

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Daed: 09.08.2016

CORAM

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

CRP.No.3094 of 2012

and

M.P.No.1 of 2012

C.Kanniappan

.. Petitioner/Defendant

Vs

R.P.Nandagopal

.. Respondent/Plaintiff

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the Order and Decreetal order passed on 31.03.2011 made in I.A.No.30 of 2010 in O.S.No.23 of 2006, on the file of Subordinate Judge, Ponneri.

Petitioner : Mr.S.Balasubramanian

Respondent : Mr.T.N.Sugesh

O R D E R

The defendant in O.S.No.23 of 2006 is the civil revision petitioner before this Court. Challenging the order passed in I.A.No.30 of 2010 in O.S.No.23 of 2006, dated 31.03.2011, on the file of the Subordinate Court, Ponneri, dismissing the application filed under Section 5 of the Limitation Act, for condoning the delay of 735 days for setting aside the exparte decree dated 25.10.2006.

2.The case of the plaintiff is that he filed the suit for specific performance against this petitioner / defendant, to seek direction to the defendant to perform the sale agreement dated 02.09.2004. Pursuant to the sale agreement dated 02.09.2004, the suit was decreed as exparte on 25.10.2006. Thereafter, the plaintiff has filed petition in E.P.No.9 of 2007 for executing the said decree dated 25.10.2006.

3. The case of the petitioner / defendant is that it is an admitted fact that the suit was filed in O.S.No.23 of 2006

against this petitioner / defendant for specific performance. But, the summons was served by the plaintiff to the petitioner's / defendant's old address and got the exparte decree due to his absence. When the notice was received by the petitioner / defendant, in the E.P.No.9 of 2007, then only he came to know about the Exparte Decree. Therefore, he filed the present application in I.A.No.30 of 2010, for condone the delay of 735 days in filing the set aside the exparte decree dated 25.10.2006.

4.The petitioner / defendant come forward by saying that he never received any notice or summon in the said suit in O.S.No.23 of 2006 since his original address was No.5, Ramasamy Street, Vetri Nagar, Chennai-82. But, he has shifted his family at the present address at No.4/4, Bajanai Koil Street, Siruniyam Village, Ponneri Taluk, Tiruvallur District. While being so, he has received the notice in E.P.No.9 of 2007 from the executing Court in which the plaintiff has clearly stated that the petitioner / defendant address as C.Kanniappan s/o Chandran, Siruniyam Village, Ponneri Taluk, Tiruvallur District. Thereafter, only the petitioner / defendant received the notice and immediately rushed to the Court and verifying the same about filing of the suit by this respondent/plaintiff.

5. On his verification, this petitioner / defendant came to know that though the suit was filed by the respondent / plaintiff against this petitioner and the address was given previous address of the petitioner as Vetri Nagar, Chennai-82. Summons were sent to the said old address and the exparte decree was passed in I.A.No.30 of 2010 on 25.10.2006. Thereafter, he approached the Advocate practicing at Chennai, on his advice the application to set aside the exparte decree dated 25.10.2006 was filed along with the delay petition for condone the delay of 735 days in filing the set aside application. Since as per the Limitation Act, if any order has been passed exparte, the party, who suffered the exparte order, should file an application within a period of 30 days. But due to the above said reason, he could not able to approach the Court immediately.

6. In fact, on the engagement of the Advocate at Chennai, he has got the signature in set aside petition affidavit and Vakalath and the petitioner thought that the counsel would file the set aside application, but he has not filed any application, on his verification, later on. Thereafter, the petitioner / defendant further states that thereafter only he engaged the present Advocate and filed the application for setting aside the exparte decree. Hence, there is a delay of 735 days in filing the application. Therefore, he prayed the trial Court to condone the delay of 735 days in filing the set aside petition.

7. On receipt of notice in the condone delay application,

the respondent / plaintiff has filed the counter affidavit in which he has stated that though the petitioner / defendant has not received summon in the suit, but, on receipt of the notice in E.P.No.9 of 2007, he engaged the Advocate and the Advocate has filed his Vakalath on 27.11.2008 itself. When he filed the vakalath on 27.11.2008, in executing Court in E.P.No.9 of 2007, then he would approach the trial Court and filed the application immediately for setting aside the exparte decree. But, after lapse of 9 months i.e. 28.08.2009 only he has filed the present petition to set aside the exparte decree along with the condone delay application.

8. The respondent / plaintiff also states that he has cited the judgment reported in 2009 (5) CTC 48 before the trial Court in which the defendant is guilty of latches and negligence and such delay cannot be condoned, if set aside petition filed after the long delay from filing Vakalath in E.P., the above Judgment in the trial Court, the respondent has come forward by saying that he filed vakalath in E.P. on 27.11.2008, but filing the set aside petition in I.A.No.30 of 2010 in O.S.No.23 of 2006 only on 28.08.2009.

9. The respondent / plaintiff also stated that though he filed vakalath on 27.11.2008, but later on he has not turned up for enquiry. Therefore, the E.P. Court has allowed the E.P. and posted for draft sale deed, the respondent / plaintiff has also filed draft sale deed and the matter was posted for enquiry on 23.02.2010. The respondent / plaintiff also come forward by saying that he has also not filed any application in setting aside the E.P.No.9 of 2007, dated 30.04.2009 and hence, the very filing of the application in I.A.No.30 of 2010 for condoning the delay of 735 days in filing the setting aside application is not maintainable. Hence, he prayed the trial Court to dismiss the application.

10. Considering both side arguments, the learned Subordinate Court, Ponneri, has dismissed the petition on the ground that the reasons putforth in the affidavit filed by the petitioner / defendant have not given any acceptable one. The learned Judge also stated that law would protect the vigilant persons and the petitioner has tainted with latches and absolutely bonafides and hence in the interest of justice, the learned Judge has dismissed the application.

11. Heard Mr.S.Balasubramanian, learned counsel appearing for the petitioner and Mr.T.N.Sugesh, learned counsel appearing for the respondent.

12. It is an admitted fact that the suit was filed against this petitioner / defendant in the address of Ramasamy Street,

Vetri Nagar, Chennai-82 and the summons were also served in the said address. But, the learned Judge has stated that the petitioner / defendant before shifting his family from Chennai to Ponneri and presently residing at Siruniyam Village, Ponneri Taluk, Tiruvallur District and he has to furnish the address to the respondent/plaintiff. It is common knowledge, now a person had in shifting his family would give his new address to the debtors.

13. The learned Judge without gone through the facts and circumstances that since the original address was Chennai, whereas the E.P. address was shown the present address of Siruniyam Village, Ponneri Taluk, Tiruvallur District and without evidencing the same, how the learned Judge had dismissed the condone delay application.

14. In my consider opinion is that the learned Judge should make an enquiry that how the respondent/plaintiff/deGREE holder has got the new address of the respondent/plaintiff at the Siruniyam village, mentioned in E.P. petition, since the decree was passed with the address of Chennai. Therefore, the learned Subordinate Court, Ponneri had totally lack on her eyes to gone through the affidavit filed by the petitioner and without verifying the said reason given by the petitioner in a proper manner and simply dismissed the application that the petitioner / defendant should vigilant and the learned Judge also stating that the reason assigned by the petitioner / defendant is not acceptable. Therefore, this Court find the reason given by the petitioner / defendant is acceptable one and the circumstances of the case also support the petitioner/defendant. Accordingly the application for condoning the delay should be allowed.

15. Apart from this, it is a suit for specific performance and the Court namely the Subordinate Court, Ponneri, ought to have gone through the case on merits about the execution of the sale agreement and also receipt of the sale amount. Unless, this petitioner/defendant would appear before the trial Court and to prove the very validity of the execution of the sale agreement, the trial Court should not pass the decree exparte by believing the words of the respondent/plaintiff. The Court must be in vigilant while dealing the suit like specific performance since unless the plaintiff without proving the very alleged sale agreement through the defendant about the validity of the sale agreement, no decree can be passed. Therefore, in the interest of justice, I am inclined to give one opportunity to the petitioner / defendant to putforth and prove his case before the trial Court, this Court, condone the delay of 735 days in filing the set aside application. For allowing the petition, the respondent / plaintiff should be compensated by the petitioner,

for the delay in filing the set aside application.

16.In the result:

(a) this civil revision petition is allowed by setting aside the order in I.A.No.30 of 2010 in O.S.No.23 of 2006, dated 31.03.2011, on the file of the Subordinate Court, Ponneri, on condition that the petitioner should pay a sum of Rs.3,000/- to the respondent/plaintiff within a period of two weeks from the date of receipt of a copy of this order;

(b) the trial Court namely the Sub Judge, Ponneri, is hereby directed to number the set aside application and to pass orders by giving notice to both sides, within a period of one month; and

(c) thereafter, on the order passed in the set aside application, if the trial Court has come to a conclusion that the application is allowed, the trial Court is directed to dispose of the suit in O.S.No.23 of 2006 within a period of three months, without giving any adjournments and both the parties are hereby directed to co-operate for early disposal of the set aside application as well as the suit in O.S.No.23 of 2006.

17.Accordingly, this civil revision petition is allowed with cost. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

To

The Subordinate Court,
Ponneri.

+1cc to Mr.T.N.Sugesh, Advocate, S.R.No.46086

ug(CO)
md(21/12/2016)

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