



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Civil Appellate Jurisdiction



Thursday, the Sixteenth day of February Two Thousand and Twenty
Three

PRESENT

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The Hon`ble Dr.Justice G.JAYACHANDRAN
AND
The Hon`ble Mr.Justice K.K. RAMAKRISHNAN

CMP(MD) . No.7511 of 2021
in
AS(MD)No.104 of 2016

1.R.Ramasamy

2.Senthil Kumar

3.Prakash

4.R.Suresh

... Petitioners/Respondents Nos.1,12,13 & 14

Vs

1 M.K.Srinivasan

2 M.S.Jeevarekha

3 M.S.Giridharan

4 M.S.Sakthinivasan

(Rep by His General

Power of Agent Father M.K.Srinivasan for R3 & R4)

...Respondents Nos.1 to 4/Appellants

5 N.Palanisamy

6 P.Vijaya Baskar

7 P.Devi

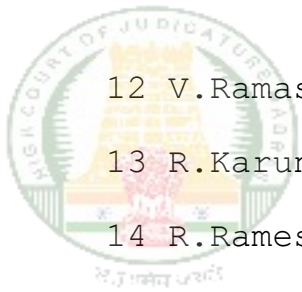
8 K.Rengasamy

9 Pappathi

10 K.Subbulakshmi

<https://www.mhc.tn.gov.in/judis>

11 R.Chellammal



12 V.Ramasamy

13 R.Karunanithi

14 R.Ramesh

... Respondents Nos 5 to 14/
Respondents Nos 2 to 11

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Prayer CMP(MD). No.7511 of 2021:-

This Civil Miscellaneous Petition filed under order 41 Rule 21 of C.P.C., R/W of C.P.C, R/W 151 of C.P.C., to set-aside the judgment and decree dated 31.03.2021 made in A.S.(MD)No. 104 of 2016 and also rehear the said appeal.

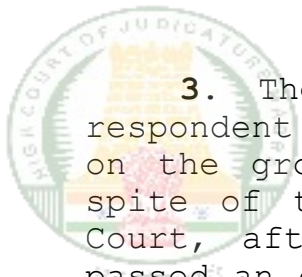
Prayer in AS No.104 of 2016:-

This Appeal Suit filed under section 96 of the C.P.C., R/W 41 R1 & 2 of C.P.C., to set aside the judgment and decree dated 19.01.2016 in OS No.6/2011 on the file of the Principal District Judge, Karur.

ORDER:- This Miscellaneous Petition coming on for orders on this day and upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr.N.Shanmugaselvam, Advocate for the Petitioner and of Mr.H.Arumugam For Mr.Samuel Guna Singh For R1, R3 & R4, and M/s.J.Bharathan for R2, this Court made the following order:

The Division Bench of this Court on 31.03.2021 passed a final order in A.S(MD)No.104 of 2016, recording the non-appearance of R1, R12, R13 & R14. R2 to R11 already remained ex-parte. The appeal suit was filed against the judgment and decree passed in O.S.No.6 of 2011 on the file of the Principal District Court, Karur, for the relief of Specific performance of an agreement dated 03.03.2010. When the matter was taken up for final hearing, this Court has specifically recorded the service of notice to the respondents 1, 12, 13 & 14 and their names are printed in the cause-list. After recording so, this Court has considered the appeal on merits and allowed the appeal and the judgment and decree passed by the Trial Court was set aside.

2. In the said background of facts, the respondents 1, 12, 13 & 14 has taken out the present miscellaneous petition to re-hear the appeal stating that they engaged a counsel to defend them soon after receiving notice in this appeal suit. The counsel also, as per instruction, filed Vakalat on 02.09.2016 and S.R.No.34703 of 2016 was assigned. However, the said vakalat was not taken on record. Instead of printing the name of the counsel, who has filed vakalat, parties names were printed in the cause list, which disabled their counsel to appear when the matter was listed. Therefore, the present petition in C.M.P(MD)No.7511 of 2021 is filed under Order 41 Rule 21 CPC r/w. 151 of C.P.C.

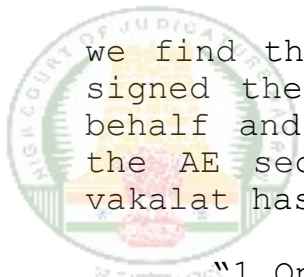


3. The said application was strongly opposed by the first respondent who is the contesting party succeeded in the appeal but on the ground that notice was duly served on the petitioners in spite of that, they have not ensured to be represented and this Court, after adjourning the matter on several occasions, finally passed an order, on 31.03.2021 on merits. In fact, the claim of the petitioners seeking re-hearing of the appeal is not factually correct and not supported by sufficient reason. The Vakalat dated 02.09.2016 filed on behalf of the petitioners, was returned by the Registrar, on 07.09.2016, whereas after listing the matter on several occasions, this Court passed an order on merits on 31.03.2021, specifically recording the non appearance on behalf of the petitioners herein. The said vakalat in S.R.No.34703 of 2016 was taken back by the counsel only on 20.01.2023 long after the disposal of the appeal. However, the petition for rehearing was presented before the Registrar of High Court on 30.04.2021 with fresh vakalat.

4. The learned counsel for the petitioners states that it is true that his vakalat filed on 02.09.2016 was returned and he took the vakalat back only on 20.01.2023. But it is incorrect to say that he has filed a fresh vakalat in C.M.P.(MD)No.7511 of 2021. According to the learned counsel for the petitioners his C.M.P.(MD) No.7511/2021 was numbered on the premise that his earlier vakalat filed on 02.09.2016 was valid and the petition was numbered and also listed before the open Court on 23.02.2022 along with the application filed by the successful respondent seeking clarification of the order dated 31.03.2016. The contention of the learned counsel for the petitioners is that when the clarification petition along with this petition to rehear listed before the Bench on 23.02.2022, the clarification petition was ordered, but his petition to rehear was adjourned and would submit that the petitioners were deprived of being heard due to the error of the Court by non printing the name of the counsel and therefore, no party should be prejudiced by the act of the Court.

5. The learned counsel appearing for the first respondent would submit that it is incorrect to say that the Court has committed error in not printing the name of the counsel for the petitioners. When the vakalat itself filed with defect and returned, it is the duty of the counsel to rectify the defect and represent it which he did not do till date, but pursuing the petition in C.M.P(MD)No.7511 of 2021 even without proper authorisation.

6. Considering the rival submission touching upon the administration of the Court, this Court summoned the Registry to produce the cause list of the relevant dates and the Register maintained by the Registry for receipt of vakalat and its return. On verification of the register, this Court finds that the vakalat received by the Court on 02.09.2016 returned on 07.09.2016. The learned counsel has taken back the vakalat only on 20.01.2023. This Court also requested the learned counsel for the petitioners to produce the vakalat which he has taken back on 20.01.2023. The learned counsel has promptly produced it. On perusing the vakalat,



we find that the petitioners who are respondents 1, 13 and 14 as signed the vakalat authorising three counsels to appear on their behalf and this vakalat was signed on 01.09.2015 presented before the AE section on 02.09.2016. Same has been scrutinized and the vakalat has been returned for the following two reasons:

"1. One of the co-counsel has not signed the vakalat;

2. There is no attestation of the signatures of the parties, who are signed the vakalat."

7. An attestation by any gazetted officer or an advocate is a mandatory requirement for accepting the vakalat as a valid vakalat. To be precise, the learned counsel for the petitioner, who are representing before this Court has no valid authorisation to represent the petitioners.

8. Be that as it may, the petition filed for rehearing was numbered and was listed on 23.02.2022. On that day, the petition was adjourned at the request of the counsel for the petitioners and the same has been noted in the order sheet maintained by this Court. So, it is incorrect to say that this Court entertained the clarification petition of the respondents, but not pass any order in the rehearing petition. Only at the request of the petitioners' counsel, his petition has been adjourned. De hors of all these facts which does not support the case of the petitioners, this Court is conscious of the fact that a party cannot be deprived of the right of hearing, if he has reasonable and sufficient cause to explain before this Court for non-appearance in person or through counsel on the date of hearing. Order 41 Rule 21 CPC also contemplates that the parties to the proceedings who is set ex parte for non-appearance should be given an opportunity of hearing if the said party is able to satisfy the Court that the notice was not duly served or that he was prevented by sufficient cause for appearing when the appeal was called for hearing. For the sake of clarification, the said provision under Order 41 Rule 21 CPC is extracted below:

"Order XLI Rule 21: Rehearing on application of respondent against whom ex parte decree made:- Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him."

9. Now coming to the affidavit filed in support of the petition for rehearing, paragraph No.3 of the affidavit reads as below:

"3. I respectfully submit that I filed the vakalat through my counsel on 02.09.2016 in Court No. SR.No.34703 of 2016 for the respondent Nos.1, 12,13 and 14 inspite of the same my name was printed instead of my counsel name in the cause list



therefore, I was not able to contest the above said appeal in such circumstances this Hon'ble Court . judgement and decree dated 30.03.2021 made in A.S(MD), No.104 of 2016 was pleased to allow the first appeal."

10. The affidavit does not provide any sufficient cause for non-appearance. It is alleged that he filed the vakalat through a counsel but in the cause list, the counsel name was not printed but the parties name were printed. Therefore, counsel was not able to appear. It is to be noted that the counsel, who filed vakalat on 02.09.2016 had never cared to know the fate of his vakalat filed on behalf of his clients. However, the petition for rehearing been prepared by him and presented before this Court on 30.04.2021, ie. 30th day after passing the judgment in A.S(MD)No.104 of 2016. Even when filing this petition, he has not verified why his name was not printed inspite of filing the vakalat. After seven years, he has gone to the Registry and taken back his vakalat and even then, he had not sought leave of this Court to file fresh vakalat or to rectify the vakalat which was returned for the defects mentioned above. Reverting back to the provision of Order 41 Rule 21 CPC., only on two grounds, right of hearing can be given to a party. The first ground is notice should have not been duly served. That is not the case of the petitioner, notice served on them, they have engaged a counsel and knowing decree has passed against them, they have filed MP for rehearing. The next ground is they have prevented by sufficient cause from appearing when the appeal was called on for hearing.

11. One of the reason now propounded by the learned counsel for the petitioners is that it was during the COVID period and therefore neither the party nor him were able to follow up the case. If that is to be taken into account, the said impediment is equally applicable to the other side also and on verification of the civil miscellaneous petition filed before this Court seeking rehearing of the appeal suit, this was presented on 30.04.2021 even without serving copy to the other side and without affixing required stamp. Only after return, the other side been served with copy on 20.05.2021 and 10/- rupees stamp has been affixed and presented. Therefore, it is not a case that the petitioners were not provided opportunity to contest the case or prevented from appearing before this Court. The petitioners have chosen to remain absent and only after getting an adverse order, have come before this Court invoking Order 41 Rule 21 CPC r/w 151 CPC for rehearing. But on merits, this Court finds this petition deserves to be dismissed.

12. Yet another reason for this Court to dismiss the petition is that the appeal suit was filed in the year 2016 and been pending till 2021. When the matter ripened for trial, it was listed for final hearing on 15.02.2021, 02.03.2021, 15.03.2021, 18.03.2021 and only on 23.03.2021, the matter has been heard, reserved for orders and the order has been pronounced on 31.03.2021. Therefore, this Court



finds no merits in the petition and the petition is accordingly dismissed.



Sd/-

Assistant Registrar (CS III)

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/03/2023

Sub Assistant Registrar(CS)

TO

The Principal District Judge,
Karur.

+1 cc to Mr.H.Arumugam, Advocate, CASR No.9387/2023

+1 cc to N.Shanmuga selvam, Advocate , CASR No.9249/2023

+1 cc to Mr.Mr.Samuel Guna Singh , Advocate, CASR No.8945 of 2023

ORDER DATED : 16/02/2023

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ORDER

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CMP (MD) . No.7511 of 2021
in
AS (MD) No.104/2016

Giving direction and etc.

as stated within.

MGJ(17.03.2023) 6P 5C