

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.08.2016

Pronounced on : 17.10.2016

CORAM

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

**CRP(PD)No.1040 of 2012
and
M.P.No.1 of 2012**

Satbir Singh Bakshi

... Petitioner

Versus

1.Saroja

2.Lakshmanan

3.Munusamy

4.K.Suresh

5.Devaki

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decretal order dated 25.08.2011 made in I.A.No.55 of 2011 in O.S.No.185 of 2008 on the file of the Principal District Munsif Court, Kancheepuram.

For Petitioner : Mr.M.Devendran

For Respondents : No Appearance

ORDER

The Civil Revision Petition has been filed against the order and decreetal order dated 25.08.2011 made in I.A.No.55 of 2011 in O.S.No.185 of 2008 on the file of the Principal District Munsif Court, Kancheepuram.

2.The case of the petitioner / 3rd defendant is that the suit was filed by the respondents / plaintiffs against this petitioner along with three others for declaration of title of the suit properties in their favour and for permanent injunction.

3.The case of the plaintiffs are that the 1st plaintiff is the wife of one deceased Kuppan and the plaintiffs 2 to 5 and the 4th defendant herein are the sons and daughters of the above said deceased Kuppan and the 1st defendant Tmt.Saroja. The deceased Kuppan was the original owner of the suit schedule property and during his life time he was in possession and enjoyment of the suit property. The patta has also issued in favour of the said Kuppan. The plaintiffs further state that the deceased Kuppan has died intestate in or about 1981 leaving behind the plaintiffs and 4th

defendant herein as his legal heirs and they have succeeded to the estate and liabilities of the deceased Kuppan.

4.The further case of the plaintiffs are that the 1st defendant is the wife of the 4th defendant herein and the plaintiffs and the 4th defendant wherein jointly executed a registered power of attorney deed dated 14.06.2001 in favour of the 1st defendant and under the power deed, they have been authorizing and empowering the 1st defendant to sell the suit schedule mentioned property on behalf of the plaintiffs and the 4th defendant and directing her to pay the sale proceeds to the plaintiffs and the 4th defendant after receiving the same from the 3rd party.

5.The plaintiffs further case are that when the plaintiffs were applied the encumbrance certificate in respect of the suit schedule of property, the plaintiffs surprised and shocked to see that the 1st defendant has seemed to have executed a power of attorney in favour of the 2nd defendant on 07.02.2006. While the power was in force in favour of the 1st defendant, the 1st defendant without knowledge and consent of the plaintiffs herein, colluded with the 4th

defendant has executed another power of attorney deed dated 07.02.2006 in favour of the 2nd defendant in respect of the suit schedule of property. The plaintiffs further state that the power holder namely the 1st defendant have not delegating her power to any other person itself which is invalid in law. Hence, the power of attorney executed by the 1st defendant, who is the original power holder of the plaintiffs dated 07.02.2006 is not valid in law and also not binding upon the plaintiffs' interest in the suit schedule of property.

6.The further case of the plaintiffs are that as per the power deed dated 07.02.2006 which was executed by the 1st defendant power agent of this plaintiff has no right to deal with the power of suit property under the guise of the said power of attorney deed executed by the 1st defendant dated 07.02.2006. Therefore, the 1st defendant has transferred the power in favour of the 2nd defendant without knowledge of the plaintiffs and the 1st defendant is also not acting truly or faithfully to the expectation of the plaintiffs and the 1st defendant has also not rendered any accounts to the plaintiffs till this date in respect of the suit schedule of property. Pursuant to the

above power of attorney dated 07.02.2006, the 2nd defendant has executed the registered sale deed in favour of the 3rd defendant in respect of the suit schedule property. Hence, the very same execution of sale deed is not valid and not binding on the plaintiffs' interest. Therefore, the sale deed dated 12.11.2007 executed in favour of the 3rd defendant would not confer any right, title over the suit properties and the said sale deed dated 12.11.2007 is invalid in law and unexercisable. Therefore, the plaintiffs have approached the learned District Munsif Court, Kancheepuram and filed the above suit in O.S.No.185 of 2008 against this petitioner and other three defendants for declaration that the plaintiffs are absolute owners of the suit schedule of property and for permanent injunction.

7.The case of the petitioner / 3rd defendant and other defendants are that the suit filed in O.S.No.185 of 2008 has not maintainable and the said sale deed dated 12.11.2007 was executed by the 2nd defendant in favour of the 3rd defendant is not valid in law. Pursuance to the execution by the plaintiffs and the 4th defendant in favour of the 1st defendant who represented the principals, the plaintiffs and the 4th defendant and who has received

the entire sale consideration and executed the sale agreement on behalf of the plaintiffs and the 4th defendant. On receiving of entire sale consideration from the 1st defendant on behalf of the plaintiffs and the 4th defendant, the plaintiffs and the 4th defendant having given the necessary power of attorney to the 1st defendant, the said power of attorney dated 14.06.2001 and the agreement of sale dated 06.02.2006 coupled with interest has become irrevocable.

8.The further case of the defendant is that having received the entire sale consideration has executed the power of attorney dated 07.02.2006 in favour of the 2nd defendant who in turn has executed the sale deed on behalf of the 1st defendant and registered the same. In pursuance of the said agreement of sale the 1st defendant has put the 2nd defendant in possession and this defendant after the execution of the sale deed has put the 3rd defendant in possession of the suit schedule of property.

9.The further case of the defendants are that on the sole ground that the power of attorney i.e., the 1st defendant cannot execute another power of attorney is opposed to law. The plaintiff's

suit is opposed to the provisions of the Contract Act. The 1st defendant having got the power of attorney in her name has every right to execute the agreement of sale and the agreement holder has every right to nominate the same. The defendants' case is that the sale deed is valid in law. Therefore, they sought for dismissal of the suit on various grounds.

10. After filing the suit, the suit in O.S.No.185 of 2008 was posted for filing of written statement on 02.04.2009. But due to suffering from viral fever and the advice of the Doctor to take bed rest, the written statement was not filed on the said date. The petitioner / 3rd defendant states that the suit was posted for filing written statement on 02.04.2009, due to non filing of the written statement by the 3rd defendant, the exparte order was passed on the same day against this defendant. Challenging the said exparte order dated 02.04.2009, the 3rd defendant, who is the petitioner herein filed I.A.No.55 of 2011 in O.S.No.185 of 2008 before the District Munsif Court, Kancheepuram for setting aside the exparte order dated 02.04.2009.

11. The petitioner / 3rd defendant has filed the above I.A. on the

ground that though the suit was posted originally on 02.04.2009 and the sale deed executed by the 3rd defendant/petitioner and who is in actual possession has taken care of the case and he only should file the written statement in the above suit. But though the suit was posted on 07.02.2009, on that day he was suffering from viral fever and as per the advice of the Doctor, he take bed rest and due to that he was not able to give instructions to his counsel on record to file written statement and hence the suit was set exparte. Due to non filing of written statement, the exparte order was passed on 02.04.2009 against the petitioner / 3rd defendant.

12. On receipt of the notice in the above Interlocutory Application in I.A.No.55 of 2011 in O.S.No.185 of 2008, the respondent / 4th plaintiff has filed counter. In the counter, it was stated that the petitioner / 3rd defendant's counsel filed vakalath on behalf of the 3rd defendant on 16.06.2008 and took time for filing written statement and the Court below also given more than one year for filing written statement and the 3rd defendant has not filed written statement. Hence, on 02.04.2009 an exparte order was passed against the 3rd defendant.

13.The 4th plaintiff further states that originally the suit was posted on 07.02.2009 and the 4th plaintiff has also adduced evidence as PW1 and the learned counsel for the 2nd defendant has also cross examined the PW1 and the cross was in continuation. After five years, the petitioner / 3rd defendant has come forward to file a petition to set aside the exparte order and that the petition is highly belated. The 4th respondent / 4th plaintiff has stated that there was no bonafide reason given by the petitioner to set aside the exparte order and there is no merit in the petition. The petitioner / 3rd defendant has not produced any single document to show that the petitioner / defendant suffering from viral fever. Hence, he sought for dismissal of the petition with cost.

14.Considering both side cases, the learned District Munsif, Kancheepuram was pleased to dismissed the above I.A.No.55 of 2011 on 25.08.2011. The reason given by the learned District Munsif is that on perusal of the records, the suit was filed in the year 2008 and it is in the stage of cross continuation of PW1. This petitioner / 3rd defendant has entered appearance even on 17.06.2008 and due to

non filing of written statement, he has been set exparte on 17.02.2009 and exparte evidence has been recorded on 02.04.2009. Subsequently, D1 and D2 alone has filed an application to set aside the exparte decree in I.A.No.191 of 2009 and after framing of issues the case was posted in the list and now it is in part heard stage.

15.Learned Judge further states that the case of the petitioner is that as he was suffering from viral fever and he could not contact his counsel and not filed the written statement, but on perusal of the records shows that inspite of time granted for nearly one year the petitioner has not filed the written statement. Furthermore, he has filed the application to set aside the exparte order only on 08.08.2011 and without filing application to condone the delay in filing this application. The learned Judge has also stated that though the petitioner / 3rd defendant was suffering from viral fever on 17.02.2009 and his counsel continuously appearing before this Court for two years and what prevented the petitioner from filing this application to set aside the exparte order, which has not been clearly stated and established. Furthermore, the petitioner has not filed any condone delay application and he has straight away filed the set aside petition and even in the set aside petition he has not explained

the proper reason for each and every day delay. The learned District Munsif has also states that when the matter is in the part heard stage being for declaration and for consequential relief the petitioner / 3rd defendant has not come forward before this Court with proper and reasonable cause. He has filed the application only on 08.08.2011 for setting aside the exparte order dated 02.04.2009. Therefore, the learned District Munsif has stated that the Court of the opinion that it has been contemplated under Order 122 of Limitation Act to set aside the exparte decree and an application has to be filed within the time prescribed period. But the petitioner has not filed the same within the time prescribed by the Limitation Act. He has also stated that the petition is devoid of merits and it is not maintainable and dismissed the application. Challenging the said order of dismissal in I.A.No.55 of 2011 dated 25.08.2011, the present civil revision petition has been filed by the 3rd defendant.

16.Heard Mr.M.Devendran, learned counsel appearing for the petitioner. No appearance for the respondents.

17.This Court while ordering notice of motion, an order of interim stay was granted. It is admitted fact that the petitioner / 3rd

defendant was set exparte and the exparte order was passed on 02.04.2009, but for setting aside the exparte order, the Interlocutory Application was filed in I.A.No.55 of 2011 for setting aside the exparte order dated 02.04.2009, which was filed on 08.08.2011 is absolutely maintainable.

18.This Court considering the various cases held by this Court and the Hon'ble Apex Court that there is no period of Limitation is for deciding the application for setting aside the exparte order. Apart from this, the Court should consider the application filed to set aside the exparte order can be allowed on cost since the suit was pending as on date for filing the set aside application. The case in hand, this petitioner / 3rd defendant was set exparte on 02.04.2009 and the application to set aside was filed on 08.08.2011. But till such time no exparte decree was passed and the suit was pending as part heard stage. Therefore, the very dismissal order of the learned District Munsif Court is totally wrong and this Court has considered the said point in the following cases as follows:-

(1)***N.Ramanathan and another Vs.***

Meenakshisundaram reported in ***2001 (4) CTC 8*** this

Court held as follows:-

“Code of Civil Procedure, 1908, Order 9, Rule 7 – Defendants against whom ex parte order was passed filed application before trial court to set aside such ex parte order on ground that defendants who are employed in Madurai had requested their friend in Karaikudi to follow suit and that on account of communication gap there was non-appearance on 9.9.97 which was neither willful nor wanton – Rule contemplates that such petition could be allowed on costs as suit was pending – Obstructing defendants from participating in suit would be unreasonable – Ex parte order should be set aside on costs even if defendants failed to substantiate reasons for non appearance in court and it would be in accordance with principles of natural justice.”

(2) ***Valleeswari Vs. Kamalakannan and another*** reported in ***2010 (1) MWN (Civil) 581*** this Court held as follows:-

“10. The learned counsel appearing for the second defendant rightly makes out a difference in the rigors of Order 9, Rule 13, C.P.C., and the liberal constriction which is warranted under Order 9, Rule 7, C.P.C., It is a

case where the proceedings are still pending adjudication. But after the termination of the lis, the plaintiff or the defendant invokes the provision under Order 9, Rule 7 or Order 9, Rule 13, C.P.C., as the case may be. When the Suit is terminated and the party concerned knocks at the doors of this Court to set aside the decree passed or to restore the Suit which was dismissed for default, a rigorous test would be applied to weigh the veracity of the reason given for the non-appearance of the party concerned. Considering the fact that the Suit is pending adjudication and no prejudice will be caused to the other side, the Petition filed under Order 9, Rule 7, C.P.C. is liberally construed.

12. This Court in ***N.Ramanathan and another v. Meenakshisundaram, 2001 (4) CTC 8***, has clearly held that even if the defendant is not in a position to substantiate the reason assigned for his non-appearance, his right to participate in the pending trial proceedings cannot be denied. Though the second defendant has come out with some weak reasons for not attending the hearings before the Trial Court, the Court finds that it would be unjust in the light of the aforesaid ratios to deny

his right to participate in the trial proceedings which is pending adjudication.

13.It is true that there has been a delay of about four and half years in filing the Petition by the second defendant under Order 9, Rule 7, C.P.C. This Court in ***Palani Nathan v. Devannai Ammal, 1987 (2) MLJ 259,*** has held that for filing an Application under Order 9, Rule 7, C.P.C., no limitation is prescribed and it is open to the Court to condone the absence of the defendant and set aside the ex parte order passed as against him and permit him to take part in the proceedings at any stage of the proceedings.

16.After all, the trial proceedings are pending before the Trial Court. Not much hardship will be caused to the plaintiff if the second defendant is permitted to participate in the trial proceedings. As rightly pointed out by the learned counsel appearing for the second defendant, if the permission sought for by the second defendant to participate in the trial proceedings under Order 9, Rule 7, is rejected, the Trial Court can at best pass an ex parte decree as against the second defendant. The said proceedings will give scope for the second defendant to

invoke provisions under Order 9, Rule 13, C.P.C. There is every scope for such multiplicity of proceedings, if the right to participate in the trial proceedings made by the second defendant is negated.”

19.As per the above judgments of this Court, it is made clear that even if this petitioner / 3rd defendant has not assigned specific reason for non appearance and non filing of the written statement, it is true that there is a delay of two years in filing the set aside application by the petitioner / 3rd defendant under Order 9, Rule 7 of C.P.C. and for filing an application under Order 9, Rule 7 of C.P.C. no limitation is prescribed and it is open to the Court to condone the absence of the 3rd defendant and set aside the exparte order passed as against him on 02.04.2009 and permit this petitioner to take part in the proceedings at any stage of the proceedings. In fact, the Hon’ble Supreme Court has also held in a case in **Bhanu Kumar Jain v. Archana Kumar and another** reported in **2005 (1) CTC 368** was pleased to hold as follows:-

“...Only at the stage when the matter has been posted for judgment after completing the trial proceedings, an Application under Order 9, Rule

7, C.P.C., cannot be maintained.”

20. It is made clear that only at the stage when the matter has been posted for judgment after completing the trial proceedings, an Application under Order 9, Rule 7, C.P.C., cannot be maintained, which was clearly upheld by the Hon'ble Supreme Court. In the case in hand, the trial proceeding has not completed and it is pending for cross examination of PW1. Therefore, the very application filed by the petitioner / 3rd defendant is absolutely maintainable and the order of the learned District Munsif is totally misconceived and wrong. I am of the opinion that after all the trial Court proceedings are pending before the trial Court and which hardship caused in the plaintiffs, it is made clear that due to the rejection of the petition filed by the petitioner / 3rd defendant under Order 9, Rule 7 of C.P.C., the trial Court can pass an ex parte decree against the petitioner / 3rd defendant, the said proceedings will give scope for invoke proceedings under Order 9 Rule 13 of C.P.C. Therefore, the learned District Munsif without gone through the above judgements has dismissed the application on the ground that though the petition was filed to set aside the ex parte order dated 02.04.2009 after 2 and half years only on 08.08.2011. If the learned District Munsif would

properly gone through the proceedings, he would not dismissed the application filed under Order 9 Rule 7 of C.P.C., since the suit is pending before the said Court and it is part heard stage only.

21.The Hon'ble Supreme Court also very clearly held in yet another case in **Sangram Singh v. Election Tribunal, Kotah and another, AIR 1955 SC 425**, has categorically held as follows:-

"..28.Then comes Rule 7 which provides that if at an adjourned hearing' the defendant appears and shows good cause for his "previous non-appearance", he can be heard in answer to the Suit "as if he had appeared on the day fixed for his appearance."

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

Participation by the defendant in the trial proceedings cannot be denied even if he does not show any good cause."

22.The Hon'ble Supreme Court has very clearly held in the

above case and in various cases that participation by the defendant in the trial Court proceedings cannot be denied even if he does not show any good cause for his absence in previous proceedings, which is squarely applicable to the present case in hand.

23. Therefore, it is made clear that there is no limitation for filing the petition under Order 9 Rule 7 of C.P.C. but the limitation apply only for the setting aside the exparte decree under Order 9, Rule 13 of C.P.C. The question of condoning delay of Section 5 of Limitation Act, there is no necessary condition for this case since the suit is pending and no exparte decree passed against this petitioner / 3rd defendant. Therefore, the very filing of the application under Order 9, Rule 7 of C.P.C. is maintainable and as per the order of the Hon'ble Supreme Court and this Court clearly held that even the 3rd defendant has not given any valid reason, the Court can give an opportunity and it is open to the Court to condone the delay of set aside application and permit him to take part in the proceedings at any stage of the proceedings. Accordingly, the civil revision petition is liable to be allowed.

24. In the above circumstances, I am inclined to pass the

following orders as follows:-

(a) this civil revision petition is allowed by setting aside the order in I.A.No.55 of 2011 in O.S.No.185 of 2008 dated 25.08.2011 on the file of the Principal District Munsif, Kancheepuram on condition that the petitioner should pay a sum of Rs.5,000/- by way of Demand Draft and the same should be paid in favour of the Headmaster, Government Higher Secondary School, Iyyappanthangal, Chennai-56. The petitioner should pay the said cost by way of taking demand draft in favour of the above said school and hand over the same to the school Headmaster within a period of two weeks from the date of receipt of a copy of this order and produce the receipt before this Court.

(b) the Headmaster, Government Higher Secondary School, Iyyappanthangal, Chennai - 56 is hereby directed to encash the demand draft and use the said sum for the welfare of the students by way of constructing a good toilet in the school.

(c) the trial Court viz. the District Munsif, Kancheepuram is hereby directed to dispose of the suit in O.S.No.185 of 2008 by giving an opportunity to the

plaintiffs as well as the defendants and to dispose of the suit within a period of four months from the date of receipt of a copy of this order and both the parties viz. the plaintiffs and the defendants are hereby directed to co-operate for early disposal of the suit.

25. Accordingly, the civil revision petition is allowed with cost. Consequently, connected miscellaneous petition is closed.

17.10.2016

vs

Note: Issue order copy on 18.10.2016.

Index: Yes.

Internet: Yes.

To

The Principal District Munsif,
Kancheepuram.

M.V.MURALIDARAN, J.

vs

**Pre-Delivery Order made in
CRP(PD).No.1040 of 2012
and
M.P.No.1 of 2012**

17.10.2016