



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.10.2016

CORAM

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THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

C.R.P. (NPD) (MD) No.1276 of 2016

and

C.M.P. (MD) .No.6087 of 2016

M.Rajangam

... Petitioner

Vs.

P.Muthumanikandan

... Respondent

PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India against the order dated 21.01.2015 made in I.A.No.282 of 2014 in O.S.No.30 of 2011 on the file of the Ist Additional District Judge (Civil Protection), Thanjavur.

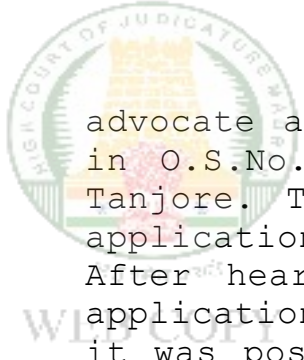
For Petitioner : Mr.R.Vijayakumar

For Respondent : Mr.T.V.Sivakumar

O R D E R

The civil revision petition is filed against the order dated 21.01.2015, passed by the First Additional District Judge (Civil Protection), Thanjavur in I.A.No.282 of 2014 in O.S.No.30 of 2011.

2. The respondent herein filed a suit in O.S.No.30 of 2011 before the First Additional District Judge (Civil Protection), Thanjavur for specific performance. The petitioner herein is the defendant in the suit filed a detailed written statement disputing the sale agreement. The above said suit was posted for hearing on 09.07.2013 for let in evidence on the side of the defendant. However, the petitioner herein could not appear before the trial Court on that day, due to the heart ailment. Thereby result in ex-parte decree was passed on 23.07.2013. The aforesaid ex-parte decree was came to know by the revision petitioner only in the month of March 2014. After knowing the ex-parte decree passed by the trial Court, the petitioner filed an application to set aside the ex-parte decree and also along with the application under Section 5 of the Limitation Act, to condone the delay of 213 days in filing a petition to set aside the ex-parte decree. The petitioner has filed an affidavit before the Court below by stating that he was suffered from heart ailment. Subsequently, he was also suffered unconscious and thereafter, he was admitted in Government Medical College Speciality Hospital on 26.02.2013 and thereafter, he was discharged on 01.03.2013. Because of the aforesaid severe ailment, the petitioner was not in a position to contact his



advocate and filed the present application in I.A.No.282 of 2014 in O.S.No.30 of 2011 before the Ist Additional District Court, Tanjore. The respondent herein filed a counter in the aforesaid application and opposed the reasons adduced in the affidavit. After hearing both the parties, the trial Court dismissed the application on the ground that after examining the plaintiff side, it was posted for the evidence of defence side and the said suit was decreed on merits and therefore, the application under Order 9 Rule 13 is not maintainable. Hence, the application filed by the revision petitioner under Section 5 of the Limitation Act is not maintainable. Aggrieved by the aforesaid order, the petitioner has preferred the present revision before this Court.

3. Per contra, the learned counsel for the respondent strongly objected for the reasons adduced in the affidavit is not sufficient to condone the delay of 213 days in setting aside the ex-parte decree.

4. Heard the learned counsel for the petitioner as well as the learned counsel for the respondent and perused the materials available on record.

5. In support of his contention, the learned counsel for the petitioner relied on the judgment of the Supreme Court in **B.Janakiramaiah Chetty v. A.K.Parthasarathi** reported in (2003) 5 SCC 641.

6. The respondent herein filed a suit in O.S.No.30 of 2011 before the Ist Additional District Court, Tanjore (Civil Protection) for the relief of specific performance. The aforesaid suit was set ex-parte. Result in the ex-parte decree was passed on 23.07.2013. Thereafter, the petitioner filed an application in I.A.No.282 of 2014 to condone the delay of 213 days in filing the application to set aside the ex-parte decree and the aforesaid application was dismissed by the Ist Additional District Judge, Tanjore, on the ground that the aforesaid ex-parte decree was passed on merits. Therefore, he filed the present application.

7. In the light of the decision in **B.Janakiramaiah Chetty v. A.K.Parthasarathi** reported in (2003) 5 SCC 641, it is stated as follows:

"In Rule 2, the expression used is "make such order as it thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a direction to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position

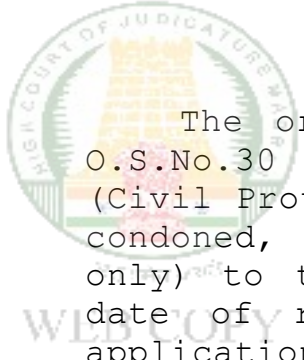


is not so, the Court has no option but to proceed as provided in Rule-2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the rule. While Rule 3 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision."

8. On perusal of the affidavit, the revision petitioner has adduced the reasons that he was suffered from heart ailment and subsequently, he was unconscious and thereafter, he was admitted in the Sugam Multi Speciality Hospital as an in-patient on 26.02.2013 and thereafter, he was discharged on 01.03.2013. Thereafter, he contacted his counsel and came to know that in the aforesaid suit, ex-parte decree was passed by the trial Court. Thereafter only, he filed an application in I.A.No.282 of 2014. But however, the petitioner has not produced any document in support of his contentions raised in the said affidavit.

<https://hcservices.courts.gov.in/hcservices/> of the decision cited supra and the facts and circumstances of the case, I am inclined to pass the following order:



The order dated 21.01.2015 passed in I.A.No.282 of 2014 in O.S.No.30 of 2011 by the learned First Additional District Judge (Civil Protection), Thanjavur is hereby set aside and the delay is condoned, subject to payment of Rs.2,000/- (Rupees Two Thousand only) to the respondent within a period of four weeks from the date of receipt of a copy of this order. In the event of application under Order 9 Rule 13 C.P.C, is allowed by the trial Court, the trial Court is directed to dispose of the suit, within a period of six months from the date of receipt of a copy of this order, on merits and in accordance with law.

10. With the above direction, the Civil Revision Petition is allowed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS I)

/True copy/

Sub Assistant Registrar

To

The First Additional District Judge (Civil Protection),
Thanjavur.

+1cc to Mr.H.Lakshmi Shankar, Advocate Sr.No.58239

+1cc to Mr.R.Vijayakumar, Advocate SR.No.58185

akv

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