

IN THE HIGH COURT OF KARNATAKA AT BENGALURUDATED THIS THE 4TH DAY OF OCTOBER 2018

BEFORE:

THE HON'BLE MR. JUSTICE K.N.PHANEENDRA

MISCELLANEOUS FIRST APPEAL No.4866/2015 [CPC]**BETWEEN:**

SRI. M. RAMESH KUMAR,
AGED ABOUT 58 YEARS,
S/O. LATE MUDDAPPA,
R/AT DOOR NO.314,
5TH A CROSS, SANMARGA,
SIDDHARTHA NAGAR,
MYSURU-570 011.

... APPELLANT

[BY SRI. K.K. VASANTH, ADVOCATE]

AND:

1. SRI. RIYAZ-RU-REHMAN,
AGED ABOUT 55 YEARS,
S/O. KHALIL-UR-REHMAN,
PROPRIETOR,
R.R. ENTERPRISE,
R/AT DOOR NO.527,
DARUSSALAM, GROUND FLOOR,
8TH MAIN ROAD (WEST),
UDAYAGIRI, MYSURU-570 011.

2. SRI. SYED NAGINA BHANU,
AGED ABOUT 47 YEARS,
W/O. RIYAZ-UR-REHMAN,
R/AT DOOR NO.527,
DARUSSALAM, GROUND FLOOR,
8TH MAIN ROAD (WEST),
UDAYAGIRI, MYSURU-570 011.

... RESPONDENTS

[NOTICE TO R1 & R2 ARE HELD SUFFICIENT
V.C.O. DATED 09.08.2018.]

THIS MFA IS FILED UNDER ORDER 43 RULE 1(C) OF THE CODE OF CIVIL PROCEDURE, AGAINST THE ORDER DATED 31.03.2015 PASSED ON THE APPLICATION IN O.S. NO.394/2013 ON THE FILE OF THE III ADDITIONAL SENIOR CIVIL JUDGE & CJM, MYSURU, NOT CONSIDERING THE APPLICATION FILED BY THE PLAINTIFF THEREIN TO RESTORE THE SUIT FILED U/O 9 RULE 9 OF CPC.

THIS MFA COMING ON FOR ADMISSION, THIS DAY THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The respondents though served with notice through paper publication have remained absent and this Court vide Order dated 09.08.2018 held that, the service on the respondents as sufficient.

2. Heard the arguments of learned counsel for the appellant and perused the record.

3. A perusal of the record discloses that, the plaintiff/appellant has filed a suit in O.S. No.394/2013 before the Principal Senior Civil Judge and CJM., Mysuru, on 27.05.2013 and the Court has issued notice to defendant Nos.1 and 2 vide Order dated 03.06.2013. On various occasions, notice was issued. But, defendant Nos.1 and 2 were not secured and the case was posted for taking steps in respect of defendant Nos.1 and 2 therein. In that context, it

is said that on 28.11.2014, the plaintiff and his counsel remained absent. Therefore, the Court felt that, the plaintiff has no interest to prosecute the case. The case was dismissed for non-prosecution vide Order dated 08.01.2015. The order sheet also discloses that, the learned counsel for the plaintiff had filed Process Memo, I.As. under Section 151 of CPC., under Order 9 Rule 9 of CPC r/w. Section 151 of CPC and also under Order 5 Rule 20 of CPC and requested the Court to set aside its order and to issue process against the defendants. However, for the reasons best known to the office of the III Addl. Senior Civil Judge and CJM., Mysuru, the said representation was recorded and scored out in the order sheet.

On 29.01.2015, it appears that, the plaintiff has filed a memo and requested the Court to put up the file for orders. An application was also filed under Order 9 Rule 4 of CPC for the purpose of seeking restoration of the suit which was dismissed for non-prosecution. The trial Court in fact, without registering the said memo and the application as a miscellaneous case, disposed of the said memo vide impugned Order dated 31.03.2015 on the ground that, the

plaintiff may bring a fresh suit if he satisfies the Court for his non-appearance on the earlier dates and it has also observed that, in the present case, the plaintiff has sent this memo through RPAD., addressing to the Sheristedar and in the memo, he has simply made the allegation against the Court without verifying about his own conduct in non-appearance before the Court on all those hearing dates so as to take steps against defendant Nos.1 and 2. It is also observed by the trial Court that, the plaintiff has filed application for restoration through an Advocate, who has not obtained NOC from the earlier Advocate, who is already on record.

4. In my opinion, the said observation of the trial Court is without giving an opportunity to the plaintiff/appellant, who has filed the memo and in fact, through some other Advocate he has also filed an application for restoration of the suit to the file. Once, the suit has been dismissed for non-prosecution, the vakalat of that particular Advocate ceases to operate for the purpose of filing a miscellaneous application and there is no need for another Advocate to take NOC from the previous Advocate.

5. Be that as it may, when an application is filed bearing the signature of the party along with the memo, it was the duty of the Court to register the same as miscellaneous case and provide an opportunity to the applicant at least party-in-person to explain as to why he could not take steps against the defendants 1 and 2 on the date fixed for taking steps. Therefore, under the above said circumstances, the trial Court has straight away persuaded on the allegations made against the Court perhaps prejudiced itself and passed the impugned order without providing an opportunity to the applicant to substantiate his case. Under the above said circumstances, in my opinion, the application filed by the plaintiff/appellant for restoration of the suit is not properly entertained by the trial Court and a wrong order has been passed. In the above said circumstances, it is just and necessary to direct the trial Court to register the said memo and application filed by the petitioner as a miscellaneous case and provide an opportunity to the plaintiff/appellant to substantiate the grounds urged in the said application and after issuing notice to the other side and hearing the parties, the trial Court has to pass appropriate order with regard to

restoration application filed by the learned counsel for the plaintiff/appellant under Order 9 Rule 9 of CPC r/w. Section 151 of CPC.

In the above said circumstances, I pass the following.

ORDER

The appeal is hereby **allowed**. The Order dated 31.03.2015 passed by the III Addl. Senior Civil Judge & CJM., Mysuru is hereby set aside. Consequently, the application filed by Sri. AVJ., Advocate along with the memo under Order 9 Rule 9 r/w. Section 151 of CPC is directed to be registered as a miscellaneous proceedings before the trial Court and the same has to be disposed of in accordance with law after providing sufficient opportunity to the plaintiff/appellant.

**Sd/-
JUDGE.**

Ksm*
CT-JLR