

IN THE HIGH COURT OF JUDICATUE AT MADRAS

DATED 19.06.2017

CORAM

THE HONOURABLE DR. JUSTICE S.VIMALA

C.M.A. No.1368 of 2017

and

C.M.P.No.7218 of 2017

1. N.Sivakumar
2. S.Sowndiram
3. S.Deepika ..Appellants/Petitioner/Defendants 1 to 3.

versus

1.C.S.Palanisamy ..1st Respondent/1st Respondent/Plaintiff
2. S.Gowthami .. 2nd Respondent/2nd Respondent/4th Defendant

Appeal filed under Section 43 Rule 1(d) of C.P.C. against the petition and Order dated 12.09.2014 made in I.A.No.340 of 2013 in O.S.No.9 of 2012 on the file of the Principal District Judge, Namakkal.

For appellants : Mr.C.Prabakaran
For Respondents: Mr.V.P.Appaswamee for R-1

J U D G M E N T

whether the 'Apple-cart' of the plaintiff can be permitted to be upset, by the defendants, by seeking to set aside the exparte decree, when the plaintiff has achieved the settled position by taking delivery of property through the execution proceedings is the issue raised in this appeal.

2. Defendants 1 to 3 in O.S.No.9 of 2012 are the appellants.

2.1 The Plaintiff is the 1st respondent in this Appeal. The 4th defendant in the suit is the second respondent in this appeal.

3. The appellants filed I,A No.61 of 2013 u/s 5 of limitation Act, seeking to condone the delay 146 days in filing the petition under order 9 rule 13 CPC and I.A.No.340 of 2013 is the petition filed under order 9 rule 13 CPC to set aside the exparte decree dated 10.07.2013, against defendants 1 to 3.

4. Both the applications were dismissed by the order dated 12.09.2014.

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

5. This appeal has been filed by defendants 1 to 3 seeking to set aside the order dated 12.09.2014 made in I.A.No.340 of

2013 in O.S.No.9 of 2012, on the file of learned Principal District Judge, Namakkal.

6. In the impugned order, in I.A.No.340 of 2013, the learned Principal District Judge has made an observation that the decree and judgment passed on 10.07.2012 was on merits and the appellants herein were aware of the proceedings and therefore the application to set aside the exparte decree is dismissed.

7. In the application to condone the delay itself, the Trial Court has observed that sufficiency of cause is a condition precedent for exercise of discretionary of Jurisdiction for condoning the delay and the range of the delay is no matter, but acceptability of the explanation is the only criteria.

8. The learned counsel for the appellants would submit that when the petition to condone the delay has been allowed, by the order dated 12.06.2013 there cannot be a subsequent order on 12.09.2014 dismissing the same and once when the application to condone the delay is allowed, automatically, the petition to set aside the exparte decree also ought to have been allowed. This contention is not correct and it cannot be the universal proposition applicable at all times.

9. The circumstances which are placed before the Court, would go to show that the defendants have participated in the proceedings by filing the written statement as well as by participating in the cross examination of the witnesses also.

10. The Execution petition itself (E.P.No.198 of 2012) has been filed in the year 2012. Even in the Execution petition, till in the year 2014, the defendants did not file the counter and that is how, the Execution Petition came to be allowed on 09.10.2014.

11. The defendants/respondents did not file counter in the execution petition. The plaintiff has used the opportunity and he has deposited the balance sale consideration on 06.04.2015 and only thereafter the appellants herein have filed the petition to set aside the exparte order in the Execution petition in E.P.No.246 of 2015 and the same has been already dismissed by the learned District Judge.

12. The learned counsel for the 1st respondent would submit that after the Execution Petition, the plaintiff has taken possession through Court on 16.08.2016 and thereafter Patta has been transferred in the name of the plaintiff on 20.08.2016, with regard to the suit property and therefore as the issue raised in the subject matter of the litigation has been brought to an end it cannot be allowed to be reopened.

Learned counsel for the respondent submitted that after the delivery of possession and recording of delivery by the Court below, the petitioners are not entitled

to seek setting aside of ex parte decree and in support of his contention, learned counsel for the respondent relied on the following two decisions :

1. Muthusaamy vs. Subramanian, (2009) 7 MLJ 746
2. Rathinathammal vs. Muthusamy, (2004) 3 MLJ 36

In Muthusaamy vs. Subramanian, reported in (2009) 7 MLJ 746, this Court has held that delay in seeking to set aside the ex parte decree cannot be set aside, after delivery of possession is taken over and after the termination of execution proceeding on the ground that settled matter cannot be re-opened to upset the apple cart.

Similarly, in Rathinathammal vs. Muthusamy, reported in (2004) 3 MLJ 36, this Court has held that delay of 545 days in seeking to set aside the ex parte decree could not be condoned when the party aggrieved is not diligent in pursuing the matter and approached the Court only during execution proceedings.

These decision apply to the facts of this case.

13. "Equity aids the vigilant, not those who slumber on their rights."- as the maxim goes, considering the facts and circumstances, this Court is satisfied that the defendants have not shown diligence neither in the trial stage nor in the execution stage. Hence there is no scope for setting aside the ex parte decree passed. When the possession has been taken over through execution proceedings and the matter has been brought to an end, the defendants 1 to 3 /appellants cannot to be permitted to reopen the matter.

14. The Court below has rightly dismissed the petition to set aside ex parte decree and this Court is inclined to confirm the order passed by the learned District Judge.

15. In the result, the Civil Miscellaneous Appeal is dismissed by confirming the order of the Principal District Judge. Consequently, connected miscellaneous petition is closed. No costs.

s/d-
Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

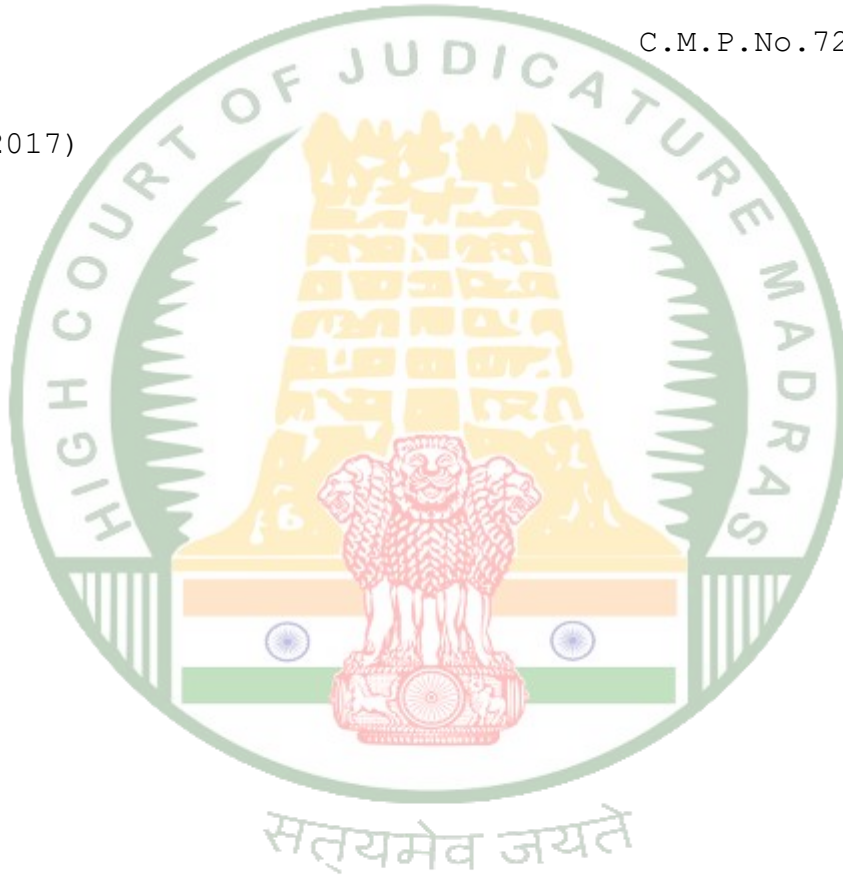
To

1.The Principal District Judge, Namakkal.

+1 CC to Mr.V.R. Appaswamee, Advocate sr 43038

C.M.A. No.1368 of 2017
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GJII (CO)
sp (26/09/2017)



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