

Reserved On: 26-08-2016

Delivered On: 02-09-2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02-09-2016

CORAM

THE HONOURABLE THIRU JUSTICE M. DURAISWAMY

C.R.P.(NPD)No.587 of 2013
and
CMP Nos.12504 to 12506 of 2016

1. Ravishankar Prasad A. (deceased)
 2. Manohar Prasad A.
 3. Sai Siva Jyothi
 4. A. Lakshmi Ananthi
 5. A. Anjali Krishnamani
 6. A. Indira Anand
- (Petitioners 3 to 6 are impleaded as
per Order of this Court vide C.M.P.
No.12506/2016 dt.

... Petitioners

vs

Prasad Production Private Ltd
No.28, Arunachalam Road,
Saligramam,
Chennai-600 093
rep by its Managing Director,
Ramesh Prasad

.... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the petition and order of the VI Additional Judge, City Civil Court, Chennai dated 23.01.2013 in I.A.S.R No.33080 of 2012 in O.S.No.13825 of 2010.

For petitioners : Mrs.R. Maheswari

For respondent : Mr.S. Raghunathan

ORDER

Challenging the order passed in an unnumbered application in I.A.S.R.No. 33080 of 2012 on the file of VI Additional Judge, City Civil Court, Chennai, the defendants have filed the above Civil Revision Petition.

2. Originally, the respondent/plaintiff filed a suit in C.S.No.248/2004 before this Court for recovery of possession, for mesne profits and for recovery of Rs.26,957/- towards maintenance and telephone charges. The defendants filed their written statement and were contesting the suit. Subsequently, when the pecuniary jurisdiction of the City Civil Court was increased, the suit in

C.S.No.248/2004, pending on the file of this Court, was transferred to the file of VI Additional Judge, City Civil Court, Chennai and numbered as O.S.No.13825/2010. Since the defendants failed to appear before the VI Additional Judge, City Civil Court, Chennai, the trial Court, by its Judgment and Decree dated 31.10.2011, on merits, decreed the suit for recovery of possession and for recovery of a sum of Rs.26,957/-. Regarding the prayer for mesne profits, the trial Court observed that the same can be decided in a separate enquiry, under Order 20 Rule 12 of the Civil Procedure Code.

3. Though the judgment was pronounced by the trial Court, on merits, in Paragraph-7 of the judgment, it has been stated that the arguments on the side of the defendants was not heard. Based on the pleadings, documents and evidence, the trial Court had passed the decree. Thereafter, the defendants filed an unnumbered application in I.A.S.R.No.33080/2012 to condone the delay in filing the application to set aside the ex-parte decree dated 31.10.2011. In the affidavit, filed in support of the petition, the defendants have stated that after the transfer of the suit from the file of this Court to the file of City Civil Court, no Notice was sent to the defendants by

the Transferee Court and therefore, they could not appear before the City Civil Court and contested the matter, inspite of the fact that they filed their written statement and also let in evidence before the High Court of Madras.

4. The trial Court returned the application, filed by the defendants, as not maintainable for the reason that the judgment was pronounced on merits and therefore, the same cannot be set aside. Challenging this order, the defendants have filed the above Civil Revision Petition.

5. The learned counsel appearing for the petitioners submitted that the application, filed by the defendants, to condone the delay in filing the application to set aside the ex-parte decree, is maintainable for the reason that the judgment and decree was passed without hearing the defendants and the same should be construed only as an ex-parte decree. The learned counsel also submitted that though the suit was transferred from the file of this Court to the file of City Civil Court, since the defendants were not given Notice, they could not appear before the trial Court and contest the suit. Further,

the learned counsel submitted that the defendants are entitled to Notice from the transferee Court. In support of her contention, the learned counsel relied upon the following judgments:

(i) 1979 3 SCC 578 (N. Jayaram Reddy and Another vs Revenue Divisional Officer and Land Acquisition Officer, Kurnool)

But even if it were assumed that the government appeal deserved to be dismissed as a whole because of its abatement against the deceased respondent, there is no justification for Mr. Sen's further argument that the High Court's decree dated February 4, 1969, was a nullity merely because it was passed against a dead person, namely, Y. Prabhakar Reddy. It has to be appreciated that a decree against a dead person is not necessarily a nullity for all purposes. It will be sufficient to say that such a decree has been held to be a nullity because it cannot be executed against his legal representative for the simple reason that he did not have a full opportunity of being heard in respect of it, and the legal representative can not be condemned unheard. So if a respondent to an appeal dies, and the appeal abates because of the failure to bring his legal representative on the record

within the time limited by law, and the appellate court loses sight of that development or ignores it, it will still be permissible for the court hearing the appeal to bring his legal representative on the record on an application to that effect and to examine any application that may be made for condonation of the delay. It is also permissible, and is in fact the common practice, to remand the case for disposal according to law to the court in which it was pending at the time of the death of the deceased party. The law has therefore provided, and accepted, modes for reopening and hearing the appeal in such cases.

7. The basic fact remains that a decree against a dead person is treated as a nullity because it cannot be allowed to operate against his legal representative when he was never brought on the record to defend the case. Any other view would not be possible or permissible for it would fasten on him a liability for which he did not have any hearing. So while the law treat such a decree as a nullity qua the legal representative of the deceased defendant or respondent, there is nothing to prevent him from deciding that he will not treat the decree as a nullity, but will abide by it as it stands, or as it

may be modified thereafter on appeal. If a legal representative adopts that alternative or course of action, it cannot possibly be said that his option to be governed by the decree is against the law or any concept of public policy or purpose, or the public morality. It is thus a matter entirely at the discretion of the legal representative of a deceased respondent against whom a decree has been passed after his death to decide whether he will raise the question that the decree has become a nullity, at appropriate time, namely, during the course of the hearing of any appeal may be filed by the other party, or to abandon that obvious technical objection and fight the appeal on the merits. He may do so, either because of his faith in the strength of his case on the merits, or because of incorrect legal advice, or for the reason that he may not like to rely on a mere technical plea, or because in the case of cross-appeals, he may have the impression that bringing the legal representative of the deceased respondent on record in an appeal by a coappellant will enure for the benefit of or be sufficient for purposes of the cross-appeal. An abandonment of a technical plea of abatement and the consequential dismissal of the appeal, is therefore a matter at the discretion of the legal representative of the

deceased respondent and there is no justification for the argument to the contrary. It is equally futile to argue that an appellate court is denuded of its jurisdiction to hear an appeal in which one of the respondents has died and the right to sue does not survive against the surviving defendant or defendants alone merely because no application has been made to bring his legal representative on the record when no objection to that effect is raised by any one.

7. But, as is equally obvious, it will not be fair to draw an inference as to the abandonment, it will not be fair to draw an inference as to the abandonment of such a plea of abatement unless there is clear, sufficient and satisfactory evidence to prove that the legal representative of the deceased respondent was aware of it and abandoned it wilfully. The following facts have been well established in this respect in the present case.

28. If this is the discernible principle underlying order 22, rules 3 and 4 it has been demonstrably established by interpretation put on these two rules. Original view was that all legal representatives of a deceased plaintiff or defendant must be substituted on the pain of the

action abating. With utmost diligence from a multitude some one may escape notice and the consequent hardship in abatement of action led this Court to assert the principle that where some legal representatives are brought on record permitting an inference that the estate is adequately represented, the action would not abate though it would be the duty of the other side to bring those legal representatives on record who are overlooked or missed even at a later date. When the aforementioned two provisions speak of legal representatives it only means that if after diligent and bona fide enquiry the party liable to bring the legal representatives on record ascertains who are the legal representatives of a deceased party and brings them on record within the time limited by law, there is no abatement of the suit or appeal on the ground that some other legal representatives have not been brought on record, because the impleaded legal representatives sufficiently represent the estate of the deceased and the decision would bind not only those impleaded but the entire estate including the interest of those not brought on record. This view has been consistently adopted by this Court in [Daya Ram & Ors. v. Shyam Sundari](#) (1) [N. K. Mohammad Sulaiman v. N. C. Mohammad Ismail & Ors.](#);(2)

and [Harihar Prasad Singh & Ors. v. Balmiki Prasad Singh & Ors.](#)(3) The principle deducible from these decisions is that not only the interest of the deceased was adequately taken care of by those who were on record but they had the opportunity to put forth their case within permissible limits. Neither the case of the deceased nor of his successors in-interest has gone by default. In other words, the principle is that if the deceased had as a party a right to put forth his case, those likely to be affected by the decision on death of the deceased had the same opportunity to put forth their case and even if from a large number having identical interest some are not brought on record those who are brought on record would adequately take care of their interest and the cause in the absence of some such would not abate. In legal parlance this procedure affords an opportunity of being heard in all its ramifications before a decision on the pending list is taken.

(ii) **2001 (3) CTC 67 (Devi and 6 Others vs K. Jayaraman (Cavetor))**, wherein this Court held as follows:

1. The defendant is the petitioner whose application is condone the delay of 316 days is filing the petition to set aside the ex parte

decree was dismissed.

2. The respondents filed C.S.No.551 of 1995 before this Court. Subsequently, upon enhancement of pecuniary jurisdiction, it was transferred to the City Civil Court and numbered as O.S.No.9306 of 1995. The petitioner was not aware of the transfer and therefore did not appear in the City Civil Court. Further since the petitioner's counsel also fall ill, they could ascertain the actual state of affairs. Only when E.P.No.1612 of 1999 was served on them, they came to know that the suit was decreed ex parte on 12.12.1998. the delay in filing the application had...only in the above circumstances and not on account of any negligence or indifference.

3. To the above averments made by the petitioners in their affidavit, the respondent filed his counter denying the according to him the petitioners counsel had also appeared in the City Civil Court taking adjournment and therefore, the case set up by the petitioner that they know about the pendency of the suit in the City Civil Court only after service of notice was baseless.

4. The learned Second Assistant Judge, City Civil Court dismissed the application on the ground that no oral or documentary evidence had been produced by the petitioners in support of their case.

5. Mr.M.K. Kabir, the learned counsel for the petitioner submitted that he had entered appearances for the respondent in this court. However, he had not appeared before the City Civil Court after the transfer and the conclusion drawn by the court below as though he had entered appearance and thereafter, wilfully allowed the matter to go ex parte was not correct. He relied on the decision reported in M/s Fast Cool Services by Partners 1. Radhamohan, 2. Shankar Vs. P. Shanthakumari, , Edwin Alex v. Syndicate Bank, Karingal Branch rep. by its [Branch Manager, and Shiram Chits and Investment \(P\) Ltd., T. Nagar v. M. Krishnan and others](#), to support his case that courts liberally constructs the words " Sufficient Cause" while exercising their jurisdiction in applications filed under [Section 5](#) of the Limitation Act 1963.

6. Mr. Veerpathiran, learned counsel for the

respondent on the other had vehemently argued that there is no justification for interfering with the order of the court below and that the only intention of the petitioners is to harass the respondent by employing dilatory tactics. He also produced the certified copy of the suit register.

7. On a consideration of the arguments advance on both sides and on a perusal of the records sent by the lower court as well as the extract of the suit register furnished by the learned counsel for the respondent, I am not able to come to the conclusion, that the learned counsel for the petitioner here who had entered appearance in this court when the suit was originally filed, had actually takes notice and appeared on several hearings before the City Civil Court. I am inclined to accept the explanation given by Mr. M.K. Kabir that the courts below had taken note of the appearance entered by him in this Court and had proceeds on that basis. In the decision reported in [Edwin Alex v. Syndicate Bank, Karingal Branch](#) rep. by its Branch Manager, , the learned Judge while condoning the delay held as follows:

"Moreover, even in such event, when the delay is quite long, the petitioner cannot be punished with denial of further opportunity to prosecute the main case in which event, the petitioner's entire right regarding the suit properties would become jeopardised. Hence, proper course to adopt under such circumstances is not to punish the petitioner with the dismissal and denial of opportunity to carry on with the enquiry, or trial of the main proceedings but to condone to burden him with costs."

(iii) **2002 (3) LW 143 (Sankaralingam and another vs V. Raghuraman)**, wherein this Court held as follows:

11. Before this Court takes up the task of considering the merits of the Claims and rival claims it is absolutely necessary that this Court has to refer to the ruling of the Supreme Court reported in [Ram Nath Sao @ Ram Nath Sahu v. Gobardhan Sao](#), 2002 (1) CTC 769, where the Supreme Court ruled as under:

"Thus it becomes plain that the expression "sufficient cause" within the meaning

of [Section 5](#) of the Act or Order 22, Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."

In [\(1998\) 7 SCC 123 = 1999-1-L.W 739 \(N. Balakrishnan v. M. Krishnamurthy, , the Supreme Court ruled as under, "... Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion](#)

and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

12. From the above it is clear that while considering the petition filed under [Section 5](#) of the Limitation Act, this Court has to examine the following aspects,

" 1. Whether the petitioner has satisfactorily proved "sufficient cause" for the delay for not filing the petition in time.

2. Was there any negligence or inaction or want of bona fide on the part of the petitioner.

3. Whether a valuable right that has accrued to the other party will be likely to be defeated by condoning the delay.

4. Whether the petitioners have arguable points on facts and law."

6. Countering the submissions made by the learned counsel for the petitioners, the learned counsel for the respondent submitted that after transfer of the suit from the file of this Court to the file of City Civil Court, the defendants are not entitled to any Notice from the transferee Court and the defendants should have verified the date of hearing and appeared before the City Civil Court and contested the matter. In support of his contention, the learned counsel relied upon the following judgments:

(i) **1992 (2) L.W 505 (K. Janarthan and another vs R. Thilak Kumar)**, wherein this Court held as follows:

After the said judgment the matter was considered administratively by this Court. A note was put up by the office before the Judges for framing of appropriate Rules. The observations of Ratnam, J., were placed before the Judges. After considering the matter this Court issued the following circular in Roc. No. 193-A/S1.R.R. in July, 1981. The following

instructions were given to the subordinate courts for their guidance:

(i) When suits, appeals or other proceedings are transferred from one court to another court, the transferor court shall post before it, the cases to a particular date and take endorsement of the Advocate, who have already entered appearance for the parties that they are aware of the suits, appeals or other proceedings being transferred to a particular court and only thereafter forward the papers to the transferred court.

(ii) In cases where parties have not already been served, notice or fresh notice (as the case may be) shall be issued by the transferee court.

That circular will also apply only to a transfer by courts. It is seen from the first instruction that it is for the transferor court to make the parties aware of the proceedings of transfer. The second instruction applies to cases where the parties have not already been served. With regard to those cases the instruction was that a notice or fresh notice, as the case may be, shall be issued by the transferee court.

Hence, the circular does not contemplate a fresh notice or summons by a transferee court in a case where summons had been served duly on parties when the proceedings were pending in the transferor court. In the present case summons had been served duly on the respondent when the matter was pending in this Court and no question of fresh notice to the respondent arises when the matter was transferred to the City Civil Court. The City Civil Court was under no obligation to issue notice to the respondent about the transfer. It was for the respondent to inform himself about the proceedings and appear before the court. Hence, the respondent cannot place any reliance on the circumstance that he was not served with summons or notice in the suit after it was taken on file in the City Civil Court. The suit is certainly the same one which was filed in this Court. It is the same suit for several purposes. It may be necessary for counsel to file a fresh vakalat as the Vakalat filed by them earlier in the transferor court might authorise them to continue the proceedings in that Court only. That will not, however, enable the respondent to contend that a fresh summons should be issued by the transferee court. It is the same suit whichw as

being continued in the City Civil Court. For administrative convenience the suit is given a fresh number in the City Civil Court so that there may not be any confusion later. That will not make it a different suit or a fresh suit. This position will be evidence from the provisions of the Civil Procedure Code itself found in S.150. Under that Section the transferee court shall have the same powers and shall perform the same duties as those respectfully conferred and imposed by or under the Civil Procedure Code upon the Court from which the business was so transferred.

(ii) **2007 (138) Company Cases 95 (Mad), (Mannariah and Sons P.Ltd and Others vs M.M. Sankaranarayanan)**, wherein, this Court held as follows:

9. Due to enhancement of pecuniary jurisdiction, Civil Suits in the High Court have been transferred to the City Civil Court, Chennai. The Transfer of those suits were by General Notification issued. The parties cannot expect individual notices in all such Suits transferred. Assuming for the sake of arguments that the Plaintiffs have not received any notice, the same cannot be

the reason for non prosecuting the matter for more than three years. Had the Plaintiff been vigilant in enquiring the matter, the Plaintiff would have known about the transfer of the Suit. After the transfer of the Suit in 1996, the Suit was dismissed on 16.06.1997. The Application in I.A.No. 9994 of 2000 was filed only in February 2000. This only shows that the Plaintiff had not taken appropriate steps / not vigilant in prosecuting the Suit. Learned counsel for the Revision Petitioners has submitted that along with the Suit, simultaneously, the Plaintiff was prosecuting parallel proceedings before the Company Law Board. When that being so, the Plaintiff ought to have been more vigilant in pursuing the Suit.

10. It is not as if the Plaintiff is illiterate and not worldly wise. From the cause title, it is seen that he is the Company Executive of the First Defendant Company. The Plaintiff being the Company Executive must have been in the know of things and the consequences of non-prosecuting the Suit. The Plaintiff has not satisfactorily explained the

reason for the inordinate delay of 1008 days. There is no sufficient reason for his absence on 16.06.1997 or the subsequent dates. Had he been little more careful and vigilant, the Plaintiff could have known about the transfer of the Suit to the City Civil Court, Chennai.

(iii) **1997 (1) MLJ 291 (Krishnammal vs Arulmighu Madanagopalaswamy Temple)**, wherein, this Court, following the ratio laid down in the judgment reported in **1992 (2) L.W 505 (K. Janarthan and another vs R. Thilak Kumar)** held that it is not the duty of the transferee Court to inform the parties about the transfer, when the parties are represented by the counsel before the Transferor Court.

7. On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and the judgments relied upon by the learned counsel on either side, it could be seen that it is not in dispute that originally the suit was filed before the Original Side of this Court and the same was numbered as C.S.No.248/2004. The defendants filed their written statement and were contesting the suit, pending before this Court.

P.W.1 was examined and Exs.P.1 to P.10 were marked on the side of the plaintiff. On the side of the defendants, D.W.1 was examined and Exs.D.1 to D.15 were marked.

8. At that stage, since the pecuniary jurisdiction of the City Civil Court was raised, the Civil Suit in C.S.No.248/2004, pending on the file of this Court, was transferred to the file of City Civil Court. Since no Notice was sent to the defendants by the transferee Court, they could not appear before the trial court and contest the matter. Hence the trial Court passed the judgment and decree, on merits, without hearing the defendants.

9. This Court in the judgment reported in **AIR 1981 Madras 248 (Ellapuram Panchayat Union vs Sri Bhavaniamman Devasthanam)**, found that there were no Rules prescribing the issue of notice after a transfer of a suit is effected and held that it was necessary and imperative to make such provisions so that the principles of natural justice could be satisfied. Further, it has been held that it is essential that the parties must be informed by the

transferee Court in order to enable them to appear before the transferred Court and contest the proceedings so transferred by engaging other counsel and taking necessary steps in this regard.

10. After the said judgment, the matter was considered administratively by this Court and a Note was put up by Office before the Judges for framing appropriate Rules. After considering the matter, this Court issued the following Circular in ROC No.193-A/81. R.R. In July, 1981. The following instructions were given to the Subordinate Courts for their guidance:

(i) When suits, appeals or other proceedings are transferred from one court to another court, the transferor court shall post before it, the cases to a particular date and take endorsement of the Advocate, who have already entered appearance for the parties that they are aware of the suits, appeals or other proceedings being transferred to a particular court and only thereafter forward the papers to the transferred court.

11. In the case on hand, there is nothing on record to show that the transferor Court viz., this Court had obtained the endorsement from the Counsel, who had appeared for the defendants in the suit before this Court. In the absence of any endorsement obtained from the counsel, in the interest of justice and for proper adjudication of the matter, the transferee court should have given notice to the defendants. However, this Court, in the judgment, reported in **1992 (2) L.W 505 (K. Janarthan and another vs R. Thilak Kumar)** and **1991 (1) MLJ 291 (Krishnammal vs Arulmighu Madanagopalaswamy Temple)** held that no Notice is required to be sent to the parties by the transferee Court, if the parties are represented by their counsel before the Transferor Court. However, since the issue involved in the present Civil Revision Petition is with regard to the maintainability of the applications, filed under Sec.5 of the Limitation Act and Under Order 9 Rule 13 of the Civil Procedure Code alone, the issue with regard to the service of notice on the parties, by the transferee Court need not be decided by this Court in this Civil Revision Petition. If any such finding is given, it would affect the proper adjudication of the applications, before the trial Court.

12. In the judgment reported in **1992 (2) L.W 536 (Kamakshi vs Jugraj Jain)**, this Court in a case, where the defendant was present in Court, but not participating in the hearing and her counsel was absent, held that ex-parte decree cannot be construed as appealable and as passed on merits and further held that the dismissal of the application for setting aside the ex-parte decree is erroneous. Even though the defendant was physically present, was incapable of participating in the proceedings and not knowing the procedure of the Court. The defendant was helpless in such a situation, as he could not proceed without the assistance of his counsel. In these circumstances, the order, passed by the trial Court, cannot be construed as an Order under Order 17 Rule 3 of Civil Procedure and it has to be construed as an order under Order 17 Rule 2 of Civil Procedure Code and the application, filed under Order 9 Rule 13 of Civil Procedure Code is maintainable.

13. In the judgment reported in **1988 1 L.W 368 (Suyambulingam vs V.K. Swaminathan)**, the Division Bench of this Court held as follows:

2. In this appeal, learned counsel for the appellant (Plaintiff) raised two contentions. Firstly, he contended that the judgment dt.31.10.1984, is not an ex-parte judgment (sic) is not maintainable. This was on the ground that the suit had been taken up for trial and, in fact, some evidence had been taken and therefore on merits and the judgment delivered should not be treated as an ex parte judgment. The relevant provision of the Code of Civil Procedure is R.2 of O.17, which reads as follows:-

“Rule 2:- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O.9 or make such other order as it thinks fit;

Explanation – Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present”.

As may be seen from the explanation, the party failing to appear should have let in

evidence or a substantial portion of the evidence in order to enable the Court to proceed with the case as if the party were present. The first defendant has not let in any evidence in this case. Only the plaintiff had let in evidence. The contesting first defendant had not entered on his defence, so to say, by giving any evidence and his counsel withdrew his appearance during the examination of P.W.1 on 24.10.1984. In such circumstances, in view of the Explanation to R.2 of O.17, it could not be said that the first defendant should be treated as having begun his part of the case in the suit, entitling the Court to proceed with the case as if he was present. In the circumstances, the treatment of the case as ex parte was right and does not call for any interference.

14. In the judgment reported in **1997 (1) L.W 374 (Athianna Gounder and another vs Kumaraswamy (now deceased))**, this Court, with regard to the issuance of notice by the transferee court, held as follows:

“12. While narrating the facts, I have already said that the Execution Petition was transferred from one Court to

another, not in the same place, but in different taluk. The transfer was made due to bifurcation of Districts, for administrative reasons, and not on application of parties. When anew Sub Court was formed, certain suits were transferred to that Court. Naturally, that Court was bound to issue notice to the judgment-debtors that their case has also been transferred, and Execution Petition will be proceeded by that Court. Unfortunately, that procedure was not adopted in this case. After sale was ordered in R.E.A No.421 of 1985 (renumbered as R.E.A No.7 of 1985), a duty was cast on that Court to issue notice under Order, 21, Rule 66, CPC. That procedure was also not adopted. A sale without notice under O.21 R.66 C.P.C is always declared as a nullity and as a matter without jurisdiction. In a very recent decision of the Supreme Court reported in (1994) I SCC 131 = 1994-1-L.W 49 (Desh Bandhu Gupta vs N.I. Anand Rajinder Singh) their Lordships held thus:

“Service of notice on judgment-

debtor under Order 21 Rule 66 (2), unless waived by appearance or retained ex parte, is fundamental step in the procedure of the Court in execution. Judgment-Debtor should have an opportunity to give his estimate of the property. Sub-rule (1) of Rule 66 enjoins the Court that the details enumerated in sub-rule (2) shall be specified as fairly and accurately as possible. The duty to "comply with it arises only after service of the notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremedial injury to the judgment-debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66(2) are intended that the prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgment debtor disables him to offer his

estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment-debtor and confers those rights in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment-debtor or the decree-holder. A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment-debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that

it is being so sold and given an opportunity to offer his estimate as he is the person who intimately know the value of his property and prevailing in the locality through exaggeration may at time be possible. Therefore, notice under Order 21 Rule 66(2), unless proviso is applied if not already issued under Order 21 Rule 22, and service is mandatory. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment debtor appears without notice and thereby waives the service of notice.

15. In the case on hand, though the judgment was pronounced on merits, since the defendants were not given an opportunity to put forth their arguments, the same should be construed only as a judgment passed under Order 17 Rule 2 of Civil Procedure Code, which is liable to be set aside under Order 9 Rule 13 of the Civil Procedure Code. Since Order 9 Rule 13 application is maintainable, the other application, filed under Sec.5 of the Limitation Act in I.A.S.R.No.33080/2012 is also maintainable.

16. In these circumstances, the order passed by the VI Additional Judge, City Civil Court, Chennai, returning the application in I.A.S.R.No.33020/2012 dated 23.01.2013 is not maintainable, and the same is liable to be set aside. Accordingly, the same is set aside. The matter is remanded to the VI Additional Judge, City Civil Court, Chennai and the trial Court is directed to number the application in I.A.S.R No.33080/2012 and decide the same on merits and in accordance with law, after giving opportunity to both sides.

17. The petitioners have filed the application in **CMP No.12504 of 2016** to condone the delay in filing the petition to set aside the abatement caused due to the death of the first petitioner.

18. In the affidavit, filed in support of the petition, the petitioners have stated that the first petitioner died on 13.07.2013, during the pendency of the Civil Revision Petition. Further, in the affidavit, filed in support of the petition, the petitioners have stated that due to certain changes in the management of business, the petitioners had taken change of vakalat from their counsel in order to entrust the matter to a new counsel for defending all its cases

pending before various courts. Though change of vakalat was given by the counsel on record to the new counsel, the new counsel had failed to file the same into this Court and defend the petitioners suitably. The petitioners could not inform the present counsel to represent the matter and protect their interest. In these circumstances, there is a delay of 962 days in filing the petition to set aside the abatement caused due to the death of the first petitioner.

However, the second petitioner was contesting the matter throughout.

19. The respondent filed their counter and opposed the condonation of delay.

20. Since the petitioners have satisfactorily explained the reasons for the delay in the affidavit, filed in support of the petition, further in the interest of justice, the delay can be condoned for the reason that the petitioners, who are the legal representatives of the deceased first petitioner, shall have the opportunity to contest the suit on merits. In these circumstances, the delay of 962 days in filing the suit to set aside the abatement caused due to the death of the

first petitioner is condoned and the abatement caused due to the death of the first petitioner are set aside and the petitioners 3 to 6 are brought on record as the legal representatives of the deceased first petitioner.

With these observations, the Civil Revision Petition is allowed. No costs. The petitions in **CMP Nos.12504/2016, 12505/2016 and 12506/2016** are ordered.

02-09-2016

sr

Index:yes
website:yes

Note: Registry is directed to carry out the amendment in the papers.

To

The VI Additional Judge, City Civil Court, Chennai

M. DURAISWAMY,J.,

sr

Pre-Delivery Order in
CRP (NPD) No.587/2011
& CMP Nos.12504 to 12506
of 2016

02-09-2016