



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.12.2016

CORAM:

WEB COPY

THE HONOURABLE MS.JUSTICE V.M. VELUMANI

CRP(MD).Nos.1706 and 1684 of 2016 and
CMP(MD).No.8294 of 2016 in CRP(MD).No.1706 of 2016 and
CMP(MD).No.8190 of 2016 in CRP(MD).No.1684 of 2016

R. Gunaseelan : Petitioner in both CRPs

Vs.

G. Balamurugan : Respondents in both CRPs

Prayer in CRP(MD).No.1706 of 2016: The Civil Revision Petition is filed under Article 227 of the Constitution of India to call for the records in connection with ex parte judgment and decree dated 28.01.2010 made in O.S.No.120 of 2009 on the file of the Sub Court, Theni and set aside the same.

Prayer in CRP(MD).No.1684 of 2016: The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 12.06.2014 made in I.A.No.15 of 2012 in O.S.No.120 of 2009 on the file of the Sub Court, Theni.

For Petitioner : Mr. A. Arumugam
For respondent : No appearance

COMMON ORDER

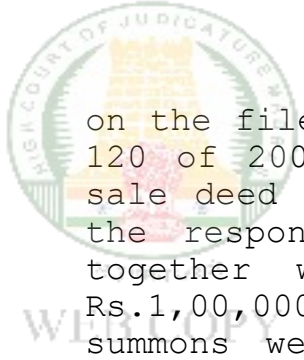
The Civil Revision Petition in CRP(MD).No.1706 of 2016 is filed to call for the records in connection with ex parte judgment and decree dated 28.01.2010 made in O.S.No.120 of 2009 on the file of the Sub Court, Theni.

The Civil Revision Petition in CRP(MD).No.1684 of 2016 is filed against the fair and decreetal order dated 12.06.2014 made in I.A.No.15 of 2012 in O.S.No.120 of 2009 on the file of the Sub Court, Theni.

2. Parties in both the CRPs are one and the same. Therefore, both the Civil Revision Petitions are disposed of by the common order.

<https://hcservices.ecourts.gov.in/hcservices/>

3. The petitioner herein is the defendant in O.S.No.120 of 2009



on the file of the Sub Court, Theni. The respondent filed O.S.No. 120 of 2009 for a decree of specific performance of agreement of sale deed dated 10.10.2008 entered into between the petitioner and the respondent or in alternative for a decree of Rs.1,74,700/- together with interest at 24% p.a on the advance sum of Rs.1,00,000/- and for permanent injunction. In the suit, suit summons were served on the petitioner. He engaged one Muthu Advocate to appear on his behalf on 10.2.2009. The said Advocate appeared and took time for filing written statement.

4. According to the petitioner, the said Advocate informed him that he would inform the petitioner about filing of written statement after some time. The petitioner on 15.04.2010 received notice in E.P.No.12 of 2010. When he contacted his Advocate Muthu, his Advocate informed him that the suit was decreed ex parte on 28.01.2010 and took his signature in the affidavit to be filed in the application to set aside the ex parte decree also put the signature in the Vakalat to appear on his behalf in the execution proceedings. The said Advocate did not file any application to set aside the ex parte decree and also did not appear on his behalf in the execution proceedings. Therefore, the petitioner engaged another Advocate and on verification, he came to know that his previous Advocate did not appear on his behalf and therefore, suit property was auctioned and sale was confirmed on 22.03.2012 and sale certificate was issued to the auction purchaser on 04.07.2012. He also came to know that his earlier advocate is close friend of respondent / plaintiff and hence, he did not appear on behalf of the petitioner. Therefore, the petitioner filed an application in I.A.No. 15 of 2013 to set aside the ex parte decree along with an application to condone the delay of 993 days in filing the petition to set aside the ex parte decree. The petitioner submitted that he has valid defence in the suit and his intention is not to drag on the proceedings.

5. The respondent filed counter affidavit and opposed the said application. The respondent stated that petitioner is an educated person and he is a Veterinary Doctor and he has not given any sufficient reason for condoning the delay of 993 days in filing an application to set aside the ex parte decree and prayed for dismissal of Interlocutory Application in I.A.No.15 of 2013.

6. The learned Judge considered the averments made in the affidavit and counter affidavit and also available materials on record dismissed the application holding that the petitioner is being an educated person and having been come to know that the ex parte decree, ought to have diligent enough to set aside the ex parte decree in time and the reason given is not sufficient to set aside the ex parte order dated 12.06.2014 passed in I.A.No. 15 of 2013. Against the said order of dismissal, the Civil Revision Petition in C.R.P(MD).No.1684 of 2016 is filed.

<https://hcservices.ecourts.gov.in/hcservices/>

7. The petitioner also filed CRP(MD).No.1706 of 2016 to set



aside the ex parte decree dated 28.01.2010 passed in O.S.No. 120 of 2009.

8. The learned counsel appearing for the petitioner submitted that the court below failed to see that the petitioner has given valid and sufficient reason to condone the delay of 993 days in filing a petition to set aside the ex parte decree. The petitioner was examined in the application and his evidence was not disputed by letting in any contra evidence by the respondent. The Court below failed to see that the petitioner totally relied on the Advocate and the petitioner should not be penalised for the mistake committed by his Advocate. The Court below failed to consider the averments made in the affidavit properly and failed to see that the petitioner has explained the delay in filing a petition to set aside the ex parte decree. In any event Court below ought to have allowed the application on terms imposing cost on the petitioner.

9. As far as CRP(NPD)(MD).No. 1706 of 2016 is concerned the learned counsel for the petitioner submitted that the ex parte judgment dated 28.01.2010 is not a judgment in the eye of law and is non est. Even if the defendant does not contest the suit, it is the duty of the court to consider the averments in the plaint and oral and documentary evidence and give reasons for deciding the suit. In the present case, the learned Judge has not mentioned in the judgment whether anybody was examined or any document was marked and no reason was given for decreeing the suit for payment of money, instead of granting relief of specific performance of agreement of sale.

The learned counsel for the petitioner relied on the following judgments:-

i) 2013(2) CTC 388 (N. Maheswari Vs. Mariappan and others), wherein paragraph No. 11 it has been held as follows:-

"11.....In so far as the Defendant No.1 is concerned, even though he remained ex parte, a duty is cast upon the Trial Court to frame necessary issues and to give a judgment on the basis of the evidence adduced by answering those issues. The Court cannot simply pass a judgment and decree as prayed for without giving any reasons, just because the Defendant remained ex parte. In fact, the onus is more on the part of the Trial Court when Defendant/ Defendants remain ex parte, as the Trial Court has to go through the Plaintiff's evidence, his claim, etc. to find out whether the Plaintiff has proved his case. Merely because there is no contest, as the Defendant does not appear, it does not mean that the Plaintiff has proved his case in entirety."

<https://hcservices.ecourts.gov.in/hcservices/>

ii) 2010(4) CTC 690 (Southern and Rajamani Transport Private



Limited Vs. R. Srinivasan and others), wherein paragraph No.21 it has been held as follows:-

"21.It is an everlasting and also an axiomatic principle of law that subsequent purchaser will step into the shoes of his vendor, who entered into a Sale Agreement with prior purchaser. Under the said circumstances, subsequent purchaser is also a necessary and proper party to a Suit instituted for Specific Performance."

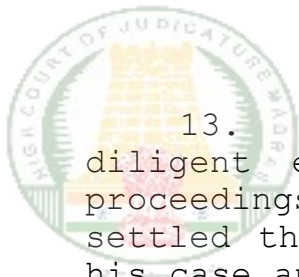
iii) 2011(3) CTC 168 (Meenakshisundaram Textiles Vs. Valliammal Textiles Ltd.), wherein paragraph No.21 it has been held as follows:-

"21.From the above discussions, it is manifestly clear that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any Appeal, the decree is executable. In that sense, there is no difference between a judgment and decree and an ex parte, judgment the Court should be extra careful in such case and it should consider the pleadings and evidence and arrive at a finding as to whether the Plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required in a contested matter, an ex parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment."

10. I have heard the learned counsel appearing for the petitioner and perused the materials available on record.

11. Though the notice served on the respondent and his name is also printed in the cause list in CRP(MD).No.1684 of 2016, there is no representation either in person or through his counsel.

12. The petitioner received summons in the suit and engaged Advocate and took adjournment for filing written statement on 01.12.2009 itself. subsequently, the petitioner did not follow up the matter, with regard to the stage of the suit. When he received notice in Execution Petition in E.P.No.12 of 2010, engaged another Advocate and according to him, he took steps to set aside the ex parte decree as well as to contest the execution proceedings. Again he did not follow the matter with his advocate and only in the year 2015 he engaged another Advocate and filed an application to set aside the ex parte decree.



13. From this fact it is seen that the petitioner was not diligent enough to defend the suit as well as the execution proceedings filed against him to execute the decree. It is well settled that a litigant must be given an opportunity to put forth his case and he should be shut down at the threshold itself. At the same time, it is well settled that party must be diligent enough in prosecuting the case and his intention must be bonafide and not malafide.

14. In the present case,, the petitioner is well educated and Veterinary Doctor and not illiterate person. After engaging an Advocate he failed to diligently pursue the matter. After two years, the petitioner has filed application with the allegation that his previous counsel in collusion with the respondent did not file Vakalat and contest the suit.

15. As far as CRP(MD).No.1706 of 2016 is concerned, the Division Bench Judgment of this Court reported in **2011(3) CTC 168 (Meenakshisundaram Textiles Vs. Valliammal Textiles Ltd.,)** held that there is no difference between a Judgment and Decree and an ex parte Judgment and Decree and both are appealable. The petitioner has not filed any appeal against the judgment and decree dated 28.1.2010.

16. In view of the Division Bench Judgment of this Court, as referred to above, both the Civil Revision Petitions are not maintainable. Accordingly, both the Civil Revision Petitions are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar ()

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge, Theni.

+ 2 CC TO M/s.AJMAL ASSOCIATES, IN SR No. 82374, 82374

TRP

TE/CM-MSA : 09/02/2017 : 5P/4C

CRP(MD).Nos.1706 and 1684 of 2016 and
CMP(MD).No.8294 of 2016 in CRP(MD).No.1706 of 2016 and
CMP(MD).No.8190 of 2016 in CRP(MD).No.1684 of 2016
20.12.2016