
(1991) 07 MAD CK 0071
In the Madras High Court

Govindaswami (died) and Another

APPELLANT

Vs

Vedanayagam Pillai represented by Next Friend and Guardian
Ramakrishna Pillai

RESPONDENT

Date of Decision : 25-07-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9, 151

Citation : (1992) 1 LW 56 : (1992) 1 MLJ 15

Hon'ble Judges : Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—This revision arises out of the order passed in I.A.No.2075 of 1986 in I.A.No.1404 of 1982 in O.S. No. 11 of 1973. The suit O.S. No. 11 of 1973 was dismissed for default. I.A.No.1404 of 1982 was filed under Order 9, Rule 9 of C.P.C., to restore the suit. That application was also dismissed for default. Hence I.A.No.1404 of 1982. This application was also dismissed for default. In the order passed in I.A.No.2075 of 1986 dated 25.8.1987 it is stated as under:

Petition filed under Order 9, Rule 9 and Section 151, C.P.C., to restore the I.A.No.1404 of 1982 which was dismissed for default on 2.12.1986 Counter not filed. The petitioner and the petitioner's counsel called absent at 10.30 am. The Petition is dismissed for default.

2. It is against this order, the present revision has been preferred by the defendant/petitioner. The learned Counsel appearing for the petitioner herein submits that Application No. 2075 of 1986 was filed with an affidavit disclosing all the material facts to show as to why the petitioner was unable to be present on the date of hearing. But no counter was filed by the other side. Again It was contended that the above said petition was dismissed even at the threshold at 10.30 a.m. inspite of the fact that a representation was made on behalf of the petitioner by another advocate by name Arunachalam. It was therefore pleaded, the lower court was not correct in dismissing the I.A.No.2075 of 1986, for default.-

3. On the other hand, the learned Counsel appearing for the respondent submitted that as against the order passed in an application filed under Order 9, Rule 9 only an appeal will lie and revision will not lie. The learned Counsel further contended that even on merits the petitioner has not made out a case for the restoration of I.A. No. 2075 of 1986. It was further pleaded that the lower court was correct in dismissing I.A. No. 2075 of 1986 for default.

4. I have heard the rival submissions. The fact remains that the suit was dismissed for default I.A. No. 1404 of 1982 was filed to restore the same and that was also dismissed for default on 2.12.1986. In order to restore I.A. No. 1404 of 1982 I.A. No. 2075 of 1986 was filed and that was also dismissed for default. It is against that order the present revision has been preferred by the defendant petitioner. In support of the above said application an affidavit was filed by the petitioner. Wherein the petitioner has given various reasons for his absence on the date of hearing. A third party affidavit, was also filed. According to third party affidavit, when the matter was called at 10.30 a.m. representation was made on behalf of the petitioner by another advocate. It also remains to be seen that the petition was dismissed at the threshold at 10.30 a.m. on that particular day. The respondent herein has not filed any counter denying the allegations made in the affidavit filed in support of I.A. No. 2075 of 1976. Therefore on merits the petitioner herein made out a case for restoration of I.A. No. 2075 of 1986. By way of answer to the ground raised by the counsel for the respondent, whether a revision will lie against the order passed in I.A. No. 2075 of 1986, the learned Counsel appearing for the petitioner relied upon a full bench decision of Madhya Pradesh High Court, in the case of Nathu Prasad v. Singhai Kapurchand AIR 1976 M.P. 136, wherein, while considering this aspect, it was held as under:

When an application, (A) under Order 9, Rule 9, C.P.C., for restoration of the suit is rejected and an application (B) is made for restoration of the application (A) although such application of Order 9, Rule 9 read with Section 151, C.P.C., yet, the order rejecting the application, (B) does not fall within Order 43, Rule 1(c) inasmuch as the application (B) is not "for an order to set aside the dismissal of the suit" it is for an order to set aside dismissal of the application (A).

Therefore the contention raised by the learned Counsel appearing for the petitioner that a revision is competent, is fully supported by the above said Full Bench decision of the Madhya Pradesh High Court. Further in the case of Doma Choudhary and Others Vs. Ram Naresh Lal and Others, , the Full Bench of the Patna High Court held that:

An appeal lies under Order 43 Rule 1(c) or (d) from an order rejecting for default an application under Article 9 or Rule 13 of Order 9 respectively, because on a plain reading of Clause (c) and (d) of 43 Rule 1 there is no ground for discriminating between rejection of an application on merits and its rejection for default.

5. In view of all these aspects, I consider that the lower Court was not correct in dismissing the I.A. No. 2075 of 1986 for default. Accordingly, the order passed in I.A. No. 2075 of 1986 is set aside and the same is allowed. Consequently the I.A. No. 1404 of 1982 is restored and the same is remitted back to the file of the trial court with a direction to dispose of the same on merits in accordance with law after giving an opportunity of being heard to both parties. In that view of the matter, the revision is allowed. There will be no order as to costs.