



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.06.2016

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THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.M.A.(MD).No.412 of 2016

and

C.M.P.(MD)No.5594 of 2016

P.S. Pandiyarajan

...Appellant/Defendant

Vs.

1. P.C. Nalliah Nadarajan

2. M. Maharani

...Respondents/Plaintiffs

PRAYER : Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of Civil Procedure Code, to set aside the dismissal order passed in I.A.No.116 of 2012 in O.S.No.92 of 2007, dated 25.04.2016 by the learned Additional District Judge, Dindigul and to restore the suit by allowing this Civil Miscellaneous Appeal.

For Appellant : Mr.G.Pandiarajan

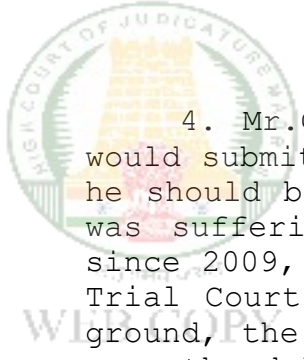
For Respondents : Mr.H.Lakshmi Shankar

JUDGMENT

This appeal arises out of the order passed by the Additional District Court, Dindigul in I.A.No.116 of 2012 in O.S.No.92 of 2007.

2. The appellant is the sole defendant in O.S.No.92 of 2007. The respondents have instituted a suit against the appellant for specific performance based on an agreement of sale dated 21.09.2006. The appellant has filed his written statement denying the case of the respondents. The specific case of the appellant is that while borrowing money from the respondents, the sale agreement was executed as security and he did not have any intention to sell the property to the respondents.

3. Since the appellant did not participate in the trial, he was set ex-parte and an ex-parte decree was passed against him on 11.01.2010. The appellant filed an application to set aside the ex-parte decree in time. However, it was re-presented with a delay of 740 days. So, an application in I.A.No.115 of 2012 was filed by the appellant to condone the delay. The application to condone the delay in representation was dismissed by the Trial Court. However, this Court in C.R.P.(NPD)(MD)No.2246 of 2012 has condoned the delay on payment of cost of Rs.3,000/-. Thereafter, the petition filed to set aside the ex-parte decree in I.A.No.116 of 2012 was taken up for hearing. The learned Additional District Judge, Dindigul dismissed the application with cost. Aggrieved over the order, the present appeal is filed.



4. Mr.C.J.Pandiyarajan, learned counsel appearing for the appellant would submit that the appellant is having a valid defence in the suit and he should be given an opportunity to defend his case, that the appellant was suffering from serious ailment, for which he was taking treatment since 2009, that the previous counsel engaged by the appellant before the Trial Court did not intimate the stage of the case properly and on that ground, the case of the appellant need not be nipped in the bud and that once the delay is condoned on terms, the appellant is entitled to contest the suit on merits.

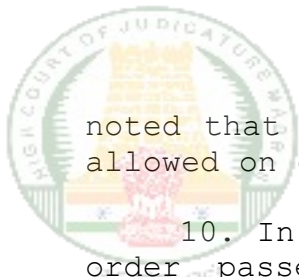
5. Per contra, Mr.H.Lakshmi Shankar, learned counsel appearing for the respondents would submit that the sale agreement is a registered one and the suit was originally posted in the special list on 09.09.2008 and in view to his absence, the ex-parte decree was passed on 21.10.2008 and even thereafter, the appellant was not vigilant to defend his case. It is further submitted that the respondents have already filed an execution petition in E.P.No.92 of 2010 for execution of the Sale Deed. Though the appellant received notice in the execution petition, but he did not choose to contest the case. So, the Court itself executed a Sale Deed in favour of the decree holders on 30.01.2012.

6. The learned counsel appearing for the respondents would further submit that though the application to set aside the ex-parte decree was filed in time, he deliberately did not re-present the papers and the delay in re-presentation would show that his intention to drag on the proceedings. He would further submit that in the affidavit filed in support of the petition to condone the delay in setting aside the ex-parte decree, the appellant has stated that he was suffering from Small Pox, however, the Medical Certificate discloses a different disease. It is further submitted that the respondents have spent more than Rs.3,50,000/- for execution of the Sale Deed in favour of the appellant and other expenses. Therefore, at this stage, if the ex-parte decree is set aside, the respondents would be put to great hardship and loss.

7. By way of reply, the learned counsel for the appellant would submit that the appellant is ready to bear the entire cost and he is ready to co-operate for early disposal of the suit. The learned counsel appearing for the appellant has filed an affidavit dated 15.06.2016 to that effect.

8. It is seen from the records that the suit was filed for specific performance in the year 2007. It is not in dispute that in the year 2008, an ex-parte decree was passed against the appellant and for the second time, he remained absent and on 11.01.2010 ex-parte decree came to be passed against him. The set aside petition was also re-presented with an enormous delay of 740 days.

9. Though the conduct of the appellant cannot be appreciated by this Court, however considering the fact that the suit property is a residential house and his specific defence is that there was a loan transaction between the parties, and the Sale Agreement was executed as a security and also, considering the fact that the appellant is ready to pay the cost of Rs.3,00,000/-, this Court is inclined to set aside the ex-parte decree passed against the appellant on 11.01.2010, with a view to give one more opportunity to defend the case. It is to be further



noted that the petition filed to condone the delay in representation was allowed on cost.

10. In the result, this Civil Miscellaneous Appeal is allowed and the order passed by the learned Additional District Judge, Dindigul in I.A.No.116 of 2012 in O.S.No.92 of 2007, dated 25.04.2016, is set aside on payment of cost of Rs.3,00,000/-.

11. The appellant shall pay the cost of Rs.3,00,000/- (Rupees Three Lakhs only) as per the affidavit of undertaking dated 15.06.2016 within the period of two weeks from the date on which this order copy is made ready. The cost shall be paid to the respondents by way of Demand Draft on or before 01.07.2016, failing which, this Civil Miscellaneous Appeal shall stand automatically dismissed. On such compliance, the learned Additional District Judge, Dindigul shall take up the suit in O.S.No.92 of 2007 and dispose of the same on merits in accordance with law on or before 31.08.2016.

12. It is further submitted that the value of the suit is Rs.9,95,000/- and it has to be tried by the Subordinate Court, Dindigul. In view of the submissions, the learned Principal District Judge, Dindigul shall pass necessary orders for transfer of the suit to the competent Court. Consequently, connected Miscellaneous Petition is closed.

Sd/
Assistant Registrar(AE)

/True Copy/

Sub Assistant Registrar.

To

1 The Additional District Judge,
Dindigul District.

2 The Principal District Judge,
Dindigul.

+1CC to M/S.H.Lakshmi Shankar, Advocate, SR.No. 30752

+1CC to M/S.G.Pandiyarajan, Advocate, SR.No. 30676

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