

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.07.2016

Pronounced on : 17.11.2016

CORAM

The Hon'ble Mr.Justice **M.V.MURALIDARAN**

CRP(NPD)No.1654 of 2011 and
M.P.No.1 of 2011

M/s.Ganapathy Sugar Industries Ltd.,
8-3-438/5 Road No.4,
Banjara Hills,
Hyderabad 500 034.

.. Petitioner

Vs

M/s.Kwi Konveyors,
A Registered Partnership Firm,
Rep. by its Partner
Mr.Rohi Malhotra
156, 1Thambu Chetty St.,
Chennai 600 001.

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, against fair and decreetal order made in C.M.A.71 of 2010 on the file of the VIth Additional Judge, dated 31.03.2011 against the order made in I.A.No.20897 of 2009 in O.S.No.4946 of 2003 dated 09.04.2010 on the file of VI Assistant City Civil Court, Chennai.

Petitioner : Mrs.Thenmozhi Shivaperumal

Respondent: Mr.S.R.Raghunathan

ORDER

The defendant in O.S.No.4946 of 2003 is the revision petitioner before this Court.

2. The case of the plaintiff is that the defendant had approached the plaintiff to purchase of Fibrizor Hammers fitted with bushes. The defendant had placed the purchase order dated 19.08.1999, Doc.No.1, received by the plaintiff at their office at Madras. Based on such purchase order, the plaintiff had sold and delivered Fibrizor Hammers fitted with bushes and had raised invoices in the defendant on 16.10.1999 and 19.10.1999 from Madras for Rs.1,50,335.10/-, as per Doc.Nos.2 and 5. The goods were duly dispatched from Madras on instructions from the defendant and the lorry receipts are also enclosed. Therefore, the plaintiff claimed the amount of Rs.2,67,123.35/- and on the Principal amount of Rs.1,44,352/- at the rate of interest 18% per annum. Therefore, claiming the said amount, he filed the above suit before the learned VI Assistant Judge, City Civil Court, Chennai.

3. Denying the above plaint, the defendant has also filed his written statement and prayed the Court for dismissal of the suit.

4. When the case was posted on 27.10.2009 for cross examination of PW1 by the defendant's counsel, there was no representation either by the defendant or his counsel and hence the matter was posted to 28.10.2009 for recording evidence and on the said date also the defendant and his counsel were not appeared before the Court and hence the exparte decree was passed against the defendant. Therefore, the petitioner / defendant has filed an application in I.A.No.20897 of 2009 before the learned VI Assistant Judge, City Civil Court, Chennai to set aside the exparte order dated 28.10.2009 and permit the petitioner to contest the above suit.

5. The petitioner / defendant had filed the above application with an affidavit of his counsel by namely D.Sumathi. In her affidavit, she has stated that the said case was entrusted by her senior to conduct the case. The case was posted on 27.10.2009. But on that day, the said D.Sumathi, Advocate, who is the counsel for the defendant was not appeared before the Court for the reason that as instructed by her senior two other matters to be attended in other Courts. Therefore, she went to other Courts to attend the other matters and after she finished the other Court's matters and she rushed to the learned VI Assistant Judge, City Civil Court, for attending the case in the above suit. But, unfortunately, the above suit was called and since there was

no representation for the defendant, the said Court was called the defendant and set exparte and posted the suit for evidence on 28.10.2009.

6. The Advocate D.Sumathi also further stated in her affidavit that immediately they prepared an affidavit and petition to set aside the exparte order and informed the petitioner to come and sign in the affidavit. However, the petitioner representatives did not come to the Advocate since its office situated at Hyderabad. Therefore, the case was called on 28.10.2009, there was no representation for the defendant or his counsel. Hence, on the same day, the learned VI Assistant Judge, City Civil Court, Chennai has passed an exparte decree against the petitioner / defendant. Therefore, the petitioner / defendant has filed the application in I.A.No.20897 of 2009 for setting aside the exparte decree passed on 28.10.2009, with the affidvit of counsel D.Sumathi.

7. There was no counter filed by the respondent. After hearing the arguments by both sides on 09.04.2010, the learned VI Assistant Judge, City Civil Court, Chennai was pleased to dismissed the application in I.A.No.20897 of 2009.

8. The learned Judge, has given reasons for dismissal of the petition stating that though the case was entrusted to the learned counsel D.Sumathi, it is the duty of the petitioner / defendant to represent before the Court, the learned Judge also states that when an application filed by the petitioner / defendant, the defendant should file an affidavit for supporting his petition. In fact, this application is also curiously supported by his own affidavit since the petitioner could file personal affidavit now, what prevented him from filing the petition on 28.10.2009, but that was not explained in the affidavit. The learned Judge also given reasons stated that the suit is pending for 7 years. Therefore, this petition was dismissed by the learned Judge on 09.04.2010.

9. The petitioner / defendant has filed an appeal in C.M.A.No.71 of 2010 before the learned VI Assistant Judge, City Civil Court, Chennai. Consider the petitioner / defendant's case, the learned Appellate Judge was passed an order in the interest of justice and also giving one more opportunity to the defendant, he allowed the Civil Miscellaneous Appeal with the condition, to deposit the suit claim within a particular period. In the result, the said appeal was allowed on condition that the petitioner / defendant was directed to deposit the said claim of Rs.2,67,123.35/- on or before 28.04.2011 to the credit of

suit in O.S.No.4946 of 2003 on the file of VI Assistant Judge, City Civil Court, Chennai. Aggrieved against the said order to deposit the suit claim amount, the petitioner / defendant has filed the present Civil Revision Petition before this Court.

10. The case of the respondent is that the petitioner / defendant has not filed any supporting affidavit for setting aside the exparte decree petition, whereas the petitioner counsel alone were filed affidavit. The petitioner has filed this application only with an intention to protract the proceedings, since he was not diligently defending the suit from the beginning. The respondent also states that in fact the suit was already decreed exparte once and for the same, the petitioner/defendant also filed the set aside application, the same was allowed by giving opportunity to the petitioner / defendant to contest the suit.

11.The respondent also come forward by saying that though the Court has granted long adjournments for the cross examination of PW1 and finally on 27.10.2009, it was posted for cross examination of PW1, but on that day also there was no representation. Hence, the trial Court has closed the evidence on the petitioner's side and post the

matter for respondent's side evidence on 28.10.2009, on that day also there was no representation on behalf of the petitioner/defendant and the exparte decree was passed against the petitioner/defendant. The respondent/plaintiff also stating that unless supporting affidavit filed by the petitioner/defendant to set aside the exparte decree is not maintainable. Apart from this, the petitioner / defendant has not given any valid reason to set aside the exparte decree. Therefore, he sought for the dismissal of the petition. Accordingly, the petition also dismissed by the trial Court and the appeal was allowed, on condition to deposit of suit claim amount, by the First Appellate Court.

12.Heard Mrs.Thenmozhi Shivaperumal, learned counsel appearing for the petitioner and Mr.S.R.Raghunathan, learned counsel appearing for the respondent.

13.Admittedly, the suit was filed for recovery of amount of Rs.2,67,123.35/- along with future interest at the rate of 18% per annum on the principal amount of Rs.1,44,352/- from the date of plaint till date of realisation.

14.The petitioner/defendant also contest the suit by filing written

statement, but on 27.10.2009, either the petitioner/defendant or his counsel were not appeared before the trial Court. Therefore, the case was posted on 28.10.2009, on that day also there was no representation. Hence, the suit was decreed exparte. The petitioner/defendant has filed the application to set aside the exparte decree dated 28.10.2009 in O.S.No.4946 of 2003.

15.It is relevant to point out that the petitioner/defendant has filed the petition to set aside the exparte decree in Order 9 Rule 7, which is extracted as follows:

"Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance. Where the court has adjourned the hearing of the suit exparte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the date fixed for his appearance."

16.The Appellate Court has fairly considered and stated that as

per the above provision, nowhere it stipulates that on the failure of the defendant to appear on the date of hearing, the trial Court had to close the evidence of the plaintiff and post the matter for examination of defendant. It is well settled law, if any litigant has filed any application, he would have filed application for supporting his petition. But in this case, the Advocate appeared for the petitioner/defendant herself had filed the affidavit, but the Advocate, who appear for the litigant cannot identify herself with litigant by filing an affidavit. It is an admitted fact that an Advocate is not competent person to file an affidavit for the absence of the defendant on the date of hearing. Therefore, the affidavit filed by the learned counsel cannot treated as a sufficient reason for the absence of the petitioner/defendant.

17. But, on the other hand, the learned counsel who appearing for the defendant should appear before the Court either in the absence of the defendant in person or non-appearance, since the matter was posted only for cross examination of PW1. Thus being the case, the learned counsel who appearing for the defendant and appear before the Court and due to non-appearance of herself before the trial Court, she can very well filed the affidavit for supporting the petitioner/defendant case that too, the petitioner/defendant should file an

affidavit. In fact, the learned counsel appearing for the defendant herself stated that she was not able to attend the Court at the time of hearing, since she was attending two other Courts, which was entrusted by her senior and before she reach the trial Court, the matter was called and no one is appearing on behalf of the defendant. On behalf of the defendant's side, the evidence was closed. Therefore, the reason given by the petitioner/defendant is not convinced the Court. But, any how the Appellate Court namely, VI Assitant Judge, City Civil Court, Chennai in CMA.No.71 of 2010 has considered the claim of the defendant and stating that considering the nature of the claim that which is based on the goods sold and delivered in the year 1999 and the matter was prolonged more than 7 years, instead of driving the parties to multiplicity of proceedings, the Appellate Court is of the opinion that in the interest of justice, it will be fit and proper to give an opportunity to the defendant with the condition that the defendant should have deposit the entire claim and accordingly CMA.No.71 of 2010 was allowed, by setting aside the order passed in I.A.No.20897 of 2009 in O.S.No.4946 of 2003, dated 09.04.2010 and in default, CMA.No.71 of 2010 stand dismissed. Challenging the said order, the Appellant/ Petitioner/Defendant has come up with the present civil revision petition No.1654 of 2011 before this Court.

18.The main ground raised in this case is that whether the affidavit filed in support of the set aside petition by the counsel for the defendant can be accepted or not? or whether the counsel have right to file the affidavit in her/his own case. Admittedly the senior counsel for the defendant has entrusted this case along with two cases to his junior namely D.Sumathi, but due to attending in other Courts, she could not appeared in the present case for cross examination of the PW1 and hence she is person who should request before the Court in this case in O.S.No.4946 of 2003 has not appeared and the reason for non-appearance to be given by her only and hence she filed the affidavit, but the fact in remain is that the counsel is not a litigant but a defendant alone is the litigant and he only should file the affidavit and the counsel who entrusted to conduct can file the supporting affidavit, but in this case the counsel has filed the affidavit and no law permit to file affidavit to support the petition. Therefore, the Court namely VI Assistant Judge, should direct the defendant to file the affidavit, but without doing so the trial Court has simply dismissed the application on the ground that the petitioner/defendant has not filed the supporting affidavit for the set aside petition. Therefore, the counsel have no right to file affidavit for supporting the petition, but

the counsel can file supporting the parties case and the litigant alone should file the affidavit for supporting the petition to be filed by him. In this case, the affidavit filed by the counsel could not be taken into account, but in the interest of justice since the trial Court or the first Appellate Court have not shown their eyes to direct the petitioner/defendant to file the affidavit. The affidavit filed by the Advocate can be taken into account in this case and it should not be precedent in any other case.

19. During the course of argument, the petitioner/defendant has produced an order passed by this Court, which was reported in ***N.S.Yamuna v. A.Venugopal*** reported in **2003 (III) CTC 724** as follows:

"5. I have heard the contentions of both the parties. From the affidavit filed in support of the petition to set aside the *ex parte* order it is seen that a mistake had been made while recording dates and that is why neither the petitioner nor the counsel were present on 10.3.2000. When the mistake was realised on 13.3.2000, no time was lost by the petitioner and she had moved the

application on 16.3.2000 itself. There is nothing in the conduct of the petitioner to show that she was deliberately trying to delay the proceedings or that she had not made an honest offer to participate in the proceedings. The learned Judge's order is quite terse. The fact remains the respondent/plaintiff has still have to prove his case even after the *ex parte* order is passed. The Court has to be satisfied after recording the plaintiff's evidence that the suit has to be decreed but here on a very premature, the learned Judge has directed the petitioner to deposit the entire suit claim which, in my opinion is a very onerous condition and harsh punishment for being absent on 10.3.2000. A reasonable and sufficient explanation has been given by the petitioner for the absence on 10.3.2000. The order directing the petitioner to deposit the entire suit claim is clearly in excess of his jurisdiction, in an application under Order 9, Rule 7. The learned Counsel for the respondent said that he had filed an application for passing of interim decree and that is why this order

has been passed. This may be true. But, it is not a reason why learned Judge should have passed such an order in this application. There is nothing in the order to show that the learned Judge had been this in mind while passing this order.

6.While setting aside the condition imposed by the learned Judge I have to keep in mind the grievance of the learned Counsel for the respondent that he apprehends that the suit will be delayed. The suit is of the year 1999. The written statement has also been filed which is another factor to show that the petitioner has been vigilant in setting out her defence. However, I direct the lower Court to dispose of the suit expeditiously within six months from the date of receipt of this order."

20.On the other hand, the respondent/plaintiff has produced the judgment in ***K.Munusamy v. R.Velusamy in CRP(NPD).No.1729 of 2010, dated 09.06.2010***, in which this Court has passed as follows:

"5.Whereas the learned counsel for the respondent, by way of torpedoing and

pulverising the arguments, as put forth on the side of the revision petitioner submitted his arguments, the gist and kernal of them would run thus:

(i)It is not for the first time the lower Court passed the ex-parte decree.

(ii)Despite the Court having setting aside the first ex-parte decree and having given opportunity to the revision petitioner to participate in the proceedings, he willfully refused to avail of that opportunity, whereupon only the second ex-parte decree was came to be passed.

(iii)Both the Courts below understood the dilatory tactics of the revision petitioner herein and dismissed his request for still one more opportunity, warranting no interference by this Court in revision.

6.The point for consideration is as to whether there is any illegality or irregularity on the part of both the Courts below in rejecting

the prayer of the petitioner herein in seeking one more opportunity to participate in the proceedings?

7. Trite the proposition of law is that due opportunity has to be given to the defendant to participate in the proceedings. The maxim 'Audi alteram partem' contemplates that the Court should be lenient in giving opportunity to the parties concerned in this suits.

8. The core question arises as to how far such leniency can be extended; is it ad infinitum and ad nauseam? The answer is an emphatic no. It has become a trite proposition of law that in the litigative process both the parties should show interest and try to reach finality, as otherwise, it would lead to abusing the process of law. Understanding the basic principle of law relating to giving opportunity to the defendant, the trial Court granted earlier one opportunity by setting aside the first ex-parte decree. Despite six months

having been elapsed to avail the opportunity given, the defendant did not choose to avail the same. In fact, in the grounds of revision, he would rely upon C.R.P.SR.No.19392 of 2005 as the one filed before this Court as against the dismissal of Tr.O.P. But till date nothing has been shown as to what happened to the said un-numbered CRP. All these facts would clearly and unambiguously demonstrate and display pellucidly and palpably that the revision petitioner does not deserve any more opportunity.

9.Incidentally, before the lower Court, during the hearing of the CMA, the sale deed executed by the Court as per the ex-parte decree was produced to show that it has become a fait accompli, whereupon the appellate Court incidentally remarked, that the said sale deed is binding on the respondent. The learned counsel for the revision petitioner cannot look askance at it. I am of the

considered view that in a matter of this nature, both the Courts below were justified in dismissing the application, warranting no interference."

21. In fact, the judgment referred in **2000 (III) CTC 724** has passed by considering the orders passed by the Hon'ble Apex Court, the learned counsel appearing for the petitioner/defendant vehemently opposed the order passed in CMA by imposing the conditional order of deposit of the suit claim amount. On the other hand, the respondent would state that the discretionary orders passed by the learned VI Assistant Judge, City Civil Court, Chennai in CMA.No.71 of 2010 is a discretionary order for the lower Court and should not be interfered with any revision and supporting his case he cited the judgment referred above. He also stated that the conditional order imposed by the Appellate Court is perfectly in order and it was also stated that the learned Judge also stated that the petitioner/ defendant to pay directly to the respondent of his entire suit claim. In the interest of the petitioner, the Appellate Court has directed to deposit the suit claim amount before the Court only.

22.Considering the above judgment and records produced by the parties, I am convinced that the conditional order imposed by the Appellate Court is a very onerous condition, it is highly irreparable exercise, since the Court can give opportunity to the defendant by setting aside the exparte decree. But, he should not imposed the onerous condition, this will consider by this Court in the above reported judgment in 2000 (III) CTC 724. Therefore, the order passed by imposing condition of the Appellate Court in CMA.No.71 of 2010, dated 31.03.2011, is hereby set aside in so far as the condition to deposit the suit claim in the Court is concerned. But, on the other hand, this is the second time the attempt made by the petitioner / defendant to file an application to set aside the exparte decree. In fact, the suit has been filed in the year 2003, more than 13 years, the respondent/plaintiff was thrown pillar to post. Therefore, in the interest of justice, when the case was considering in favour of the petitioner/defendant that should be compensated to the respondent/plaintiff by way of cost.

23.Accordingly, I am inclined to pass the following orders:

(a)the civil revision petition is partly
allowed and the order of the learned VI

Additional Judge, City Civil Court, Chennai, passed in CMA.No.71 of 2010, dated 31.03.2011, is set aside in so far as the condition relating to deposit the suit claim in the Court is concerned, the petitioner/defendant is hereby directed to pay a sum of Rs.5,000/- as cost to the respondent/plaintiff within a period of two weeks from the date of receipt of a copy of this order;

(b)the learned VI Assistant Judge, City Civil Court, Chennai, is hereby directed to dispose of the suit within a period of two months from the date of receipt of a copy of this order on day today basis without giving any adjournment and both the parties are hereby directed to co-operate for early disposal of the said suit.

24. In the result, this civil revision petition is allowed with costs.
Consequently, connected miscellaneous petition is closed.

17.11.2016

vs

Index: Yes

Internet: Yes

To

1. The VI Additional Judge,
City Civil Court, Chennai.

2. The VI Assistant Judge,
City Civil Court, Chennai.

M.V.MURALIDARAN,J.

VS

Pre-Delivery Order made in
CRP(NPD)No.1654 of 2011 and
M.P.No.1 of 2011

17.11.2016