



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.08.2016

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.M.A(MD) No.574 of 2016

and

CMP(MD)No.6684 of 2016

K.Meenakumari : Appellant/1st Petitioner/1st Defendant

Vs.

G.Kalidoss : 1st respondent/1st respondent/Plaintiff
2.K.Venkatesan : 2nd respondent/2nd petitioner/2nd Defendant

Prayer : Civil Miscellaneous Appeal is filed under Order XLIII Rule 1 of the Code of the Civil Procedure, against the fair and decreetal order, dated 08.12.2015 rendered in I.A.No.765 of 2015 in O.S.No.93 of 2014 on the file of the VI Additional District Judge, Madurai.

For Appellant : Mr.S.Subbiah

For 1st Respondent : Mr.V.Sitharanjandas

JUDGMENT

This appeal is directed against the order of the VI Additional District Judge, Madurai, passed in I.A.No.765 of 2015 in O.S.No.93 of 2014, dated 08.12.2015.

2.The facts in nutshell are that the 1st respondent is the father of the appellant and the 2nd respondent. They filed a suit O.S.No.156 of 2012 before the VI Additional District Judge, Madurai against the first respondent for partition and separate possession; for permanent injunction restraining the first respondent from dispossessing him from the suit property and for permanent injunction restraining him from alienating the suit property. After contest, the suit was partly decreed and the reliefs of partition and permanent injunction not to alienate the suit property, were rejected and a decree for permanent injunction was granted from evicting the plaintiffs, except under due process of law.

3.Accordingly, the first respondent instituted a suit in O.S.No.93 of 2014 on the file of the VI Additional District Judge, Madurai against his children/appellant and the 2nd respondent for recovery of possession. The suit summons were



served on them on 14.07.2014. The suit was adjourned on the following dates viz., 14.08.2014, 25.08.2014, 16.09.2014, 24.09.2014, 09.10.2014, 16.10.2014, 20.10.2014 for filing their written statement, however, due to non-filing of the written statement, they were set ex-parte on 20.10.2014. The plaintiff gave evidence as PW1 and marked Exs.A1 to A4 on 06.11.2014. Based on the evidence, the suit was decreed ex-parte on 07.11.2014.

4. Thereupon, the defendants filed an application to set aside the ex-parte decree, on the last day of limitation i.e., on 08.12.2014, without serving the petition copy on the counsel appearing for the plaintiff. So, the application was returned and it came to be represented only on 05.03.2015. In the meanwhile, the first respondent levied an execution petition on 09.02.2015 in E.P.No.17 of 2015. Since, notice sent to the 2nd respondent has been returned with an endorsement "returned as refused", he was set ex-parte on 25.06.2015. The appellant entered her appearance in the execution proceedings on 31.03.2015 and on her request, the petition was adjourned to 13.07.2015, 20.07.2015, 29.07.2015 and 05.08.2015, but ultimately, she did not file counter. So, she was also set ex-parte on 05.08.2015 and delivery of possession was ordered.

5. Since the door was locked and some resistances, the Decree holder/first respondent filed E.A.No.68 of 2015 to brake open the door and E.A.No.69 of 2015 seeking police protection. Both the petitions were allowed on 10.08.2015, however, they were kept in abeyance due to the reason that the Judgment debtors had preferred the following applications namely;-

(i) E.A.No.66 of 2015 to recall the delivery warrant, issued for delivery of possession.

(ii) E.A.No.67 of 2015 to set aside the ex-parte decree passed in the execution proceedings, dated 05.08.2015.

(iii) E.A.No.82 of 2015 to set aside the order of delivery, dated 05.08.2015.

(iv) E.A.No.83 of 2015 to declare the judgment and decree passed in O.S.No.93 of 2014 as non-est, null and void and not enforceable and consequently prayed to dismiss the E.P.No.17 of 2015

(v) E.A.No.84 of 2015 seeking stay of all the proceedings in E.P.No.17 of 2015.



6. During the pendency of the execution proceedings, as referred supra, the application filed to set aside the ex-parte decree in O.S.No.93 of 2014 came to be numbered on 23.09.2015 as I.A.No.765 of 2015. The learned VI Additional District Judge, Madurai, heard all the applications and by order, dated 08.12.2015, allowed the E.A.Nos.66 of 2015 and 67 of 2015, while dismissing the E.A.Nos.68 of 2015 and 69 of 2015, taking into consideration the pendency of the application in E.A.No.83 of 2015 filed under Section 47 of the Code of the Civil Procedure.

7. On 15.04.2016, the appellant examined herself as PW1 in E.A.No.83 of 2015 and the application stands adjourned to 20.07.2016 for cross examination. On 08.12.2015, the learned Judge dismissed the set aside petition filed in I.A.No.765 of 2015. Aggrieved over the order, the present appeal is filed.

8. Heard Mr.S.Subbiah, learned counsel appearing for the appellant and Mr.V.Sitharanjandas, learned counsel appearing for the 1st respondent and perused the materials available on record.

9. The learned counsel appearing for the appellant would submit that the defendants filed the application to set aside the ex-parte decree in time, however, the application came to be numbered after a lapse of 6-1/2 months, for which the appellant cannot be found fault and if there is any mistake committed in the office, the parties should not be made to suffer; the trial court dismissed the applications mainly referring to the proceedings taking place in the execution petition, but neither the appellant, nor the first respondent has marked documents in the applications and also without giving opportunity to the parties to explain their case, the procedure adopted by the trial court is contrary to the decision reported in 2015-5-L.W.854 [Karumalai and others Vs. Kittu].

10. It is further contended that the plaintiffs in O.S.No.156 of 2012 have preferred an appeal in A.S.No.226 of 2015 before this court, aggrieved over the rejection of the prayer for partition and permanent injunction; that when the issues are pending consideration, the decree passed in the subsequent suit cannot be executed; that the appellant and the 2nd respondent have filed E.A.No.83 of 2015 to declare that the decree passed in O.S.No.93 of 2014 as in-executable and null and void on the sole ground of mis-description of property and mere pendency of the application, cannot debar the parties to seek a prayer to set aside the ex-parte decree.

11. The learned counsel for the appellant, placing reliance upon the decision reported in Esha Bhattacharjee vs. Managing Committee of Raghunathpur, Nafar Academy [2013(5)CTC 547], would



contend that even if there is any delay in filing the application, the court has to adopt a liberal approach, taking into consideration the nature of the suit and that when justice is at stake, technical or pedantic approach should not be adopted by the Courts, when there is miscarriage of justice, caused to the litigant public.

12. Per contra, learned counsel for the first respondent would submit that the first respondent is 70 year old. He is suffering from knee pain and his wife abandoned the children viz., the appellant and the 2nd respondent, when they were aged about 10 and 7 years respectively and he brought them up by providing good education, securing job with great difficulty, however, at this old age, both of them have neglected him and now, he has postponed the Knee operation due to financial crises; that the appellant did not take steps to number the set aside petition, so, he cannot blame the court without any material; that admittedly, the appellant has filed an application, challenging the decree passed in the suit, under Section 47 of C.P.C and the petition is in part heard stage, so the applicant has no locus standi to prosecute the set aside petition and that the decision in 2015(5) LW 854 would not help the applicant, as facts in both the cases are totally different.

13. The case of the appellant and the 2nd respondent is that due to ill-advise and conspiracy with some other persons, their father is attempting to throw them and their family members from the suit property. Be that it may, in the affidavit filed in support of the petition to set aside the ex-parte decree, it was alleged that they entered appearance in O.S.No.93 of 2014 and by that time, the 2nd respondent was about to leave for Dubai and as his father was taking steps to throw themselves from the suit property, their life was in peril; in the above circumstances, the 2nd respondent could not go to Dubai and he was forced to be at Madurai; that the wife of the 2nd respondent was pregnant and she had severe complications and the appellant was in constant Medical surveillance. Further, the 2nd respondent had been practically out of station for the past two months and more, therefore, they forgot to make enquiry with the counsel as to ascertain the stage of the suit.

14. It is to be noted that in para 6 of the affidavit, the petitioners/defendants had taken inconsistent stand, in the first line, it is stated that the petitioners have to necessarily attend her as his wife was under constant Medical Surveillance and in the next sentence, it is stated that the 2nd respondent had been practically out of station for the past two months. Further, they have not produced any material in support of their case.



15. Indisputably, the suit in O.S.No.93 of 2014 came to be filed, pursuant to the judgment and decree passed in O.S.No.156 of 2012. In the earlier suit, the trial court granted decree of permanent injunction in favour of the appellant and the 2nd respondent restraining the first respondent from evicting them, except under due process of law. It is not in dispute that the summons in the subsequent suit were served on them and they had been taking adjournments for nearly 6 hearings i.e., for about two months. Eventually, for non-filing of the written statement, the defendants were set ex-parte on 20.11.2014 and the suit stands adjourned to 06.11.2014 for ex-parte evidence. On 07.11.2014, the suit was decreed ex-parte.

16. It is to be noted that on the 30th day i.e., on the last day of limitation, an application was filed to set aside the ex-parte decree. It was returned for compliance, but it was represented after three months i.e., on 05.03.2015. In the meantime, the appellant entered appearance in the execution proceedings on 30.01.2015 and she was taking time and on her request, the petition stands adjourned to 13.07.2015, 20.07.2015, 29.07.2015 and 05.08.2015 for filing counter. Since, no counter was filed, delivery of possession was ordered on 05.08.2015. In the execution petition also, the 2nd respondent remained ex-parte and the notice was returned as "refused". After delivery of the possession was ordered, the set aside petition was numbered on 23.09.2015.

17. The contention of the learned counsel for the appellant is that for the fault committed by the office of the Court, the parties shall not be made to suffer, cannot be accepted for the reason that he has not given any explanation for their inaction to number the petition. It is curious to notice that after delivery warrant was issued, the appellant and the 2nd respondent had filed more than five applications in the execution petitions to stall further proceedings in the EP and they were all numbered without any delay. When they had diligently numbered those petitions to see that the decree is not executed, they ought to have taken steps to number the set aside petition. As stated above, although the application was filed in time, it remained unattended for nearly 6-1/2 months. Considering the facts of this case, this court is of the opinion that the delay was caused by deliberate negligence of the defendants.

18. In the suit as well as in the execution petition, the parties were given ample opportunities, however, they have not utilised for the reasons best known to them and on the other hand, the conduct of the parties would reveal that with a mala fide intention to prolong the litigation, they remained ex-parte in the suit as well as in the execution petition.



19. At this juncture, it is appropriate to refer the decision relied on by the learned counsel for the appellant, reported in 2013(5)CTC 547 [Esha Bhattacharjee vs. Managing Committee of Raghunathpur, Nafar Academy, wherein the Hon'ble Supreme court has framed some guidelines. The relevant portion is extracted hereunder:-

(vii) The concept of Liberal Approach has to encapsule the conception of reasonableness and it cannot be allowed a total unfettered free play.

(viii)

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the Application are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

20. The learned counsel for the appellant would further urge that in the counter filed in the set aside application, the first respondent has not mentioned anything about the proceedings in the execution petition. So, suo moto comparison of the execution proceeding, while considering condone delay petition is not permissible in view of the decision reported in 2015-5-L.W. 854 [Karumalai & others vs. Kittu]. In that case, two suits were filed before the District Munsif-cum-Judicial Magistrate, Omalur. Separate trial was conducted. When the appeal was taken by the Subordinate Judge, Mettur, preferred against the judgment and decree passed in O.S.No.33 of 1998, the appellate court reversed the judgment of the trial court, reading the evidence taken in the another suit in O.S.No.106 of 1998. In the above facts, this Court in para 19 has held as follows:-

"19. It is trite that unless the pleadings made and evidence adduced in one case are introduced and adduced as evidence in the other case following the procedure for adduction of evidence, the court cannot suo motu read the evidence recorded in one case in another case even though both the cases are dealt with by the very same Court. Nothing more is



needed to hold that the procedure adopted by the learned lower appellate Judge is totally erroneous and against law. The additional Substantial question of law is answered accordingly in favour of the appellants and against the respondent."

21. In my considered view, the above decision has no bearing on the facts of the present case. As stated above, the set aside application and the other applications filed in the execution petitions arising out of the same suit, were taken up for hearing on the same day and after hearing both the parties, the VI Additional District Judge has passed the orders.

22. Keeping in mind, the principles laid down in the judgment reported in 2013(5)CTC 547, this court has to take into consideration the conduct, behaviour and attitude of the parties relating to their inaction or negligence and the liberal approach should not cause injustice to the opposite party. In my considered view, this is a classic case for abuse of process of law by the litigants.

23. It is also not in dispute that in the appeal in A.S.No.226 of 2015, the appellate court has not granted interim stay, so mere pendency of appeal would not be a bar of filing execution petition. Therefore, this court does not find force in the contention of the learned counsel for the petitioner.

24. Admittedly, the appellant and the 2nd respondent have filed E.A.No.83 of 2015 to declare that the decree obtained in O.S.No.93 of 2014 as null and void and in-executable. The petition is now posted for cross examination of PW1. In para 18 of the petition and in para 14 of the proof affidavit, it has been specifically alleged that the plaintiff by suppressing the materials facts and to cheat the defendants, by playing fraud on the court, obtained the decree.

25. It is settled law that no party could be allowed to approach two different forums for the same relief, which would also amount to forum shopping. The defendants in O.S.No.93 of 2014 have elected to challenge the decree in the execution petition and therefore, they are estopped from pursuing the petition filed to set aside the ex-parte decree in the suit. On this ground also, this appeal is liable to be dismissed and accordingly, it is dismissed.

26. In the result, this appeal is dismissed. The order of the trial court is confirmed. However, no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

/True Copy/



To

The 6th Additional District Judge,
Madurai.

+1cc to M/S.S.Subbiah, Advocate in SR No.42423

+1cc to M/s.V.Sitharanjandas, Advocate in SR No.41650

Judgment made in
CMA (MD) No.574 of 2016
03.08.2016

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