

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.03.2017

Pronounced on : 16 .03.2017

C O R A M

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.M.A.No.2857 of 2016 and
CMP.No.20691 of 2016

T.N.Ramachandran ... Appellant/1st defendant/
Petitioner

/vs/

Sri Sripadaraja Mutt, Erode,
Mujlpakal, Kolar District,
State of Karnataka,
rep. by its Power Agent
H.B.Lakshminarayana,
S/o.132/1-C, Ragavendra Colony,
Samrajat, Bangalore. ... Respondent/Plaintiff/
Respondent

Civil Miscellaneous Appeal filed under Order 43 Rule (1)(d)
CPC against the fair and decreetal order dated 18.11.2016 made
in I.A.No.405/2016 in O.S.No.263/2010 on the file of the II
Additional District Court, Erode.

For Appellant ... Ms.P.T.Asha
for M/s.Sarvabhauman Associates

For Respondent ... Mr.S.Chandrasekaran

J U D G M E N T

The 1st defendant in the suit is the appellant. The
Civil Miscellaneous Appeal is filed challenging the order passed
in I.A.No.405/2016 in O.S.No.263 of 2010 by the learned II
Additional District Judge, Erode, refusing to set aside the ex-
parte decree passed on 21.09.2015.

2. The suit was filed for recovery of possession and the
written statement was filed as early as on 11.01.2011. It is
stated that there was an application in I.A.No.262/2013 filed by
the defendants for rejection of the plaint under Order VII Rule
11 of CPC and the same was dismissed by this Court in CRP (PD)

No.4836/2014 directing the trial court to dispose of the suit in O.S.No.263/2010 within a period of six months.

3. The suit was posted for hearing on 18.09.2015 and it is stated that since the 1st defendant was suffering from viral fever, he could not meet his Counsel. Subsequently, he came to know that the suit was decreed ex-parte. The application to set aside the ex-parte decree was filed within the period of limitation. The said application was resisted by the plaintiff disputing the reasons given by the 1st defendant.

4. When the application under Order VII Rule 1 CPC was decided by this Court in CRP.4836/2013, a direction was given to the trial court to dispose of the suit within a period of six months. At that time, the suit was posted for the cross-examination of P.W.1. Despite giving sufficient opportunities to the Counsel for the 1st defendant, the cross-examination was not completed. Hence, the 1st defendant was set ex-parte.

5. It is stated that after the passing of the ex-parte decree, an execution petition was filed. There, the defendants had appeared and obtained time for filing their counter. Therefore, the contention of the plaintiff was that the acts of the defendants are only to protract the proceedings and they have no intention to proceed with the suit.

6. The trial court, after considering both the arguments of the plaintiff and the 1st defendant, has held that earlier on 29.01.2015, the 1st defendant's Counsel had made an endorsement reporting, 'no instructions' and he was set ex-parte. It was further held that the 1st defendant had not filed any document to support his contention that he was suffering from viral fever. Hence, the application was dismissed.

7. The question which arise now for determination is whether the application filed under Order IX Rule 13 has to be allowed or not.

8. The learned Counsel appearing for the appellant/1st defendant contended that the ex-parte decree was passed on 21.09.2015. Immediately thereafter, the application to set aside the ex-parte decree was filed. In the meanwhile, the plaintiff had filed an Execution Petition No.17/2016. As the Execution Petition was filed, the defendants had filed E.A.No.65/2016 under Order XXI Rule 26 of CPC for staying the execution of the decree. In the said application, the hearing was posted on 29.11.2016 and at the instance of the plaintiff, it was adjourned to 01.12.2016 and subsequently, to 08.12.2016. On 8.12.2016, an order of stay was granted for 60 days staying the further proceedings in EP.No.17/2016.

9. In the meanwhile, it is stated by the learned Counsel for the plaintiff that E.P.No.17/2016 was proceeded with and the 1st defendant was also participating in the same and delivery of possession was ordered. The learned Counsel also has produced a copy of the delivery proof (Athatchi) wherein it appears that delivery was effected on 28.11.2016.

10. The learned Counsel for the plaintiff was unable to say as to when stay was granted in E.P.No.17/2016 under Order XXI Rule 26 CPC. on 08.12.2016, on the previous hearing, namely, 21.11.2016, the same was not brought to the notice of the court. If really, on 28.11.2016, the plaintiff had taken possession of the property, the same would have been brought to the knowledge of the execution court and the stay would not have been granted.

11. The learned Counsel for the 1st defendant also said that the possession is still with him and the delivery has not been effected and if really, the delivery was effected, they would have opposed the grant of stay. Therefore, there is no truth in the statement of the plaintiff and contended that the ex-parte has to be set aside as the same is not deliberate or intentional. The said application to set aside the ex-parte has been filed without any delay and it is stated to be for the first time, the suit was allowed to go ex-parte.

12. The provision of Order IX Rule 13 CPC, being a benevolent one, aims to provide reliefs to the persons who are denied opportunity to contest the case for the reasons beyond their control. The Hon'ble Apex Court has also time and again held that the court should not decide a case on mere technicalities and should adopt liberal and just oriented approach while dealing application under Order IX Rule 13 CPC.

13. As stated earlier, in this case, the 1st defendant has allowed the suit to go ex-parte for the first time and the application to set aside the same was also filed within the time. Hence, in the interest of justice, the impugned order has to be set aside and the ex-parte decree also has to be set aside. However, considering the fact that earlier, this Court had given a direction to the trial court to dispose of the suit within six months and the same has not been followed by the parties, the appeal can be allowed only on terms.

14. Accordingly, the appellant is directed to pay a sum of Rs.2,000/- (Rupees Two Thousand Only) as cost payable to the Chief Justice Relief Fund, within a period of two weeks from the date of receipt of a copy of this Order, failing which, this order shall stand automatically cancelled without further reference to this Court. The trial court is directed to dispose of the suit in O.S.No.263/2010 on or before 30.06.2017.

15. With the above direction, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The II Additional District Judge, Erode.

2.The Sub Assistant Registrar,
Account Section,
High Court, Madras 600 104

+1cc to M/S. Sarvabhauman Associates, Sr. 16959

+1cc to Mr. S. Chandrasekaran, Advocate Sr. 16443

Pre-Delivery Judgment in
C.M.A.No.2857 of 2016

EV(CO)
VR(28/03/2017)



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