

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **02.12.2016**

CORAM:

THE HONOURABLE MR.**JUSTICE K.K.SASIDHARAN**

C.R.P.(P.D.) No.2542 of 2014

1.Ameerbasha : Petitioner
versus

D.Devan : Respondent

PRAYER: Revision filed against the order dated 26.2.2014, in I.A.No.5793 of 2013 in O.S.No.777 of 2008, on the file of the IV Assistant City Civil Court, Chennai.

For petitioner :: Mr.G.Appavu

For respondent :: No appearance

ORDER

The respondent during the currency of a suit initiated by the petitioner for redemption of mortgage, assigned the property to third parties notwithstanding the order of injunction and thereafter failed to contest the civil suit. The respondent on receipt of notice in the related execution petition, filed petitions to condone the delay and set aside the exapрте order. The learned VI Assistant City Civil Court, Chennai, even after making an observation that there are no documents produced before the Court to substantiate the contention that the respondent was laid up due to

jaundice, set aside the exparte order. The said order is under challenge in this civil revision petition at the instance of the plaintiff in O.S.No.777 of 2008.

Submissions:-

2. The learned counsel for the petitioners contended that the respondent though a party to the suit, and he was aware of the entire proceedings. The respondent purchased the property from the mortgagor and thereafter, assigned it to a third party notwithstanding the prohibitory injunction granted by the Trial Court in O.S.No.777 of 2008. According to the learned counsel, the respondent was sitting on the fence and it was only after initiating the execution proceedings, he approached the Court to set aside the exparte order after condoning the delay.

3. None appeared on behalf of the respondent.

Discussion:-

4. The petitioner filed the suit in O.S.No.777 of 2008 against the mortgagee, auctioners and the respondent, being the auction purchaser. The petitioners wanted redemption of mortgage dated 9 August 2001 on account of their repayment. The petitioners in their plaint contended that in spite of discharge, the mortgagee fabricated the documents to make it appear as if the property was sold to the respondent.

5. The respondent entered appearance and filed written statement. The suit was posted for cross examination of P.W.1. The respondent abandoned the Court. The Trial Court on the basis of the available materials, decreed the suit by passing a preliminary decree dated 16 December 2009.

6. The petitioners filed execution petition in E.P.No.4194 of 2010 and 4196 of 2010 to execute the preliminary decree dated 16 December 2009. The respondent was put on notice. It was only thereafter, the respondent filed the application to set aside the exparte decree.

7. The respondent in the affidavit filed in support of the application contended that he was laid up due to jaundice and as such, he failed to appear before the Trial Court. According to the respondent, he shifted his residence from old Washermanpet to Thiruvottiyur. In view of jaundice and shifting, he failed to contact the counsel and he was not in the know of things.

8. The documents available on record indicate that the suit for redemption of mortgage was filed on 6 February 2008. The Trial Court passed an order of injunction restraining the parties from alienating the property. The respondent notwithstanding the prohibitory order passed by the Trial Court, sold the property to M/s.Sriramulu and Mohammed Ayub on

18 February 2008. Therefore, as on the date on which he filed the application to set aside the ex parte decree, the respondent has no interest in the property.

9. The suit was posted in the list for trial during April 2009. P.W.1 filed proof affidavit on 24 April 2009. The matter was adjourned for cross examination. It was posted on 8 June 2009, 18 June 2009, 3 July 2009, 15 July 2009, and 5 September 2009 for cross examination of P.W.1. Neither the petitioner nor his counsel appeared before the Trial Court for cross examination of P.W.1. In the meantime, the suit was transferred to the Ad hoc Court No.1. The transferee Court posted the matter for cross examination on 15 October 2009. The matter was thereafter posted for cross examination on 23 October 2009, 29 October 2009, 5 November 2009 and 20 November 2009. Neither the petitioner nor his counsel appeared before the transferee Court on all these days for cross examination of P.W.1. The suit was once again transferred to IV Assistant City Civil Court, Chennai. It was posted on 27 November 2009 for cross examination of P.W.1. Since there was no representation on behalf of the respondent, the suit was adjourned to be posted on 16 December 2009. The Trial Court took up the matter on 16 December 2009 and having found that there was no representation on behalf of the respondent, passed the Judgment and Decree on merits. The respondent on receipt of notice from the executing Court, filed the application to set aside the ex parte decree.

10. Though the respondent contended that he has undergone treatment for jaundice, with effect from 14 November 2008, the date on which he filed written statement, the fact remains that not even a scrap of paper was produced before the Trial Court to prove the 12 months treatment for jaundice.

11. The learned Trial Judge allowed the application and set aside the ex parte decree primarily on the ground that the Court has already condoned the delay. Even after condoning the delay, the Court has to consider whether there are grounds made out by the respondent under order 9 Rule 13 CPC, to set aside the ex parte decree.

12. The learned Trial Judge in paragraph 6 of the order, made a sweeping remark against the respondent.

Paragraph 6 reads as follows :-

6. Now coming to the question of act, no doubt the application is bereft of treatment particulars for the alleged severe attack of jaundice coupled with virus fever and it has not been substantiated by any medical records or oral evidence. It is not the case of the petitioner also that he took native treatment and the phrase due to several reasons, the petitioner had to shift his place of residence to Thiruvaottiyur is also so vague and obscure. As rightly asked by the respondent/ plaintiff's side, what prevented the

counsel to appear before the Court and make representations for the petitioner is a million dollar question. There are sufficient number of opportunities were provided by this Court as well as the Adhoc Court-I for the appearance of the petitioner and cross examination of P.W.1. Not even the advocate clerk did appear before the Court has been stressed much on the side of the respondent/plaintiff.

13. It was only after making an observation that there was no evidence produced by the respondent to condone his absence, the Trial Court allowed the application filed by him. The Trial Court having convinced that the respondent miserably failed to plead and prove that he was prevented from appearing before the Court, ought to have rejected the application to set aside the exparte decree.

14. The learned counsel for the petitioners placed reliance on the following observation made in judgment of this Court in ***Sri Pillaiyarpatti Karpaga Vinayagar Koil Nagarathan Trust vs. R.M.Sevagan Chettiar, 1996(1) LW 432.***

“It has been repeatedly held by this Court that ex parte decrees cannot be set aside on vague allegations that the defendant was ill. It is for the defendant to prove that he was so ill on the particular day that he could not attend Court. Until then, it could not be said that there was

sufficient cause for his non appearance. Without proving the sufficient cause to the satisfaction of the Court, no person can claim to have the ex parte decree set aside. In this connection, the ruling of this Court in Arukkani Ammal vs. Gurusamy (1987(I) MLJ 32 = 100 LW 707) can be looked into. The learned Chief Justice has laid down the proposition that ex parte decrees cannot be set aside on vague allegations of illness”.

15. The petitioners are armed with a decree passed by the Trial Court. The decree cannot be set aside so lightly by giving reasons which are not supported by evidence. The Trial Court in this case was convinced about the falsity of the case pleaded by the respondent. Even then, the Trial Court exercised discretion in favour of the respondent. It is true that the Trial Court is entitled to exercise its discretion in the interest of justice. However, such discretion shall also be in accordance with the settled legal principles.

16. The Supreme Court in **Ganga Bai vs. Vijay Kumar and Others, (1974) 2 SCC 393** in the context of Order VI Rule 17 CPC observed that exercise of such far reaching discretionary power to allow amendment of pleadings is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court.

K.K.SASIDHARAN, J.

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17. The observation made by the learned Trial Judge in paragraph 6 of the order itself would be sufficient to set aside the order passed in I.A.No.5793 of 2013. I am therefore of the view that the petitioners must succeed.

18. In the result, the order dated 26 February 2014 is set aside. The application in I.A.No.5793 of 2013 is dismissed.

19. In the upshot, I allow the civil revision petition. No costs. Consequently, M.P.No.1 of 2014 is closed.

02.12.2016

Index:Yes/no
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To
The IV Assistant City Civil Court, Chennai.

C.R.P.(P.D.) No.2542 of 2014

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