

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :18.01.2016

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P(PD).Nos.38 and 39 of 2016
and C.M.P.No.228 of 2016

S.Babu

.. Petitioner/Defendant
in both the CRPs.

Vs.

A.Manoharan @ Doss

.. Respondent/Plaintiff
in both the CRPs.

Prayer:- Civil Revision Petitions are filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 25.11.2015 made in I.A.Nos.932 and 933 of 2015 in O.S.No.44 of 2003 on the file of the District Munsif Court, Thiruvottiyur.

For Petitioner : Mr.R.Dhamodaran

ORDER

Civil Revision Petitions are filed against the fair and decreetal order dated 25.11.2015 made in I.A.Nos.932 and 933 of 2015 in O.S.No.44 of 2003 on the file of the District Munsif Court, Thiruvottiyur.

2.The respondent herein as a plaintiff filed a suit in O.S.No.44 of 2003 for declaration of title in respect of B and C

schedule properties and recovery of possession in respect of B and C schedule properties. The defendant/revision petitioner herein has filed a written statement and contesting the same. Then the plaintiff's side evidence was over and when the defendant was cross-examined in part, it was closed on 09.09.2015 as there is no representation on the side of the plaintiff. Therefore, the respondent/plaintiff has come forward with the applications in I.A.Nos.932 and 933 of 2015 for reopen and recall D.W.1 stating that the counsel on record was suffering some ill-health and hence, he was unable to cross-examine the witness. The trial Court after hearing both sides, allowed the applications, against which, the present revisions have been preferred by the defendant.

3.At the time of admission, argument of the learned counsel for the revision petitioner is heard in length.

4.Learned counsel for the revision petitioner submits that the respondent/plaintiff is in jail and that factum was not mentioned in the affidavit. Since the plaintiff has suppressed this fact, he is not entitled to any relief. He further submits that because of non cross-examination only, D.W.1's evidence has been closed. Further, the

affidavit has been filed by the counsel and not by the plaintiff. It is also not mentioned that whether the counsel had obtained permission from the plaintiff to file the affidavit on his behalf. That factum was not considered by the trial Court. Therefore, he prayed for allowing the revisions.

5.The respondent herein as a plaintiff filed a suit for declaration of title in respect of B and C schedule properties and for recovery of possession in respect of B and C schedule properties after removing the superstructures stating that the suit properties originally belong to the plaintiff's father viz., Arumugam, who had five sons namely, Chandrasekaran, Balan, Vasudevan, Srinivasan and Manoharan (the plaintiff herein). Plaintiff's father Arumugam executed settlement deeds in favour of his sons including the plaintiff. The southern most portion was settled by Arumugam to his eldest son Chandrasekaran, the next portion on the north was settled to second son/Balan, the next northern portion was settled to third son/Vasudevan, the next portion on the north was settled to fourth son/Srinivasan and the northern most portion was settled to the plaintiff. 'A' schedule property was settled by the father of the plaintiff in favour of the plaintiff vide settlement deed dated

27.05.1965 and from that date onwards, he has been in possession and enjoyment of the same. Thereafter, sub-division and mutation of revenue records have been made. That property has been described as B schedule property, in which, he constructed a shop. The plaintiff also has vacant property. Now the son of Srinivasan, who is the fourth son of Arumugam, encroached upon the property by denying his title. So the plaintiff was constrained to file the suit.

6. After framing issues, the plaintiff/respondent was examined as P.W.1 and other witness was examined as P.W.2 and documents were marked on his side. Then, defendant was examined as D.W.1 and proof affidavit has been filed and when his cross-examination has been done in part, the plaintiff has filed change of vakalat and the present counsel entered appearance. During that time, D.W.1's evidence was closed. So the present counsel filed the application for reopen and recall and the defendant's counsel took three months time to file his counter (i.e.) from 10.04.2015 to 25.06.2015. Subsequently, the applications were allowed and posted for cross-examination of defendant. But the defendant did not appear before the Court and submit himself for cross-

examination. Finally, the matter was posted on 09.09.2015, on which date, defendant/D.W.1 was present and due to ill-health, counsel for plaintiff was not present. Hence, D.W.1's evidence was closed.

7. According to the learned counsel for the revision petitioner/defendant, the respondent/plaintiff is in jail. When the plaintiff was called for examination, he was brought to the Court and then examined as P.W.1. Because of non appearance and no representation of the counsel on record for the plaintiff, D.W.1's evidence has been closed.

8. As per the decision of the Honourable Apex Court reported in **Rafiq v. Munshilal** in **AIR 1981 SC 1400**, the Supreme Court held as follows:

".. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The

problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. . . . "

9. On considering the above decision along with the aforestated circumstances of the case, the counsel has every right to file an affidavit on behalf of the plaintiff. For the fault of the counsel for not appearing before the Court, the plaintiff should not be made to suffer. So the affidavit filed by the counsel for plaintiff was not a reason for dismissing the application. The second limb of argument advanced by the learned counsel for the defendant/revision petitioner is that the plaintiff has not disclosed the fact that he is in jail. But that factum was not necessary, because he himself admitted that when P.W.1 was examined before

the Court, he was brought from the jail. So it is not a suppression of material fact and it can be decided at the time of trial. Thirdly, on perusal of counter filed by the defendant, it reveals that the respondent/plaintiff did not appear before the Court, when the matter was posted for cross-examination for several hearings. But the counsel for plaintiff stated that due to ill-health, he could not appear before the Court. It is an admitted fact that cross-examination of D.W.1 was not completed. At this stage, an opportunity must be given to the plaintiff/respondent to cross-examine D.W.1. The trial Court rightly considered the above aspect and has given an opportunity to the respondent/plaintiff to cross-examine D.W.1. So I do not find any reason to interfere with the findings of the trial Court and both the revisions are dismissed as devoid of merits.

10. In the result, the Civil Revision Petitions stand dismissed. Since the suit is of the year 2003, the trial Court is directed to dispose of the suit within a period of two months from the date of receipt of a copy of this order after giving fair opportunity to both sides. No costs. Consequently, connected Miscellaneous Petition is closed.

18.01.2016

Index:Yes/No

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R.MALA,J.

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To

The District Munsif Court, Thiruvottiyur.

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