

IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE,
DINDIGUL.

PRESENT : **THIRU. A.K. MEHBUB ALI KHAN, B.L.M., LL.M.,**
PG.D.PM/IR.,
ADDITIONAL DISTRICT JUDGE, DINDIGUL.

Thursday, the 17th Day of October 2024

I.A. No.8/2024
-in-
(O.S. No.44/2016)

1. Gnanambal
2. Nandhinidevi
3. Navaranjani
4. Alagar Rajesh

... Petitioners / Plaintiffs

-Vs-

1. Chinnan Chettiar (died)
2. Rajendran
3. Karthick Rajesh
4. Sangeetha
5. S.Thirumoorthy
6. Hari
- 7.Nagamani
- 8.R.S.Nattarasan
- 9.Thamilarasi
- 10.Arulmozhi
- 11.Murugesan
- 12.Sivakumar
- 13.Ramesh
14. Latha

... Respondents / Defendants

This petition came on 3.10.2024 before this Court for final hearing in the presence of Tvl. P.Saravanan and M.Mathankumar, Advocates for the Petitioners/ Plaintiffs, 1st Respondent died, Thiru.S.Krishnakumar, Advocate for the Respondents 5 and 6. Respondents 2 to 4, 7 to 10 and 14 were called absent and set exparte and on perusal of records, this Court delivers the following :

ORDER

Petition filed by the Petitioners / Plaintiffs Under Order 9, Rule 4 of Civil Procedure Code to set aside the Order of dismissal dated 12.7.2024 dismissing the suit against the defendants 11 to 13 for non payment of batta.

2. The contention of the petitioners in brief :

This petition is filed by the 2nd petitioner/2nd plaintiff on behalf of other petitioners also. The plaintiffs have filed the suit for partition and for declaration that certain documents executed by the defendants as null and void and for other reliefs. The defendants 11 to 13 were impleaded in the suit subsequently and summons were ordered to be issued to them. But batta could not be paid due to ill-health of their counsel and as the petitioners were residing at Chennai. Therefore, the suit was dismissed against defendants 11 to 13 for non payment of batta on 12.7.2024. They are ready to pay batta now if ordered. Therefore, they pray to set aside the order dated 12.7.2024, dismissing the suit against the defendants 11 to 13 for non payment of batta.

3. The 1st respondent died, respondents 2 to 4, 7 to 10 and 14 were called absent and set exparte.

4. The contentions of the respondents 5 and 6 in brief:

The petition is not maintainable either in law or on facts and it is filed after a

long delay with an intention to drag on the proceedings. Though the suit was dismissed against defendants 11 to 13 for non payment of batta on 12.7.2024, the 1st plaintiff appeared before the Court on 8.8.2024 and was cross examined by defendants 5 and 6. Thereafter, DW1 was examined on 20.8.2024. But despite seeking time to cross examine DW1 and the case being adjourned to 30.8.2024 and 5.9.2024, they did not cross examine DW1 and hence the cross examination of DW1 was dispensed with by the Court and the evidence was closed. The suit was posted for arguments on 23.9.2024 and written arguments were also filed by defendants 5 and 6. The petitioners have filed this petition only on 23.9.2024 beyond 30 days and it is not maintainable. They have further contended that the law does not provide any opportunity to the persons who have not cared to proceed with case when it is part heard. The plaintiffs have taken the procedure casually and hence the petition has to be dismissed.

5. The point for determination in this petition is “ **Whether the petition be allowed ?**”

6. No oral or documentary evidence was let in by either party.

7. **ANSWER TO POINT:**

Before going into the discussion, this court deems it appropriate to note down the chronological events of the suit which was filed as early as on 28.1.2016 and taken on file on 11.4.2016.

8. The suit was originally filed for the relief of partition and declaration that certain documents executed by the defendants are null and void and for other incidental relief by the plaintiffs. During the pendency of the suit, the 1st defendant died and his LRs., were impleaded as defendants 9 and 10. Since another daughter of the 1st defendant was also dead, her legal representatives were impleaded as defendants 11 to 14 as per Order in I.A.No138/2019 dated 18.7.2022. Thereafter, the plaint was amended and the defendants 9 to 14 were added in the suit as per the order in I.A.No.5/2022 dated 29.8.2022 and summons were ordered to be issued to the newly added parties on 17.10.2022 and the case was posted to 28.11.2022. Later, the summons were served only upon D9, D10 and D14 and they were called absent and set exparte. Summons to defendants 11 to 13 were returned as insufficient address and for want to correct address on various occasions and this court had ordered to issue fresh summons to the proper and correct address repeatedly. It is relevant to note that on 21.7.2023, summons to defendants 10 and 14 were served and they were called absent and set exparte and again fresh summons to D11 to D13 were ordered to proper address and the case was posted to 21.8.2023. The Presiding Officer of the Court was on leave on the subsequent two hearings and though the In-charge Officer had ordered fresh summons to correct address directing the plaintiffs to pay batta within a week, batta was not paid by the plaintiffs. Therefore, on 26.2.2024 this Court directed the plaintiffs to pay batta by 12.3.2024. On that date batta was paid with petition by plaintiff and summons were ordered to D11 to D13 and the case was posted to 15.4.2024. Again the said

summons were returned as no such persons and hence this court again ordered fresh summons to D11 to D13 finally to the correct address posting the case to 15.6.2024 and directing the plaintiffs to pay batta within a week.

9. Further on 15.6.2024 it was found that the plaintiffs did not pay batta and hence the case was adjourned to 6.7.2024 for payment of batta or dismissal. Even on 6.7.2024, batta was not paid and no representation was made on behalf of the plaintiffs. Even then, this court in the interest of justice, adjourned the case for payment of batta as finally, last chance and no further adjournment and posted the case on 12.7.2024. On that date also batta was not paid and no representation was made and the plaintiffs were also called absent. Therefore, the suit was dismissed as against Defendants 11 to 13 for non payment of batta in spite of sufficient and several opportunities. Accordingly, the case was posted for cross examination of PW1 to 23.7.2024.

10. It is pertinent to note that on 23.7.2024 PW1 was present and change of vakalath was filed on behalf of the plaintiffs and at request cross of PW1 was adjourned to 6.8.2024. On 6.8.2024, PW1 was cross examined on behalf of Defendants 5 and 6 and the defendants 7 and 8 were set exparte. On the said date, the plaintiffs side evidence was closed and the case was posted for defendants' side evidence to 20.8.2024. DW1 was examined on 20.8.2024 but the plaintiffs were called absent and no representation was made on their behalf. Hence, the case was adjourned for cross examination of DW1 to 30.8.2024. Even on 30.8.2024, though

DW1 was present, the plaintiffs were called absent and considering that the suit has been pending since 2016, this court adjourned the case for cross examination of DW1 in the interest of justice and to give a substantial disposal and posted the matter on 5.9.2024. Even on 5.9.2024, though DW1 was present, the plaintiffs were called absent and since no representation was made till 3:25 p.m, the cross examination of DW1 was dispensed with and the case was adjourned for further evidence of defendants if any to 18.9.2024. On 8.9.2024 the defendants' side evidence was closed and the case was posted for arguments of 23.9.2024. The defendants 5 and 6 filed written arguments on 23.9.2024 but the plaintiff's counsel filed this application under Order 9 Rule 4 CPC on 23.09.2024 and thereby the present petition has come for hearing.

11. This being the factual matrix of this petition and the orders passed by this court on various dates in the original suit, it is clearly found that the plaintiffs have been consistently careless and were not diligent in proceeding with the case. Though sufficient opportunities were given to them on repeated and various occasions, they have not taken diligent steps to serve summons to the defendants 11 to 13 and they have not paid batta in spite of sufficient opportunities. Therefore the court had passed an order dismissing the suit against the defendants 11 to 13 for the failure of the plaintiffs to pay batta on 12.07.2024.

12. As rightly pointed out by the respondents' counsel, the order of dismissal

passed against defendants 11 to 13 is under Order 9 Rule 5 of CPC and it cannot be considered as an order passed under Order 9 Rule 2 of CPC as claimed by the petitioners' counsel. This court deems it appropriate to reproduce order 9 Rule 5 of CPC for better understanding.

Order IX Rule 5:

Dismissal of suit where plaintiff, after summons returned unserved, fails for seven days to apply for fresh summons-

1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of seven days from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed after using his best endeavours to discover the residence of the defendant, who has not been served, or

***(b) such defendant is avoiding service of process, or
(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.***

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Thus, from a considered perusal of the said provision, it is very clear that the suit dismissed under Order 9 Rule 5 of CPC cannot be restored and there is no provision to set aside the Order of dismissal and to restore the suit. The only remedy that is available to the plaintiffs is to bring fresh suit subject to the law of

limitation. This suit was dismissed as against the defendants 11 to 13 for non payment of batta despite sufficient opportunities given the plaintiffs and since they did not file appropriate petition seeking steps for substitute service also within time prescribed under Order 9 Rule 5 of CPC. The contention that the dismissal was one made under Order 9 Rule 2 of CPC cannot be countenanced, as the said provision can be applicable only at the 1st instance of summons, before it is returned unserved. But, in this case, the summons issued to defendants 11 to 13 already returned unserved and the plaintiffs failed to pay batta on subsequent occasions. Hence, the provision under Order IX Rule 5 of CPC alone is applicable.

14. This court gainfully relies upon the decision of the Hon'ble Madras High Court in "*Mrs. Aruppukottai Sri Jaya Vilas (P) Ltd Vs K.N. Karupiah and others*"¹ wherein the Hon'ble Madras High Court has held thus:

"Order 9 Rule 5 of CPC contemplates the dismissal of the suit against the defendant or defendants concerned, where there is a failure on the part of the plaintiff to apply for issue of fresh summons. Order 9 Rule 5 (2) of CPC states in such a case, the plaintiff may subject to the law of limitation, bring a fresh suit. In the case of dismissal of the suit under Order 9 Rule 5 of CPC, there is no specific provision in that order which would enable the plaintiff to have the order of dismissal set aside on sufficient cause being shown for not applying for the issue of fresh summons to the defendant or defendants concerned."

This court also deems it relevant to extract the observations of Hon'ble High Court

1 1978 SCC Online Madras 70 : 1978 (2) MLJ227

of Calcutta in “*Shaw & Co. vs B. Shamaldas & Co. on 23 December, 1953*”². the Hon’ble High Court has made the following observations.

“14. To my mind, this provision in Order 9, Rule 5, Civil P. C. is a very wholesome and salutary provision intended to activate laggard plaintiffs, who after presenting a plaint take no further interest in the suit which they have instituted, and the result very often is that there is a lot of dead wood provided by these idle claims which the plaintiffs do not choose to prosecute. Expedition in litigation is today a live problem and the legal climate is ringing with the cries for many real and fancied reforms. Here I find an existing rule of great efficacy to serve that purpose but forlorn and fitfully remembered so that its utility is not as frequently availed of as it should be.”

It further observed;

“According to my interpretation of Order 9 Rule 5, the position is that if there is a failure of the plaintiff to apply for a fresh summons and to satisfy the Court within such period of three months to condone such failure on the grounds stated in (a), (b) and (c) of Order 9, Rule 5(1), then the consequence is that the Court shall make an order that the suit be dismissed as against the unserved defendant.”

It is pertinent to note that the period of three months has been subsequently amended and presently it is reduced to 7 days by way of amendment of CPC in the year 2002. Therefore, in this case, though this court was lenient enough to give a long run of time to pay batta and to take steps to serve summons to the defendants 11 to 13 with correct address, the plaintiffs were not diligent and they did not take any steps to serve the summons to the said defendants. It is equally important to note that the plaintiffs have not made out any satisfactory reason within the period of 7

2 1953 SCC Online CAL 206: AIR 1954 Calcutta 369

days, the prescribed time given in Order 9 Rule 5 of CPC and have not satisfied the Court with any of the grounds stated in (a), (b) and (c) of Rule 5(1) of Order 9 of CPC. Therefore, the plaintiffs have to incur the penalty of dismissal, For their misadventure and failure to comply the statutory provision as observed by the Hon'ble High Court of Calcutta (referred supra).

15. This Court is mindful of the fact that if the suit is dismissed as against the defendants 11 to 13, the plaintiff will not be in a position to bring a fresh suit because, the suit is of the year 2016. But that is the situation which the plaintiffs have sought for by their own lack of diligence and non compliance of Order 9 Rule 5(1) of CPC. Therefore, it is held that in the absence of any provision under the said Order to set aside the dismissal order passed under Order 9 Rule 5 of CPC, this court has no powers to set aside the same.

16. It is further pertinent to note that even if the court considers the mandate under Order 9 Rule 5 (1) of CPC as directory, the facts and circumstances of the case clearly justifies the dismissal of the suit for non payment of batta because, sufficient and several opportunities were given to the plaintiffs to comply with Order 9 Rule 5(1) of CPC. But the plaintiffs have repeatedly failed to be diligent and they did not comply with the said provision despite the opportunities given. Therefore, this court is of the

considered opinion that the dismissal of the suit under Order 9 Rule 5, even on facts though the said provision is considered as directory, satisfies the conscience of this court, since several opportunities were already given to the plaintiff.

17. Similarly, this Court anxiously considered whether it can invoke its inherent power u/s.151 of CPC to set aside the order of dismissal passed under Order 9 Rule 5 in the absence of any specific provision therein. But, this Court is helpless to do so because, the conduct of the plaintiffs as detailed above clearly shows lack of diligence and that they are not inclined or interested to take steps for effective service of summons. It is equally important to note that these defendants 11 to 13 were already set exparte in I.A.No.138/2021. It is also found that since notice was not served due to insufficient and improper address, the plaintiffs had taken steps for paper publication and after the publication was effected, these defendants were called absent and set exparte in the said I.A.No.138/2021. Knowing fully well that, even in the previous interlocutory application, notices were not able to to be served due to lack of correct address and having taken substituted service, the plaintiffs should have taken steps promptly for substitute service atleast. But the plaintiffs have failed to do so, which clearly shows callousness and lack of diligence on their part.

18. Yet another circumstances that shows lack of diligence by the plaintiffs is that even after the dismissal of the suit against the defendants 11 to 13, PW1 appeared for cross examination and thereafter the case was adjourned to further dates, and DW1 was also examined subsequently. But the plaintiffs did not take any steps immediately to get the order of dismissal set aside and they waited till the case was posted for arguments and only on 23.9.2024 after about more than 2 months, they have filed this petition. Hence, this Court finds no reasonable justification to invoke its inherent process u/s.151 of CPC to set aside the order of dismissal dated 12.07.2024. The hardships likely to be caused to the respondents, if the petition is allowed would be enormous, and irreparable and so they cannot be made to further suffer the delay due to the callous attitude and lack of diligence of the petitioners.

19. Therefore, this court is of the considered opinion that the petition is not maintainable under law and even on facts and this court is not inclined to allow this petition and set aside the order of dismissal of the suit against the defendants 11 to 13 on 12.7.2024. This point is decided accordingly.

In the result, this petition is dismissed with cost.

Dictated to the stenographer, transcribed and typed by her in computer, corrected and pronounced by me in the Open Court on this the 17th day of October 2024.

Additional District Judge,
Dindigul.