

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.11.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.2605 of 2011

1.V.Rajagopal
2.R.Ayyaswamy

.. Petitioners

Vs.

K.S.Shanmugavelu

..Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the fair and decreetal order of the learned III Additional Subordinate Judge, Coimbatore, made in I.A.No.169 of 2008 in O.S.No.604 of 2004, dated 01.06.2011.

For Petitioners : Mr.J.Ramakrishnan

For Respondent : Mr.C.P.R.Kamaraj

ORDER

The case of the revision petitioners is that they are the defendants in the suit. The respondents herein filed the above suit for Declaration and Permanent Injunction as against the revision

petitioners on the strength of the alleged sale agreement dated 16.04.1998. Though the respondent does not have any right over the suit property, has however filed the above suit. The revision petitioners hence filed written statement and contented that there was only a loan transaction between the revision petitioners and the respondent herein. There was no agreement or whatsoever entered between the revision petitioners and the respondent. Being so, the said suit stood posted for the cross examination of plaintiff / respondent on 04.01.2007. On that day the revision petitioners have went to the Court and have waited for the cross examination of the respondent herein. However, due to the sudden ill health of one of the revision petitioner, he without instructing his Counsel in regard to the factual questions to be asked during the cross examination was constrained to leave the Court. Unfortunately, the other revision petitioner, who went in search of their Counsel was held up with his Counsel in one another Court. Therefore the revision petitioners were not in a position to appear before the Court at that particular time when the case was called. Hence, the trial Court called the revision petitioners absent and thereby set them ex-parte. The trial Court by holding reason, since the revision petitioners have failed to cross examine the plaintiff / respondent they have failed to conduct the case and hence they are set ex-parte.

2.The non appearance of the revision petitioners is neither willful nor wanton, but the same is because of the ill health of the revision petitioners, they could not appear. Therefore the revision petitioners filed an application to set aside the ex-parte decree passed against them. Since there was a delay of 297 days in filing the set aside application, they preferred I.A.No.169 of 2008 under section 5 of the Limitation Act praying for condonation of the said delay. However, without appreciating the above said fact, the trial court mechanically dismissed the revision petitioners' application. The said dismissal order is impugned herein.

3.I heard Mr.J.Ramakrishnan, learned counsel appearing for the petitioners and Mr.C.P.R.Kamaraj, learned counsel appearing for the respondents.

4.The learned counsel appearing for the revision petitioners submitted that while the suit stood posted for the cross examination for plaintiff / respondent on 04.01.2007, the revision petitioners have went to the Court and have waited for the cross examination of the respondent herein. However, due to the sudden ill health of one of the revision petitioner, he without instructing his Counsel was constrained

to leave the Court. Unfortunately, the other revision petitioner remained held up in one another Court along with his Counsel. Therefore the revision petitioners were not in a position to appear before the Court at that particular time when the case was called.

5. Further the Learned Counsel for the revision petitioners submitted that the revision petitioners also suffered from severe diabetic and other ailment only because of the same the revision petitioners suddenly fell ill. Further the Learned Counsel contented that the revision petitioners have a good case on merit and they are always ready to conduct the case.

6. Per contra, the Learned Counsel for the respondent submitted that the revision petitioners have purposefully failed to examine the respondent, so as to prolong the case. The reason put forth by the revision petitioner is not bonafide and liable to be rejected. Only on proper application of the said fact, the trial Court has rightly dismissed the petitioner's application in I.A.No.169 of 2008.

7. On perusal of the impugned order it is found that the trial Court disbelieving the version of the revision petitioners has held that the delay of 297 days cannot be condoned and thereby dismissed

application. It is found that the trial Court it is not ready to believe the medical certificate produced by the revision petitioners disclosing their health problem. The trial Court on taking into account that respondent / plaintiff is removed with one leg out of hyper diabetics and further holding that the revision petitioners despite having knowledge but have chosen to say that they are unaware of removal of the respondent's leg.

8.At this juncture this Court feels that the above said finding is neither relevant nor is required to decide the application made by the revision petitioners to condone the delay of 297 days in seeking to set aside the ex-parte decree.

9.In the case on hand it is admitted by either sides that their title as well as rights and liabilities are to be decided in the present suit. It is needless to say that either party has a rights and duty to establish their own case, so as enabling the trial Court to decide the issue and right on merits, after conducting full-fledged trial. Especially in a suit for declaration of title, an ex-parte decree can adversely affect the right and title of the other side, since the same came to be passed without any contest.

10. In this context it is useful to refer the following decision of this court reported in **2009 (1) TLNJ 6 (civil)** in the case of, **T.R.Thulkarunai –Vs- Babiammal**, wherein in para 10 it is held as follows:

“10. For the identical principle, learned counsel for the petitioner also relies upon a decision of the Supreme Court in S.L.P.(Crl.)No.131 of 2006 dated 12.08.2008 (state (NCT of Delahi) –Vs- V.Ahmed Jaan.

11. Following the dictum laid down by the Supreme Court in the decisions afore stated, bearing the explanation in the affidavit in mind, this court is of the considered view that the delay has been properly explained before this Court satisfactorily. The petitioner has stated about his bad health due to food poison and he did not assign any reason for the delay. It may also be observed that he might have furnished even some other reasons, producing certain medical certificates, but he has not done so. In the considered view of this Court, the affidavit contains “sufficient causes’ for the Court to condone the delay and for the inconvenience caused to the other side it has to be adequately compensated in terms of money. This Court quantifies such terms at Rs.3,000/- (Rupees three thousand only) which is payable by the petitioner to the respondent”.

11. For the foregoing reasons and in the light of the above said

principle laid down by the Hon'ble Apex Court, I am of the considered view that in order to give one more opportunity and to meet the ends of justice, this civil revision could be allowed with cost of Rs.10,000/-.

12.In the result:

(a) this Civil Revision Petitioner is allowed by setting aside the order passed in I.A.No.169 of 2008 in O.S.No.604 of 2004, dated 01.06.2011 passed by the III Additional Subordinate Court, Coimbatore, on condition that the petitioner should deposit a sum of Rs.10,000/- to the credit of A/C No.6514082295 in the Indian Bank, Madurai Bench of Madras High Court Branch, Madurai, within a period of three weeks from the date of receipt of a copy of this order;

(b) the learned III Additional Subordinate Court, Coimbatore, is directed to number the set aside application and to pass orders within a period of one month, by giving fair opportunity to both sides;

(c) on passing of the order on the set aside application, the learned Judge is directed to dispose the said suit within a period of three months from the date of

receipt of copy of this order, on day today basis. Both the parties are directed to co-operate for early disposal of the set aside application as well as the suit.

24.11.2016

Note:Issue order copy on 19.04.2017
Internet:Yes
Index:Yes

vs

To

The III Additional Subordinate Judge,
Coimbatore.

M.V.MURALIDARAN, J.

VS

**Pre-delivery order made in
CRP(NPD)No.2605 of 2011**

24.11.2016

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