



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 14.12.2016
CORAM:

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
C.M.P (MD) No.2828 of 2016
in
C.M.A (MD) No.1323 of 2015

1.Thiagarajan
2.Chellapappa
3.Minnalkodi
4.Rajeswari

... Petitioners/Respondents Nos.2 to 5

Vs.

1.N.R.N.Pandian

...1st Respondent/Appellant

2.Rathinavel

...2nd Respondent/1st Respondent

PRAYER: Petition filed under Order 41, Rule 21 of Code of Civil Procedure, to set aside the ex-parte Order dated 18.12.2015 passed by this Court in main Civil Miscellaneous Appeal C.M.A. (MD) No.1323 of 2015 and rehear the same.

For Petitioners : Mr.S.Ramesh
for Mr.V.Raghavachari
For Respondents : Mr.G.R.Swaminathan
for Mr.T.Antony Arul Raj for R1
No appearance for R2

ORDER

The present petition has been filed to set aside the order dated 18.12.2015, terming it as an exparte order, on the ground that the petitioners herein were not served and only the second respondent alone filed a Caveat and therefore, they had no opportunity to advance their arguments.

2. Heard Mr.S.Ramesh, learned Counsel appearing for the petitioners and Mr.G.R.Swaminathan, learned Counsel appearing for the first respondent and there is no representation for Mr.Raguvaran Gopalan appearing for the second respondent in Civil Miscellaneous Appeal.

3. The fact would reveal that the first respondent filed a <https://hcservices.ecmcs.gov.in/hcservices/> suit No.201 of 2005 on the file of the Second Additional Sub-Court, Thiruchirapalli seeking for permanent injunction. The said suit, after contest, was dismissed. Thereafter, A.S.No.30 of



2015 was preferred by the first respondent herein/appellant in the Civil Miscellaneous Appeal. In the said appeal suit, I.A.No.446 of 2015 filed seeking injunction was turned down and the same was dismissed.

4. Challenging the dismissal order passed by the appellate Court, the present Civil Miscellaneous Appeal has been filed.

5. When the matter was taken up for admission, this Court heard Mr.G.R.Swaminathan, learned Counsel for the appellant (who is the first respondent herein) and Mr.Raguvaran Gopalan, learned Counsel appearing only for Rathinavel who is the first respondent in the appeal suit as he had already filed a Caveat for himself alone and the petitioner herein were not represented.

6. The said point has been stressed upon by Mr.S.Ramesh, learned Counsel for the petitioners. On a first blush, it will look appealing, however, on close scrutiny, no such argument could be advanced by the learned Counsel for the petitioners herein for the simple reason that the second respondent herein and the petitioners are brothers and sisters, who engaged a common Advocate and filed a common written statement and contested the suit together.

7. Secondly, even in the appeal suit in A.S.No.30 of 2015, the very same Counsel, namely, Mr.K.Prabhakar, contested on behalf of the petitioners herein and the second respondent herein.

8. When the common case has been advanced by the same Counsel, there cannot be a separate argument on behalf of the petitioners herein other than the argument which was advanced by Mr.Raguvaran Gopalan on behalf of the second respondent herein. There is no conflict of interest. The petitioners cannot improve or go beyond the pleadings already raised before the Courts below.

9. When that is the position, merely because they have not been served and they have not engaged any Counsel, it will only be a technicality and it will not vitiate the entire proceedings. As a representative of the petitioners, the second respondent had already advanced the arguments, which in turn has to be the arguments of the petitioner. After getting convinced only the Court passed the orders.

10. Therefore, there is no justification in contending that they were not served upon and they were not heard before passing of the order. The said order cannot be called as an ex-parte order as claimed by the petitioners. Therefore, this Civil Miscellaneous Petition is liable to be dismissed.

11. That apart, with regard to the grant of injunction, what has to be seen is that a *prima facie* case, balance of convenience



and irreparable loss, which are the points/factors to be considered.

12. This Court while appreciating the documents, took a view based on the admission made by the petitioners herein in their written statement in paragraph '13' which reads as follows:

"13. Basically the plaintiff was not in a possession and enjoyment over the suit property he is mere a trespasser to the suit property under the guise of the documents which were made fraudulently."

13. The above paragraph in the written statement would show that the petitioners indirectly admitted that the first respondent herein/appellant in the Civil Miscellaneous Appeal is in possession of the property and hence, this Court ordered interim injunction till the disposal of the suit. One another factor which is in favour of the first respondent/appellant is the enjoyment of the injunction by the plaintiff for ten years before the trial Court till the disposal of the suit.

14. Therefore, this Court rightly set aside the order passed by the appellate Court and this Court has not given any finding and only passed the remarks in the Civil Miscellaneous Appeal and accordingly, the appellate Court is directed to dispose of the appeal in A.S.No.30 of 2015 on or before 30.04.2017. Both parties are directed to co-operate with the appellate Court for the disposal of the appeal.

15. With the above observations, this Civil Miscellaneous Petition is dismissed.

Sd/-

Deputy Registrar(Admn.)

/TRUE COPY/

Sub Assistant Registrar

To

1. The II Additional District Judge,
Trichy.

2. The Principal District and Sessions Judge,
Trichy.

+1 cc to MR.V.Raghavachari, ADVOCATE, SR NO:80948

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