



CRP (MD) No.2045 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	02.08.2023
Pronounced on	10.11.2023

CORAM:

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

CRP (MD) No.2045 of 2022

and

CMP(MD)No.9360 of 2022

Chettinad Cement Corporation Limited
Puliyur, Rep. by its General Manager,
Jayaprakash Ganth
S/o.Murugesan

... Petitioner

Vs.

1.K.Arumugam

2.R.Janaki

3.R.Saroja

4.N.Pushpavalli

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decretal order dated 13.08.2021 made in I.A.No.136 of 2021 in O.s.No.56 of 2017 on the file of the Principal District Judge, Dindigul.



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For Petitioner : Mr.Raguvaran Gopalan

For Respondents : Mr.N.S.Karthikeyan

ORDER

The above civil revision petition is preferred against the order dated 13.08.2021 made in I.A.No.136 of 2021 in O.S.No.56 of 2017 on the file of the learned Principal District Judge, Dindigul.

2. The suit in O.S.No.56 of 2017 is filed by the respondents/plaintiffs for the relief of partition and for permanent injunction, in which, an *ex parte* decree was passed on 18.08.2020. Thereafter, the petitioner/9th defendant filed an application in I.A.No.136 of 2021 under Section 5 of Limitation Act to condone the delay of 184 days in filing the petition for setting aside the *ex parte* decree passed on 18.08.2020. In the said petition, the petitioner/9th defendant has stated that the 9th defendant was set *ex parte* for non-filing of the written statement and an *ex parte* order was passed against him and thereafter, the petitioner/9th defendant filed an application under Order 9 Rule 7 of CPC in I.A.No.321 of 2019 to set aside the *ex parte* order along with the



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written statement. The said application was posted on 29.11.2019 for service of notice to the respondents/plaintiffs. Due to COVID-19 pandemic situation, the petitioner was unable to meet his counsel and give instructions. Hence, the said application was dismissed for default on 29.11.2019 as notice was not served on the respondents/plaintiffs. On 18.08.2020, *ex parte* decree was passed against the petitioner. The petitioner has further stated in the petition that he has good case on merits and fair chances of success and therefore, sufficient opportunity to be given to him to put forth his case. However, the trial Court dismissed the above application. Aggrieved by this, the present revision is preferred.

3. The learned counsel appearing for the revision petitioner would submit that the decree passed against the petitioner /9th defendant is only an *ex parte* decree and the decree in the instant suit is indivisible. When the petitioner has made out a case for setting aside the *ex parte* decree, the entire decree as against the other defendants would also have to be set aside notwithstanding the judgment and decree passed against the other defendants. The trial Court erred in holding that the petitioner/9th defendant is only a



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purchaser of the second item of the property from the fourth and fifth defendants. Hence, the 9th defendant steps into the shoes of fourth and fifth defendants and since the fourth defendant submits to decree and the right of the fifth defendant is determined by the Court, the petitioner has no leg to stand before the trial Court. He would further submit that the plaintiffs themselves have chosen to array the petitioner herein as 9th defendant in the suit. It is not open to the trial Court to render a finding that the petitioner do not have an independent stand distinct from the vendor. He would further submit that the *ex parte* decree is indivisible and therefore, depending upon the nature of the *ex parte* decree passed against all defendants can be set aside. To support his contention, he has relied upon the judgment reported in (2008) 13 SCC 466.

4. Per contra, the learned counsel for the respondents would submit that a reading of explanation to Order 17 Rule 2 r/w order 17 rule 3 of CPC would show that where substantial evidence has been recorded and the Court feels that such evidence is sufficient to decide upon the case, then in that case the Court may exercise its discretion to proceed with the case as if the parties



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were present. In the instant case, the fifth defendant appeared and contested the suit and the trial Court adopting the procedure under Order 17 Rule 2, its explanation and under Order 17 Rule 3, had proceeded to pass judgment on merits. The learned trial Judge has dealt with each issue and rendered a finding on each of these issues. It is therefore clear that the judgment has been pronounced by the learned trial Judge by adopting the procedure contemplated under the explanation to Order 17 Rule 2 r/w Order 17 Rule 3(a). Therefore, the remedy available to the revision petitioner is only to file an appeal under Section 96 of CPC and the above civil revision petition is liable to be dismissed. To support his contention, he has relied upon the decision case reported in (2018) 0 Supreme (Mad) 3619.

5. Heard on both sides and records perused.

6. This Civil Revision Petition is filed challenging the order passed by the learned Principal District judge, Dindigul in I.A.No.136 of 2021 in O.S.No.56 of 2017 dated 30.08.2021, in and by which, the learned Principal District Judge has dismissed the interlocutory application filed by the



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revision petitioner, who is the 9th defendant in the suit, to condone the delay in filing a petition to set aside the *ex parte* decree. The respondents, who are the plaintiffs in O.S.No.56 of 2017 on the file of learned Principal District Judge, Dindigul, instituted the above suit for partition and permanent injunction. In the above suit, except 5th and 9th defendants, admittedly, the other defendants submitted to the decree. The fifth defendant alone contested the suit. The 9th defendant remained absent and an *ex parte* order was passed against him for non-filing of written statement. Thereafter, the petitioner/9th defendant filed an application in I.A No.321 of 2019 under Order 9 Rule 7 of CPC to set aside the *ex parte* order along with written statement. The above application was also dismissed for default on 29.11.2019. Thereafter an *ex parte* decree was passed against him on 18.08.2020. Thereafter, the petitioner/9th defendant filed the above application in IA No.136 of 2021, which was dismissed by the trial Court by stating as follows:-

“In this case, except 5th and 9th defendant, other defendants admits to pass preliminary decree. 5th defendant contested the suit. 9th defendant is purchaser of 2nd item of property from 4th and 5th defendants. Hence, 9th defendant step into the shoes of 4th and 5th



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defendants, 4th defendant endorsed no objection in the plaint to decree the suit. 5th defendant contested the suit and his right is determined by the Court. 9th defendant failed to defend the suit. Since the rights of parties are determined, 9th defendant has no leg to stand before this Court. If he is aggrieved by the decree, the recourse available to him is only to prefer appeal. Hence, the petition is not maintainable and rejected.

7. The issue is to be considered in the above civil revision petition whether the judgement passed by the trial Court is one passed under the provision of Order 17 Rule 2 or Order 17 rule 3 of CPC? Since the other defendants submitted to the decree and the 9th defendant remained *ex parte* and the fifth defendant alone contested the suit, the trial Court proceeded with the trial of the suit and passed the judgment and decree. Thereafter, the revision petitioner came forward with an application for condoning the delay in filing the application to set aside the *ex parte* decree passed against him. The said application was dismissed by the trial Court stating that the only remedy available to the revision petitioner is to file an appeal.



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8. Before dealing with the submissions that have been made on either

side, it is necessary to extract the provisions of Order 17 Rule 2 and Order 17

Rule 3:

“2.Procedure if parties fail to appear on day fixed where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[Explanation:- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present]”

3. Court may proceed notwithstanding either party fails to produce evidence etc.- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, [the Court may, notwithstanding such default,-



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(a) if the parties are present, proceed to decide the suit

forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.]”

9. In the instant case, a perusal of the judgment would clearly establish that the learned Trial Judge adopting the procedure under Order 17 Rule 2, its explanation and Order 17 Rule 3 proceeded to pass judgment on merits. On perusal of records, it is further seen that the trial Judge has dealt with each issue and rendered findings on each of these issues. Therefore, as rightly pointed out by the learned counsel for the respondents, the remedy that is available to the revision petitioner is only by way of an appeal under Section 96 of CPC as the order was passed by the Court by exercising its powers which have now been enlarged by the insertion of an explanation to Order 17 rule 2 and Order 17 Rule 3 (a) of CPC by deeming that the judgment has been passed in the presence of both parties and where substantial evidence is available on record based upon which the judgment has been passed. Therefore, I find no infirmity in the order passed by the learned Principal District Judge, Dindigul.



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10. In the result, this civil revision petition is dismissed by confirming the order of the learned Principal District Judge, Dindigul in I.A.No.136 of 2021, dated 13.08.2021. No costs. Consequently, connected miscellaneous petition is closed.

10.11.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
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To

The Principal District Judge,
Dindigul.

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K.GOVINDARAJAN THILAKAVADI

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order made in
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