

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.11.2017

Coram

THE HON'BLE MR. JUSTICE M.DURAI SWAMY
C.M.A.No.1212 of 2017 &
C.M.P.No.6158 of 2017

H.K.Krishnamurthy

... Appellant

Vs.

1.Chennai Metropolitan Development Authority
Represented by its Member secretary
Gandhi Irwin Road, Ansari Estate,
Egmore, Chennai - 8.

2.Corporation of Chennai
Represented by its Commissioner
Ripon Buildings, Chennai - 3.

3.S.Venkataraman

... Respondents

Civil Miscellaneous Appeal filed under section XLIII Rule 1 of CPC against the fair and decretal order dated 17.03.2016 passed in I.A.No.76 of 2015 in O.S.No.9933 of 2010 on the file of XVIII Additional City Civil Court, Chennai.(Full Additional Charge of XIX Additional District Judge)

For Appellant : Ms.P.T.Asha

For Respondents : Mr.C.Johnson - for R1 & R2

Mr.K.Venkatakrishnan - for R3

J U D G M E N T

Challenging the fair and final order passed in I.A.No.76 of 2015 in O.S.No.9933 of 2010 on the file of XVIII Additional City Civil Court, Chennai, the 3rd defendant has filed the above appeal.

2. The plaintiff filed the suit in O.S.No.9933 of 2010 for the following reliefs:-

(i) for declaration that the construction put up by the 3rd defendant at No.8, Musuri Subramaniyam Salai [Oliver Road], Mylapore, Chennai - 600 004 is an illegal, unauthorised

construction, without any proper sanctioned plan and in gross violations;

(ii) for declaration that the plaintiff is entitled for a right of easement to get free flow of air, light from the eastern side and privacy to the plaintiff's family and to enjoy their easement rights undisturbed including encroachment to the entire length of the plaintiff's property; and

(iii) for a consequential mandatory injunction.

3. The suit was filed by the plaintiff as early as on 08.12.2008. The defendants filed their written statement and were contesting the suit.

4. The Trial Court posted the suit for trial and the plaintiff had also filed his proof affidavit. At that stage, since the 3rd defendant failed to appear before the Trial Court, the Trial Court set him ex-parte and an ex-parte decree was passed on 13.03.2015. Thereafter, the 3rd defendant filed an application in I.A.No.76 of 2015 on 10.04.2015 to set aside the ex-parte decree dated 13.03.2015.

5. In the affidavit filed in support of the application in I.A.No.76 of 2015, the counsel for the 3rd defendant has stated that earlier the suit was dismissed for default on 26.04.2013 and the plaintiff has filed an application in I.A.No.108 of 2013 and subsequently, the said application was also dismissed for default on 03.01.2014. Thereafter, the plaintiff filed an application in I.A.No.36 of 2014 to set aside the order dated 03.01.2014 and to restore the application in I.A.No.108 of 2013. Thereafter, on 24.07.2014, the application in I.A.No.36 of 2014 was allowed and consequently, the application in I.A.No.108 of 2013 was restored to file. Subsequently, on 22.08.2014, the application in I.A.No.108 of 2013 was allowed and the suit was restored to file.

6. According to the 3rd defendant, again, the suit was dismissed for default on 08.10.2014 and an application was filed by the plaintiff in I.A.No.170 of 2014 to restore the suit was allowed by the Trial Court. Thereafter, when the suit was posted on 13.03.2015, since the 3rd defendant failed to appear before the Trial Court, he was set ex-parte and an ex-parte decree was passed. In paragraph No.5 of the affidavit filed in support of the application, the counsel for the 3rd defendant has stated that his marriage was fixed and an engagement function was pursued, therefore, he could not attend his office

during that time and inadvertently, failed to inform his office about the restoration application filed by the plaintiff. Thereafter, when one of his colleague went to the court to check the 'A' Diary, he came to know about the ex-parte decree passed on 13.03.2015.

7. The plaintiff filed his counter disputing the averments stated in the affidavit filed in support of he application and prayed for dismissal of the application.

8. The Trial Court, taking into consideration the case of both the parties, dismissed the application stating that the 3rd defendant has not filed an affidavit for setting aside the ex-parte decree and only the Junior Advocate has sworn to the affidavit. In paragraph No.16 of the order, the Trial Court has observed that even in the sworn affidavit filed by the Junior Advocate, he has stated that the bundle got mixed up with other case records, therefore, the said reason cannot be accepted.

9. On a perusal of the affidavit filed in support of the application, it could be seen that nowhere the learned counsel has not stated that the bundle got mixed up with other case bundle. He stated that he was busy with his marriage, therefore, inadvertently, failed to inform his office about the filing of the restoration application by the plaintiff.

10. When the Junior Advocate has not stated that the bundle got mixed up with other records, the reasoning given by the Trial Court for dismissing the application cannot be accepted.

11. It is also brought to the notice of this court that subsequently the 3rd defendant has also filed an affidavit narrating the reasons for non-appearance on 13.03.2015 by his counsel. Even this affidavit was not taken into consideration by the Trial Court. The Trial Court, without applying its mind, in an mechanical manner, dismissed the application giving some reason, which was not stated in the affidavit either by the learned counsel appearing for the 3rd defendant or by the 3rd defendant himself. Apart from this, the application to set aside the ex-parte decree was filed by the 3rd defendant, within 30 days from the date of ex-parte decree. The ex-parte decree was passed on 13.03.2015 whereas, the application to set side the ex-parte decree was filed on 10.04.2015. Since the 3rd defendant and his counsel had given acceptable reason for non-appearance on 13.03.2015, in the interest of justice, the Trial Court should have set side the ex-parte decree and given an opportunity to the 3rd defendant to contest the suit on merits.

12. Mr.K.Venkatakrishnan, learned counsel appearing for the 3rd respondent-plaintiff submitted that the plaintiff is aged nearly 80 years and therefore, it would be just and proper to direct the Trial Court to dispose of the suit, within the shortest possible time. It is also brought to the notice of this court that the suit was posted for cross examination of P.W.1.

13. Ms. P.T.Asha, learned counsel appearing for the appellant-3rd defendant submitted that the 3rd defendant would co-operate for the early disposal of the suit without seeking for adjournment to the Trial Court and to that effect, the 3rd defendant has also filed an affidavit of undertaking dated 02.11.2017 before this court, which is also taken on record.

14. In the result, the fair and decreetal order passed in I.A.No.76 of 2015 in O.S.No.9933 of 2010 are set aside and the application in I.A.No.76 of 2015 stands allowed. The ex-parte decree passed in O.S.No.9933 of 2010 stands set aside. For the reasons stated above, the XVIII Additional Judge, City Civil Court, Chennai, is directed to dispose of the suit in O.S.No.9933 of 2010 on merits and in accordance with law, within a period of two months, from the date of receipt of a copy of this order, by conducting trial on day-to-day basis and report the same to the Registry of this Court. It is needless to say that the 3rd defendant shall co-operate for the disposal of the suit within two months' time as stated in the affidavit of undertaking dated 02.11.2017.

With these observations, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

Rj
To

The XVIII Additional Judge
City Civil Court
Chennai.

+1 CC to Mr.C. Johnson, Advocate sr 77900.
1 CC to Sarvabhuman Associates, sr 77836(24/11/2017)

C.M.A.No.1212 of 2017 &
C.M.P.No.6158 of 2017

SP(03/11/2017)