

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.1117 of 2011

Dhanalakshmi .. Petitioner

vs

1.P.Maheswari
2.Minor Vigneshkumar
rep. by guardian first respondent .. Respondents

Revision filed under Article 227 of Constitution of India against the order passed in I.A.No.248 of 2009 in O.S.No.150 of 1999, dated 27.10.2010 on the file of the Principal Sub-Judge, Tirupur.

For Petitioner : Mr.G.Rajan

For Respondents : No Appearance

सत्यमेव जयते

ORDER

This revision has been filed by the petitioner challenging the order passed in I.A.No.248 of 2009 in O.S.No.150 of 1999, dated 27.10.2010 on the file of the Principal Subordinate Judge, Tirupur.

2. The petitioner herein is a third party to the suit in O.S.No.150 of 1999. The respondents are plaintiffs in the suit and they filed the suit against Chennimalai Gounder for specific performance of the sale agreement dated 13.03.1997 and the suit was decreed ex parte on 09.03.2000 after setting Chennimalai Gounder ex parte.

3. The petitioner herein has filed I.A.No.248 of 2009 seeking to implead her as second defendant in the suit alleging that on the date of filing of the suit, Chennimalai Gounder was not alive and he died way back in 1989 itself. In the affidavit, it is stated that when the petitioner appeared in O.S.No.271 of 2004 before the District Munsif Court, Palladam, she came to know about the suit being in O.S.No.150 of 1999 filed by the respondents and also the ex parte decree passed therein.

4. According to the petitioner, the respondents have filed the suit on the footing of a false document against Chennimalai Gounder. It is alleged that the suit properties in O.S.No.271 of 2004 and in O.S.No.150 of 1999 are one and the same. It is stated in the affidavit that the petitioner is the sister-in-law of the first respondent and sister of Senniappan @ Senthilkumar. According to the petitioner, her father

Sennimalai Gounder had no necessity to sell the property for the meagre amount and had not at all received the alleged sale consideration. The respondents have not filed any Execution Petition for executing the decree dated 09.03.2000 obtained against the deceased person, knowing fully well that the truth will come out and they will be put into trouble. The case of the petitioner is that she is having one-third share in the suit properties and therefore, she is necessary party to the proceedings. Therefore, the petitioner has filed the petition to implead her as second defendant in the suit along with petition to set aside the ex parte decree dated 09.03.2000.

5. Resisting the petition, the respondent filed the counter stating that before filing of the suit, there were exchange of pre-suit notice dated 08.12.1998 to the petitioner's father and the father of the petitioner had also replied the notice on 29.12.1998 through his advocate. Till the date of death, Chennimalai Gounder has not raised any objection regarding the sale agreement dated 13.03.1997 and the petitioner has no right to raise the validity of the sale agreement dated 13.03.1997 in any manner. After filing of the suit, suit summons were served on the petitioner's father and he wantonly allowed the suit ex parte and nearly after 1½ years only, the petitioner's father died.

The allegations set out in the affidavit are invented for the purpose of prolonging the case and there is no valid defence for the petitioner in the suit. It is stated that the respondent has right of 12 years to execute the decree and merely the delay in taking further steps is not a ground to question the validity of the decree passed in the suit. It is also stated that the entire suit properties were in possession and enjoyment of the respondent. It is false to state that the petitioner is entitled for one-third share in the suit properties. There was no proper reason or circumstances to implead the petitioner as parties to the suit. Hence, prayed for dismissal of the petition.

6. Upon consideration of the rival submissions, the trial Court dismissed the petition. Aggrieved by the same, the petitioner has preferred this revision.

7. Despite service of notice, the respondents have not entered appearance. I heard Mr.G.Rajan, learned counsel appearing for the petitioner. Perused the materials on record.

8. The learned counsel for the petitioner submitted that the trial Court erred in holding that since the petitioner was not a party to

the suit and no ex parte decree was passed against her, there is no necessity for impleading her in the suit. According to the learned counsel, the trial Court erred in not considering the fact that the petitioner is one of the legal representatives of the deceased defendant K.Chennimalai Gounder and as such the ex parte decree would stand in the way of the petitioner in affirming and establishing her title over her share in the suit properties. He would submit that if the ex parte decree was permitted to be in existence, the same would prejudice to the rights of the petitioner.

9. The trial Court, while dismissing the petition, observed that in the suit in O.S.No.150 of 1999, where an ex parte decree dated 09.03.2000 was passed, the petitioner was not a party. Therefore, the petitioner has no right to seek impleadment in the suit. The trial Court further observed that since there was no decree against the petitioner in O.S.No.150 of 1999, the impleadment as sought for by the petitioner was not a genuine one and therefore, the petition was not maintainable and the same was liable to be dismissed.

10. As stated supra, the plaintiffs have filed the suit for specific performance of the sale agreement dated 13.03.1997 against

the original defendant Chennimalai Gounder and the suit was decreed ex parte on 09.03.2000. According to the petitioner, on the date of filing of the suit, the original defendant Chennimalai Gounder was not alive and the ex parte decree was passed against the dead person. Though the said plea of the petitioner was denied by the respondents, they have not filed any proof to show that on the date of filing of the suit and/or on the date of passing of the ex parte decree, the original defendant Chennimalai Gounder was alive.

11. When this Court examined the instant case, I have noticed that the trial Court has decreed the suit without assigning any reason how the plaintiffs have proved their claim.

12. As per Order 20 Rule 4 and 5 of Civil Procedure Code, judgments of the Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision, even in the case of defendant ex parte. The provision under Order 20 Rule 4 and 5 of Civil Procedure Code states as follows:

"4. Judgment of Small Cause Courts.- (1)

Judgments of a Court of Small Causes need not contain more than the points for determination and the decision

thereon.

(2) **Judgments of other Courts.**-Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5.Court to state its decision on each issue.-

In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

13. In the case on hand, the original defendant was set ex parte. The trial court did not frame any issue for deciding the suit. The trial Court simply examined P.W.1 and found that the claim made by them was proved. The judgment pronounced and/or the ex parte decree passed by the trial Court was clearly contrary to the provisions of Order 20 Rule 4 and 5 of the Civil Procedure Code.

14. In *C.N. Ramappa Gowda vs C.C. Chandregowda (dead) by LRs and another*, reported in 2012 (5) SCC 265, the Hon'ble

Supreme Court held that in a suit, where the defendants failed to file their written statement, the non-filing of the written statement should not have any penal consequence and the Court should proceed cautiously and exercise its discretion in a just manner and even in the absence of written statement, burden of proof would remain on plaintiff and his mere assertion in plaint would not be sufficient to discharge the burden.

15. In that case, challenging a cryptic unreasoned judgment and decree, resulting from failure to file a written statement despite repeated opportunities having been given for the same, it has been held that the High Court was justified in remanding the matter to the lower Court for de novo trial by giving fresh opportunity to the defendants to file written statement.

16. Following the ratio laid down in *Ramappa Gowda*, supra, the Hon'ble Division Bench of this Court, in *Chitrakala vs P. Mahesh and others*, reported in 2013 (4) CTC 545, held that the burden of proof lies on plaintiff, irrespective of there being any written statement or evidence of rebuttal, plaintiff to succeed in suit only on the basis of strength in his case and not on the basis of weakness in defendant's

case. Further, the Hon'ble Division Bench held that the decree cannot be passed solely on the plaint averments, as these averments are not substantiated. Hence, the Hon'ble Division Bench remanded the matter to the trial court for fresh disposal.

17. The ratio laid down by the Hon'ble Supreme Court as well as the Hon'ble Division Bench of this Court squarely applies to the facts and circumstances of the present case as based on the plaint averments, the trial Court decreed the suit ex parte. Hence, I am of the considered view that the ex parte decree passed by the trial Court dated 09.03.2000 is not in conformity with the provisions Order 20 Rule 4 and 5 of Civil Procedure Code.

18. It is the specific case of the petitioner that the original defendant died in the year 1989 i.e., even prior to the passing of ex parte decree. The said contention though was denied by the respondents, they have not filed any proof to show that at the time of filing of the suit, the original defendant Chennimalai Gounder was alive. The petitioner, who is one of the legal representatives of the deceased original defendant pleaded that her father died way back in 1989. She has also claimed right over the suit properties. When such

being the plea, it is to be ascertained whether the sole defendant was died before filing of the suit. The said exercise cannot be done before this Court. Therefore, it is appropriate to remit the matter back to the trial Court to ascertain whether the ex parte decree was passed against the dead person.

19. In *Swaran Lata Ghosh vs H.K. Banerjee and Others*, reported in 1969 (1) SCC 709, the Hon'ble Supreme Court held that when there was no real trial of the defendant case, even after a lapse of 18 years, after the date of the suit was instituted, in the absence of any satisfactory alternative, it would be appropriate to remand the suit for trial according to law. As stated supra, in the case on hand, the ex parte decree passed by the trial Court is contrary to the provisions of Order 20 Rule 4 and 5 of Civil Procedure Code.

20. In *N. Maheswari vs Mariappan and Others*, reported in 2013 2 CTC 388, this Court exercised the powers under Article 227 of the Constitution of India and set aside the judgment and decree passed by the trial Court finding that this Court cannot close its eyes in dealing with such types of judgments and direct the revision petitioner to go the Appellate Court when the judgment and decree is apparently on the face of it is illegal. Similar view was taken in *Muthamilselvan*

and others vs A. Manickam and Others, reported in in 2004 (4) CTC 650. Therefore, as stated supra, since the ex parte decree passed by the trial Court is not in conformity with Order 20 Rule 4 & 5 of the Civil Procedure Code, in my considered view, the same is apparently on the face of it passed behind the back of legal representatives of the sole defendant Chennimalai Gounder.

21. Since I am remanding the matter to the trial Court for fresh disposal for considering the issue of impleadment as well as setting aside the ex parte decree, the petitioner/proposed defendant, who filed petition seeking impleadment, is directed to prove her case before the trial Court.

22. The reasoning given by the trial Court in dismissing the petition for impleadment is not convincing as if the ex parte decree was permitted to be in existence, the same would prejudice the rights of the petitioner, who is claiming right through the original defendant. Therefore, in order to avoid controversy between the parties and to obviate the procedural defect, it is just and necessary to consider the impleadment of the petitioner in the suit as party for proper adjudication of the suit by the trial Court.

23. It is to be noted that despite service of notice, the respondents have not entered appearance in this revision. Though the petition averments state that the petitioner has filed petition to set aside the ex parte decree, the same has not been dealt with by the trial Court in its order. Therefore, in the interest of justice, the matter is remitted back to the trial Court for fresh consideration of the petitions filed by the petitioner for impleadment as also setting aside the ex parte decree in the light of the pleadings on either side. The trial Court is directed to give notice to both parties, particularly the respondents herein and dispose of the same as expeditiously as possible.

24. In the result:

(a) this Civil Revision Petition is allowed by setting aside the Judgment and Decree in I.A.No.248 of 2009 in O.S.No.150 of 1999, dated 27.10.2010, on the file of the learned Principal Subordinate Judge, Tirupur;

(b) the matter is remanded back to the Court for fresh disposal of the I.A.No.248 of 2009 by giving notice to both the parties;

(c) the trial Court is directed to dispose the I.A.No.248 of 2009 within a period of four weeks from the date of receipt of a copy of this order. No costs.

18.01.2017

Note: Issue order copy on 08.05.2018
vs

Index : Yes
Internet : Yes

To

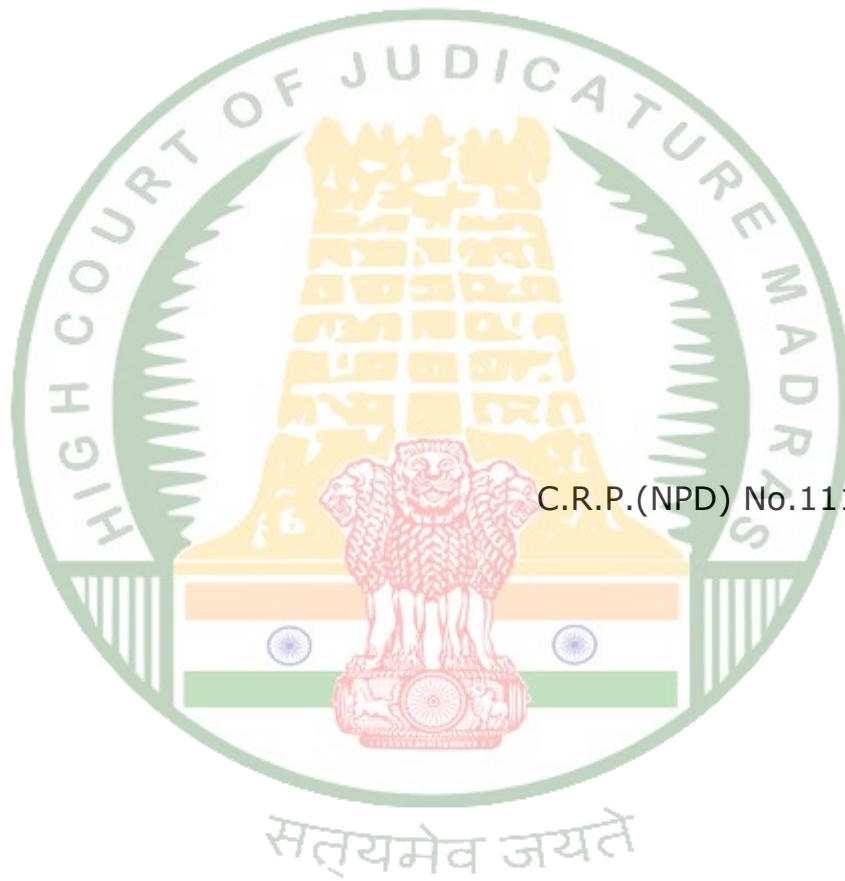
The Principal Subordinate Judge,
Tirupur.



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M.V.MURALIDARAN, J.

VS



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