

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.04.2016

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.1120 of 2016

&

C.M.P.No.6154 of 2016

M.G.Sathiyamoorthy

... Petitioner

VS.

1.Anbalagan

2.Ramalingam

3.Shanmugam

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order passed in I.A.No.235 of 2014 in I.A.No.25 of 2013 in O.S.No.127 of 2010 dated 13.04.2015 on the file of the Court of Subordinate Judge, Chidambaram.

For Petitioner : Mr.A.Muthukumar

For Respondents : Mr.C.Prabakaran for R1

ORDER

This Civil Revision Petition has been preferred against the order of the trial Court dated 13.04.2015 made in I.A.No.235 of 2014 in I.A.No.25 of 2013 in O.S.No.127 of 2010 on the file of the trial Court. The said suit was filed by the first respondent herein for specific performance based on

an agreement for sale allegedly executed by Shanmugam, the third respondent herein as power agent of Ramalingam, the second respondent.

2. In the said suit, the revision petitioner, who figures as the third defendant, was set *ex parte*, pursuant to which he filed I.A.No.25 of 2013 under Order IX Rule 7 CPC to set aside the *ex parte* order. It is pertinent to note that the suit is still pending and a defendant, who remains *ex parte*, cannot be prevented from taking part in the proceedings subsequent to his appearance after being set *ex parte*. An application under Order IX Rule 7 CPC will be necessary to restore the status-quo ante i.e., as on the date on which the order setting him *ex parte* came to be passed. Normally the Courts shall be lenient in allowing such applications. Even in case such application is not allowed, the defendant cannot be prevented from taking part in the proceedings from the moment he enters appearance after the passing of the order setting him *ex parte*. In this case, the revision petitioner was set *ex parte* on 08.01.2013. The revision petitioner had also filed the written statement before he was set *ex parte*. In January 2013 itself the revision petitioner filed I.A.No.25 of 2013 under Order IX Rule 7 CPC. The only person who was entitled to oppose the application is the first respondent, namely the plaintiff in the suit. In fact, the revision petitioner need not have shown

the other defendants as party respondents. However, he has chosen to make the other two defendants also as party respondents in the said application. The second and third respondents also were set *ex parte* in the said suit O.S.No.127 of 2010. Under the said circumstances, the petitioner could have very well sought an order dispensing with the service of notice on them in his application filed under Order IX Rule 7 CPC. Though the revision petitioner did not seek such an exemption in the petition itself, subsequently he filed a memo seeking an order of exemption from serving notice on respondents 2 and 3/defendants 1 and 2, who remained *ex parte* in the main suit. The learned trial Judge chose to refrain from passing any order in the said memo. The same drove the petitioner to file an application I.A.No.235 of 2014 under Order III Rule 1 and 2 CPC to recognize the third respondent as the power agent of the second respondent so as to enable him to proceed with the case. The said application was dismissed by the trial Court holding that the petitioner, being a third party, cannot compel a party to the suit to appear through a power agent. It is as against the said order of the trial Court dated 13.04.2015, the present Civil Revision Petition came to be filed.

3. The first respondent has entered appearance through counsel.

So far as the second and third respondents are concerned, as they remained *ex parte* in the suit, it is not necessary to serve any notice on them and this Court hereby dispenses with the service of notice on the second and third respondents.

4. The submissions made by Mr.A.Muthukumar, learned counsel for the revision petitioner in the Civil Revision Petition and by Mr.C.Prabakaran, learned counsel for the first respondent are heard. Available materials are also perused.

5. Much water has been flown into this case by the lack of understanding of the procedure not only on the part of the parties who are represented by learned counsel, but also on the part of the Court below. As indicated *supra*, when a defendant, who was set *ex parte*, comes forward with an application under Order IX Rule 7 CPC to set aside the *ex parte* order, the only person having locus standi to oppose it shall be the plaintiff or the plaintiffs, as the case may be. The co-defendants need not be made parties to such application. The initial mistake came to be committed by the revision petitioner by making the respondents 2 and 3 as party respondents in his application I.A.No.25 of 2013. The second mistake committed by him is in not seeking an exemption from serving notice on the respondents 2 and 3, who have not entered

appearance in the main suit. Of course, the second mistake has been rectified by filing a memo dated 12.11.2014 seeking exemption from serving notice on respondents 2 and 3. At that juncture, the third mistake was committed by the trial Court in not passing any order in the above said memo and thereby driving the petitioner to file I.A.No.235 of 2014, after his attempt to serve notice on the second respondent in the address furnished in the plaint failed and the third respondent, after receiving notice, failed to appear. Such an application came to be filed on a wrong advise. That is the fourth mistake committed in this case and the fourth mistake has been committed by the petitioner. Of course, at least at that point of time, the trial Court had done a right thing by holding that the petitioner, a third party, cannot dictate to a respondent that he should be represented by an agent. Hence, the order passed in the said application I.A.No.235 of 2014 on 13.04.2015 cannot be said to be either illegal or defective warranting interference.

6. However, merely holding that the order does not warrant interference will result in miscarriage of justice as the trial Court has not chosen to exercise its jurisdiction to dispense with the service of notice on R2, who remains ex parte in the original suit.

For the forgoing reasons, the revision challenging the order dated

13.04.2015 made in I.A.No. 235 of 2014 in I.A.No.25 of 2013 in O.S.No.127 of 2010 fails and the same is dismissed. However, at the same time, the learned trial Judge is directed to pass an order in the memo filed by the petitioner herein/third respondent to dispense with the service of notice on R2 Ramalingam. No costs. Consequently, the connected miscellaneous petition is closed.

07.04.2016

Index: Yes/No
Internet: Yes/No
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To

The Subordinate Judge
Chidambaram

P.R.SHIVAKUMAR.J.,

gpa

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