that a sum of Rs. 500/- has been already paid by the Respondents to the Petitioners. Therefore, it has become necessary for this Court

to direct the Respondents to pay another sum of Rs. 500/-towards cost of Rs. 1000/- within a period of 15 days from today. On such payment of

cost by the Respondents to the Petitioners, the revision preferred by the Petitioners shall be deemed to have been ordered with the modification. In

default to pay the said additional cost of Rs. 500/-, within such time, the revision shall stand allowed and the lower Court''s order shall also be

deemed to have been set aside.

7. With the aforesaid conditions, the revision is ordered. No costs. Connected C.M.P. No. 12428 of 2008 is closed.