

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.01.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.1986 of 2011

K.Perumal

... Petitioner

vs.

D.Muralidharan

...Respondent

Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and decretal order of the Principal District Munsif cum Judicial Magistrate, Vaniambadi dated 10.03.2011 made in I.A.No.838/2010 in O.S.No.9/2005.

For Petitioner : Mr.D.Balachandran

For Respondent : Mr.Pa.Sudesh Kumar

ORDER

Heard Mr.D.Balachandran, learned counsel for the petitioner and Mr.Pa.Sudesh Kumar, learned counsel for the respondent. The impugned order of the trial court and other documents produced in the form of typed set of papers are also perused.

2. The order of the learned Principal District Munsif cum Judicial Magistrate, Vaniambadi dated 10.03.2011 made in I.A.No.838 of 2010 in O.S.No.9 of 2005 has been challenged in the present revision filed under Section 115 of the Code of Civil Procedure. The respondent herein filed O.S.No.9 of 2005 on the file of the trial court for the relief of specific performance based on an agreement for sale dated 19.01.2004.

3. The petitioner, who figured as the defendant therein, after filing a written statement, stopped appearing before the court leading to the passing of an ex-parte decree dated 16.06.2007. Even thereafter, the petitioner/defendant kept quiet for about three years. On receipt of notice in the execution proceedings, he appeared in the execution petition, filed a counter and simultaneously filed a petition under Order IX Rule 13 of the Code of Civil Procedure to set aside the ex-parte decree along with I.A.No.838/2010 under Section 5 of the Limitation Act, 1963 to condone the delay of 1080 days in filing the application under Order IX Rule 13 of the Code of Civil Procedure.

4. In the supporting affidavit, the petitioner averred that during the pendency of the suit, a compromise was effected at the

intervention of the elders of the village on 13.01.2007 and he paid a sum of Rs.25,000/- together with interest calculated at the rate of 1% per mensem; that the respondent, who promised to withdraw the suit, clandestinely obtained an ex-parte decree on 16.06.2007; that the same came to the notice of the revision petitioner only when he received notice in the execution petition and that he caused verification through his advocate and therefore there was a delay of 1080 days in filing the application to set aside the ex-parte decree.

5. The contention of the petitioner was refuted by the respondent in his counter affidavit. In order to prove his contention, the petitioner, besides examining himself as PW1, examined the alleged panchayatdars as PWs.2 and 3. The learned trial judge, on an evaluation of the evidence adduced on the side of the revision petitioner, brought out the material contradiction in the evidence of the witnesses examined on the side of the revision petitioner and also the improbability of the case of the petitioner regarding the reason for the belated filing of the petition to set aside the ex-parte decree. The result is that the learned trial judge chose to dismiss the said petition holding that the delay was not properly explained and that the revision petitioner had not proved

that he was prevented by a reasonable cause from filing the petition to set aside the ex-parte decree in time. As against the said order, the present civil revision petition has been filed under Section 115 of the Code of Civil Procedure.

6. The proviso to sub section (1) of Section 115 of the Code of Civil Procedure provides an embargo on the exercise of the revisional powers of this court in certain contingencies. The proviso reads as follows:

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

7. In this regard, reliance can be made on the judgement of the Hon'ble Supreme Court in **Vidyodaya Trust and Others Vs. Mohan Prasad R and Others** reported in **(2006) 7 SCC 452**, wherein it was held in Paragraph 9 of the said judgment as follows:

"9. The amendment to Section 115 CPC is based on the recommendations made by the Malimath Committee. The said Committee was of the opinion that the expression employed in Section 115 CPC which

enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the parties against whom it was made, left open wide scope for exercise of powers with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of cases. The Committee did not favour denuding the High Court of the power of revision, but strongly felt that the powers should be suitably curtailed. The effect of the erstwhile clause (b) of the proviso was deleted and a new proviso has been inserted so that the revisional jurisdiction is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied. It is thus clear that the proviso creates an embargo in exercise of revisional power. "

8. Here is a case in which the application filed under Section 5 of the Limitation Act, 1963 to condone the delay in filing the application to set aside the ex-parte decree has been dismissed by the trial court. Suppose the application had been allowed, it can be said that the decision otherwise would have caused termination of the proceedings itself. In the case on hand, the order passed by the trial court causes the termination of the proceedings in the suit, whereas if the order is otherwise, it will not cause the termination of the proceedings in the suit. It clearly attracts the proviso to sub section (1) of Section 115 of the Code of Civil

Procedure and hence the revision preferred under Section 115 of the Code of Civil Procedure is not maintainable.

9. However even assuming that a revision filed under an erroneous provision, namely Section 115 of the Code of Civil Procedure, can be treated by this court as one filed under Article 227 of the Constitution of India, the petitioner has got no case to successfully challenge the order passed by the learned trial judge on merits also. In fact, the agreement itself is said to have been executed agreeing to sell the property for a sum of Rs.65,000/-, out of which, a sum of Rs.50,000/- was stated to be paid as advance and part payment of the consideration. Based on the agreement, a suit was filed in the year 2005 itself for specific performance. The revision petitioner entered appearance and filed a written statement in August 2006 itself. It is the contention of the petitioner that on 13.01.2007, there was a compromise at the intervention of the elders of the village, pursuant to which he paid Rs.25,000/- with interest at the rate of 1% per mensem. It is not stated in the supporting affidavit as to up to which date the interest was calculated and the total amount paid was also not indicated in the affidavit. If at all such a compromise was effected, the petitioner would not have failed to get it reduced to writing and

file it in the court for recording the compromise. Admittedly, the petitioner did not do so.

10. Again there are a lot of improbabilities and material contradictions in the evidence adduced through PWs.1 to 3. The petitioner himself, while deposing as PW1, stated that he paid Rs.10,000/- as interest at the time of settling the claim, whereas, yet another witness, namely PW2, would state that the interest was claimed at 2% per mensem. Considering the said improbabilities, the learned trial judge has arrived at a correct conclusion that the petitioner herein had not made out a case for condoning the inordinate delay of 1080 days in filing the petition to set aside the ex-parte decree passed against him. This court does not find any reason to interfere with the said order passed by the learned trial judge. Hence, on merits also, the revision petition deserves to be dismissed.

Accordingly, the civil revision petition is dismissed.
However, there shall be no order as to cost.

13.01.2015

Index : Yes
Internet : Yes
asr

P.R.SHIVAKUMAR, J.

asr/-

To
The Principal District Munsif cum
Judicial Magistrate, Vaniyambadi

C.R.P (PD) No.1986 of 2011

13.01.2015