

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.10.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(PD)Nos.2182 and 2562 of 2011
and M.P.Nos.1 and 1 of 2011

Orders reserved on 13.09.2017	Orders pronounced on 05.10.2017
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E.G.Durairajan

.. Petitioner in both C.R.Ps'

Vs.

1. Sabiyabi

2. J.Mohammad Moideen

3. A.Gomathi

.. Respondents in both C.R.Ps'

Cause title accepted vide orders of the
 Court dated 15.07.2011 and 23.06.2011
 made in M.P.No.1/2011 in
 C.R.P.SR.Nos. 57817 & 49945/2011

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decretal orders dated 23.02.2010 and 22.09.2010 made in I.A.Nos.174 of 2009 & 56 of 2010 in O.S.No.316 of 1996 on the file of the District Munsif Cum Judicial Magistrate, Thirukalukundram.

For Petitioner : Mr.V.Raghavachari
 for Mr.R.Marudhachalamurthy

For R1 : No appearance
For R2 : Mr.T.V.Ramanujam, Senior Counsel
for Mr.C.Jagadish
For R3 : Not ready in notice

COMMON ORDER

These Civil Revision Petitions have been filed against the fair and decretal orders dated 23.02.2010 and 22.09.2010 made in I.A.Nos.174 of 2009 & 56 of 2010 in O.S.No.316 of 1996 on the file of the District Munsif Cum Judicial Magistrate, Thirukalukundram.

2. The petitioner in both the Civil Revision Petitions is one and the same person, who is the third party to the suit and assignee of decree dated 05.01.1999. The respondents 1 and 2 are the defendants, third respondent is the plaintiff in O.S.No.316 of 1996, on the file of the District Munsif Cum Judicial Magistrate, Thirukalukundram. The third respondent filed the said suit against the respondents 1 and 2 for specific performance of the agreement of sale between the third respondent and first respondent dated 29.07.1992. The said suit was decreed exparte on 05.01.1999. The third respondent made over the said decree to the petitioner on

06.07.2007. The petitioner filed E.P along with E.A.No.6 of 2007 for an order to recognize him as an assignee in Execution Proceedings to enable him to proceed further under the decree dated 05.01.1999 assigned in his favour. In E.A.No.6 of 2007 notice was ordered to the respondents 1 and 2. They entered appearance and filed counter affidavit and additional counter affidavit and are contesting the same. While the said E.A was pending, the respondents 1 and 2 filed two applications viz., I.A.No.174 of 2009 to condone the delay of 3612 days in filing an application to set aside the exparte decree dated 05.01.1999 and I.A.No.56 of 2010 to set aside the exparte decree dated 05.01.1999 against the third respondent. According to the respondents 1 and 2, the third respondent filed suit for specific performance of agreement of sale dated 29.07.1992 on the file of the District Munsif Court, Chengalpattu. The suit was numbered as 507 of 1995. The respondents 1 and 2 on receipt of summons in the said suit, entered appearance through counsel. Subsequently, the suit was transferred to District Munsif Court, Thirukalukundram and renumbered as O.S.No.316 of 1996. According to the respondents 1 and 2, their counsel at Chengalpattu informed them that the Court at Thirukalukundram would issue notice to them and on receipt of such

notice they can engage an Advocate at Thirukalukundram to conduct the case. No summon or notice was received from the District Munsif Court, Thirukalukundram. The respondents 1 and 2 received notice in E.A.No.6 of 2007 in unnumbered E.P and then only the respondents 1 and 2 came to know about the exparte decree dated 05.01.1999 and filed application to set aside the exparte decree along with the petition to condone the delay. On verification, the respondents 1 and 2 came to know that after respondents 1 and 2 were set exparte, the third respondent did not appear before the Court and suit was dismissed for default on 25.09.1998. The third respondent filed I.A.No.423 of 1998 to restore the suit. The third respondent filed a memo to dispense with notice to the respondents 1 and 2 in I.A.No.423 of 1998. The said memo was allowed without any notice to the respondents 1 and 2. I.A.No.423 of 1998 was allowed and suit O.S.No.316 of 1996 was restored to file and exparte decree was passed against the respondents 1 and 2 on 05.01.1999. In the above circumstances, the respondents 1 and 2 filed I.A.No.174 of 2009 to condone the delay of 3612 days in filing the petition to set aside the exparte decree dated 05.01.1999. According to the respondents 1 and 2, the delay is neither wilful nor wanton.

3. In the said I.A.No.174 of 2009, notice was ordered to the third respondent and it was returned with endorsement as "left". The respondents 1 and 2 filed application for substituted service to serve the third respondent and the same was allowed. After effecting publication and completing the procedure contemplated for substituted service, the third respondent was set exparte and by the order dated 23.02.2010, I.A.No.174 of 2009 was allowed. On such order dated 23.02.2010, the application filed to set aside the exparte decree dated 05.01.1999 was numbered as I.A.No.56 of 2010 and the same was allowed on 22.09.2010.

4. Challenging the said two orders dated 23.02.2010 and 22.09.2010 made in I.A.Nos.174 of 2009 & 56 of 2010, the petitioner has come out with the present two Civil Revision Petitions.

5. According to the learned counsel appearing for the petitioner, the petitioner is the assignee of decree dated 05.01.1999 obtained by third respondent and petitioner has filed E.P along with E.A.No.6 of 2007 to permit him to proceed with E.P. Notice was served on the respondents 1 and 2 and they entered appearance

and filed counter affidavit and additional counter affidavit and they are opposing the said application. Suppressing the filing of E.P along with the E.A.No.6 of 2007 filed by the petitioner, the respondents 1 and 2 filed above two applications only against the third respondent without impleading the petitioner who is the assignee of the decree. Even as far as the third respondent is concerned, they have not given her correct address and did not take notice to the third respondent to the address given in the plaint. They played fraud on the Court. By substituted service they obtained the orders condoning the delay in filing the petition to set aside the exparte decree and set aside the exparte decree. The respondents 1 and 2 have not given any valid reason for such a huge delay of 3612 days. The learned Judge failed to see that the reason given by the respondents 1 and 2 is contrary to the facts and in a mechanically manner, allowed both the applications. The order of the learned Judge is not a reasoned order, wherein he has not given any reason for allowing the applications. The petitioner as an assignee is entitled to be heard before orders are passed in I.A.Nos.174 of 2009 and 56 of 2010. The respondents 1 and 2 knew about the assignment in favour of the petitioner and deliberately suppressed the said fact and obtained impugned order by suppression of

material fact and by playing fraud on the Court. The learned counsel appearing for the petitioner relied on the following judgments in support of his contentions:

(i) (2007) 8 SCC 751 in the case of T.Vijendradas and another Vs. M.Subramanian and others:

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"27. It is true that the purpose of impleadment of a necessary party is to see as to whether without it no order can be made effectively. If an effective order can be made, the suit will not be defeated. A decree which is passed in terms of Order 21 Rule 92(4) does not take into consideration the effect of a statutory charge on a property, vis-a-vis the statutory right of any persons having interest in the property to redeem or sell the same at any point of time. When a fraud is practised on a Court, the same is rendered a nullity. In a case of nullity, even the principles of natural justice are not required to be complied with.

28. Once it is held that by reason of commission of a fraud, a decree is rendered to be void rendering all subsequent proceedings taken pursuant thereto also nullity, in our opinion, it would be wholly inequitable to confer a benefit on a party who is a beneficiary thereunder. The decisions rendered in *Udit Narain*

Singh Malpaharia V. Addl. Member, Board of Revenue, Bihar and Profulla Chorone Requitte V. Satya Chorone Requitte whereupon reliance has been placed by Mr.Viswanathan, may not have any application in a case of this nature in view of the fact that the principal question which, in our opinion, would be more pertinent is as to whether even in a situation of this nature, the discretionary jurisdiction under Article 136 of the Constitution of India should be invoked, particularly when the party raising the said question has been impleaded as a party."

(ii) 2008 – 4 L.W.790 in the case of M/s.Tata Steel Limited, represented by its Principal Officer, Titania Business Unit, Tirunelveli Vs. M/s.V.V.Minerals through its Partner Mr.S.Vaikundarajan and others:

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"26. In view of the fact that the petitioner had a prospecting licence in pursuance of a Memorandum of Understanding and also in view of the fact that the petitioner carried on prospecting operations, which conferred a preferential right on them under Section 11 (1), the decree passed by the trial Court is certainly one which prejudicially or adversely affected their rights. Therefore the petitioner can be considered to be

a person aggrieved."

(iii) 2011 (2) AIR Bom.R.323 in the case of Amol & others Vs. Deorao & others:

.....

"30. Section 17(1)(e) deals with an assignment of a decree of a Court, when such decree purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent of the value of one rupees hundred and upwards, to or in immovable property. What is contemplated by this provision is that the decree passed itself, should purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property. As pointed out earlier, the decree for specific performance of contract by itself, does not create right, title or interest in or charge on the immovable property in favour of a decree holder. Hence, the provision of Section 17(1)(e) is not at all attracted. Though the Executing Court was right in holding that neither the decree nor the Deed at Exhibit 178 required registration, it committed an error in holding that the Deed at Exhibit 114 was required to be registered."

6. Per contra, the learned Senior counsel appearing for the respondents 1 and 2 contended that the petitioner has no locus standi to file the present two Civil Revision Petitions. He claims to be the assignee of the decree. Alleged assignment relates to immovable property worth more than rupees hundred. Unless the said assignment is registered, the petitioner does not acquire any right and he cannot file E.P as well as he has no locus standi to file the Civil Revision Petition. As per the proviso to Order XX1 Rule 16 C.P.C, the assignee must give notice to the assignor as well as judgment debtor and the decree cannot be executed until Court hears the objection of the parties and passes orders on merits. The suit filed by the third respondent was dismissed for default after respondents 1 and 2 were set exparte. The third respondent filed I.A.No.423 of 1998 to restore the suit and also filed a memo to dispense with notice to the respondents 1 and 2. After allowing the memo, without notice to respondents 1 and 2, the suit was restored to file. The order restoring the suit to file is an illegal order and nonest in law. Originally the suit was filed on the file of the District Munsif Court, Chengalpattu and subsequently transferred to the file of the District Munsif Court, Thirukalukundram. Without issuing any

notice to the respondents 1 and 2, the learned Judge proceeded with the suit, set the respondents 1 and 2 exparte and passed exparte decree. After transfer to the District Munsif Court Cum Judicial Magistrate, Thirukalukundram, notice to the parties by the Court is mandatory and Court having failed to issue notice to the respondents 1 and 2, have failed to comply with mandatory requirements. For the above reason, the delay in filing the application to set aside the exparte decree is not due to any fault on the part of the respondents 1 and 2. The respondents 1 and 2 have given valid reason for condonation of delay in filing the petition to set aside the exparte decree. The third respondent in the proof affidavit filed by her has given her address as No.70, Vedappachetty Street, Chengalpattu. The respondents 1 and 2 have taken notice only to the said address and it cannot be said that respondents 1 and 2 had played fraud on the Court by giving wrong address of the third respondent and obtained order by condoning delay and setting aside the exparte decree. The third respondent has not taken any steps to set aside the impugned order and has not stated that the address given in the application is not her address. The learned Senior counsel appearing for the respondents 1 and 2 relied on the following judgments in support of his contentions:

**(i) (2004) 13 SCC 18 in the case of Tala Vs. Satyawan
and another:**

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"3. The learned Senior counsel for the appellant has invited our attention to Rule 6 in Chapter 13 of the Punjab and Haryana High Court Rules and orders which provides for a notice by the transferee court being issued to the parties if the parties are not present before the transferee court. The failure to issue notice to the defendant appellant has occasioned a failure of justice. The exparte decree, therefore, deserves to be set aside."

**(ii) 2002 (2) CTC 424 in the case of The Manager
Personal Banking Division, State Bank of India, Madras Main
Branch, Madras 600 001 and others Vs. P.S.Maragatham:**

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"11. A perusal of the records relating to the suit clearly shows that no notice of the application in I.A.No. 18390 of 1990 was served on the defendants before restoring the suit on 27.02.1992. If that be so, no order shall be made in I.A.No.18390 of 1990 to restore the suit which was dismissed for default on 13.07.1990, as per Order IX, Rule 9(2), CPC. Therefore, I am of the considered opinion that the

order of restoration dated 27.02.1992 is illegal and contrary to Order IX, Rule 9(2), CPC. Consequently, question of passing an ex parte decree in the suit on 29.01.1993 made in O.S.No.4223 of 1987 is also liable to be set aside. Both the revision and the appeal are, therefore, allowed."

(iii) 1930 SCC AIR 1931 Mad 192 in the case of P.Abdul

Samad Saheb Vs. Sowcar Kamaruddin Saheb and others:

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"2. It is admitted that defendant 3 was not served in E.P.No.146, and this omission, it is not contested, renders the order void as against her and her legal representatives. It is an indispensable condition of jurisdiction Under O. 21, R.16, that the first proviso to that rule, relating to notice, should be complied with: see *kassum Goolarn Hosein V. Dyabhai Amarsi and Sreenath Das V. Aahutananda Mahanti*. There can be no doubt therefore that, considered by itself, this order was rightly revoked. An attempt has however been made to found an argument upon the existence of the subsequent order to execute passed against the legal representatives in E.P.21. It is said that these latter proceedings gave those representatives an opportunity to contest the right of the transferee decree-holder to execute, that they omitted to do so and that accordingly the matter is not

res judicata. This position cannot however be sustained, we think, in the circumstances of this case."

(iv) 2011 (3) CTC 168 in the case of Meenakshisundaram Textiles, 1st floor, Sona Towers, 72, Millers Road, Bangalore 52, rep. By its Managing Director Vs. Valliammal Textiles Ltd., No.50/1, Aandipalayam, Mangalam Road, Tiruppur:

"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 and decree. In view of the above, in the event the Defendant is set ex parte, 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."

(v) AIR 2005 Andhra Pradesh 524 in the case of K.Bhaskaram and another Vs. Mohammad Moulana (Died) and others:

.....

"14. 'Assignor' means who assigns or transfers the property to others, 'Assignee' means one to whom the rights of the assignor have been transferred either by way of conveyance, gift legacy or other transfer. Hence, the decree-holder No.4 claims himself to be an assignee of the decree by the decree-holder Nos.3 and 5 to 8 by the assignment of decree in immovable property. There is no deed of assignment and more so, the assignment of the decree in respect of immovable property requires registration and such assignment of the decree is not admittedly registered."

(vi) (1995) 6 SCC 50 in the case of Surjit Singh and others V. Harbans Singh and others:

.....

"4. As said before, the assignment is by means of a registered deed. The assignment had taken place after the passing of the preliminary decree in which Pritam Singh has been allotted 1/3rd share. His right to

property to that extent stood established. A decree relating to immovable property worth more than hundred rupees, if being assigned, was required to be registered. That has instantly been done....."

7. Heard the learned counsel appearing for the petitioner and the learned Senior counsel appearing for the second respondent and perused the materials available on record and considered the judgments relied on by the learned counsel appearing for the petitioner and learned Senior counsel appearing for the respondents.

8. The learned Senior counsel appearing for the respondents 1 and 2 vehemently contended that the petitioner has no locus standi to file the present two Civil Revision Petitions. The petitioner claims to be the assignee of the decree dated 05.01.1999 from the third respondent. The decree is with regard to the immovable property worth more than rupees hundred and it has to be compulsorily registered. Further as per proviso to Order XXI Rule 16 CPC, the petitioner ought to have given notice to the respondents 1 and 2 with regard to the said assignment. From the materials on record, it

is seen that the petitioner has already filed E.P along with E.A.No.6 of 2007 to proceed with E.P as assignee. In the said E.A.No.6 of 2007, notice has been ordered and served on the respondents 1 and 2. They have entered appearance through Advocate and filed counter affidavit and additional counter affidavit and they are contesting the said E.A. It is for the Executing Court to decide the said issue after considering the contention of the petitioner and objection of the respondents 1 and 2 and pass orders on merits.

9. From the materials on record, it is seen that the learned Judge by the orders dated 23.02.2010 and 22.09.2010, allowed two applications in I.A.Nos.174 of 2009 and 56 of 2010 to condone the delay of 3612 days in filing the petition to set aside the exparte decree and to set aside the exparte decree dated 05.01.1999. By the order dated 23.02.2010, the learned Judge condoned the delay of 3612 days in filing the petition to set aside the exparte decree without giving any reason. The order of the learned Judge is not a speaking order. Thereby the learned Judge has committed serious irregularity. Again the learned Judge by the order dated 22.09.2010, without giving any reasons allowed the I.A.No.56 of 2010 and set aside the exparte decree and once again committed grave

irregularity. The learned Judge has not exercised the power properly in allowing the applications. This Court has supervisory power over all the Courts subordinate to it. As per Article 227 of the Constitution of India, this Court has ample power to set aside any irregularity or illegality committed by the lower Court. In the present case, by filing Civil Revision Petition, the petitioner has brought to the notice, the irregularities committed by the learned Judge. Having come to the conclusion that impugned order is liable to be set aside as learned Judge has committed an irregularity, I am not inclined to decide the issue whether the petitioner has no locus standi to file Civil Revision Petition or not. By exercising power under Article 227 of the Constitution of India, I set aside both the impugned orders of the learned Judge dated 23.02.2010 and 22.09.2010 made in I.A.Nos.174 of 2009 & 56 of 2010 and remit the matter to the learned Judge for fresh disposal on merits. It is open to the petitioner to file an application for impleading himself as second respondent in both the I.A.Nos.174 of 2009 & 56 of 2010. If any such application is filed by the petitioner, the learned Judge is directed to consider the same on merits after giving opportunity to the respondents 1 to 3 and pass orders on merits in accordance with law.

10. With the above direction, both the Civil Revision Petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

05.10.2017

Speaking/Non-speaking order

Index : Yes

gsa

Note: Issue Order copy on 06.10.2017

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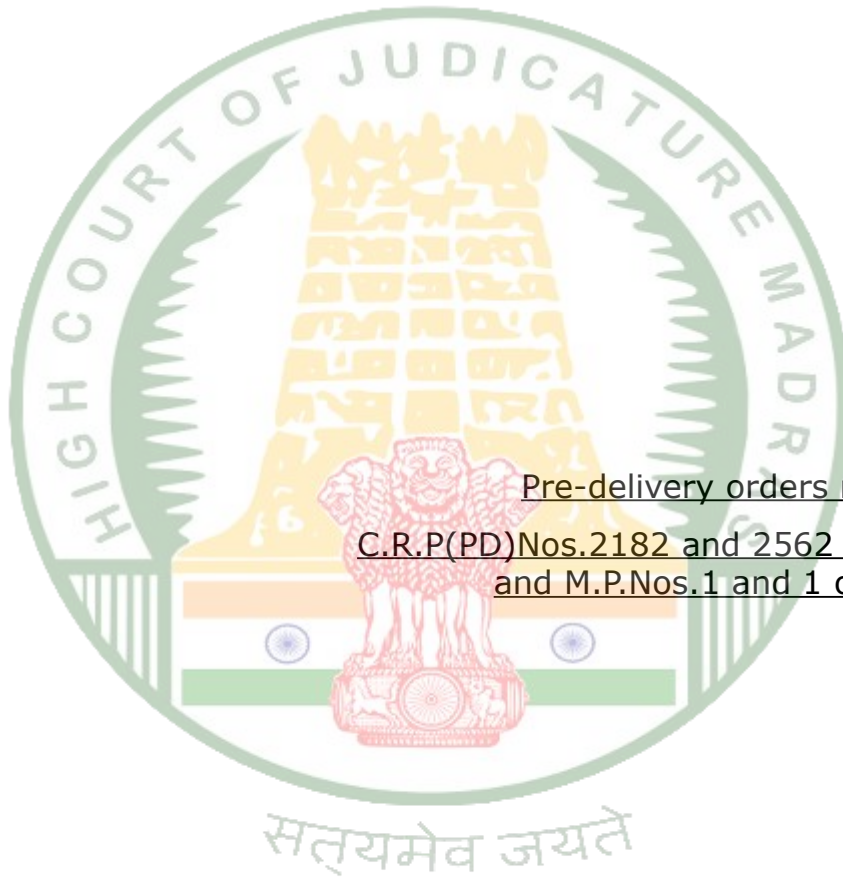
The District Munsif Cum Judicial Magistrate,
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V.M.VELUMANI, J.

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Pre-delivery orders made in
C.R.P(PD)Nos.2182 and 2562 of 2011
and M.P.Nos.1 and 1 of 2011

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05.10.2017