

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.07.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.4223 of 2011
& M.P.No.1 of 2011

1. Jothi
2. Jayasankar
3. Minor Renuka

Rep. by Court guardian, K.Umasankar,
Advocate, Tirukoilur.

..Petitioners

Vs.

Vijayalakshmi

.. Respondent

PRAYER: Civil Revision Petition filed under Section 115 of C.P.C., against the fair and decretal order dated 24.06.2011 made in I.A.No.119 of 2011 in O.S.No.291 of 2009 on the file of the Principal District Munsif Court, Tirukoilur.

For Petitioners : Mr.V.Ragavachari

For Respondent : Mr.J.Ramakrishnan

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ORDER

This Civil Revision Petition has been filed against the fair and decretal order dated 24.06.2011 made in I.A.No.119 of 2011 in

O.S.No.291 of 2009 on the file of the Principal District Munsif Court, Tirukoilur.

2. The petitioners are the defendants 1 to 3 and respondent is the plaintiff in O.S.No.291 of 2009. The respondent filed suit for recovery of money. According to the respondent, husband of the first petitioner viz., deceased Jayaprakash borrowed a sum of Rs.50,000/- from the respondent and executed promissory note on 09.12.2003. On 09.11.2006, the said deceased Jayaprakash paid a sum of Rs.10,000/- and made endorsement in the promissory note. Subsequently, he died on 12.12.2008. Therefore, the respondent filed suit against the petitioners, who are the legal heirs of the said Jayaprakash. In the suit, the petitioners 1 and 2 did not appear. Therefore, they were set exparte and the learned Judge appointed Mr.K.Umashankar, Advocate, as Court guardian of the third petitioner. The said Mr.K.Umashankar, guardian of the third petitioner, filed written statement and is contesting the suit. The suit was posted for judgment. At this stage, the petitioners filed I.A.No.119 of 2011 to set aside the exparte order dated 15.12.2009.

3. According to the petitioners, on receipt of the suit summons, on the hearing date i.e., on 15.12.2009, they met respondent in the presence of panchayat. The respondent agreed to withdraw the suit and informed the petitioners not to appear before the Court and conduct the suit. On such assurance, the petitioners did not appear on 15.12.2009. The first petitioner subsequently suffered jaundice and was bedridden and could not find out from the respondent whether she withdrew the suit or not. Subsequently, when the petitioners met the respondent, she informed the first petitioner that only to take revenge, she is proceeding with the case. In view of the above reasons, the petitioners sought for setting aside the exparte order. The first petitioner is maintaining the third petitioner and she is under the custody of the first petitioner. The first petitioner has filed the application to remove the Court Guardian and to permit her to conduct the case on behalf of the third petitioner and prayed for allowing the application to set aside the exparte order.

4. The respondent filed counter affidavit denying all the averments made in the said application and submitted that the

reasons given by the petitioners are not valid, the first petitioner was not suffering from any disease and was not bedridden. She has not substantiated the reasons by letting in evidence. The petitioners 1 and 2 were set exparte and Court guardian was appointed by the Court to represent the third petitioner and he filed the written statement on behalf of the third petitioner. After hearing, the suit was posted on 28.10.2010 for judgment. The petitioners at this stage, filed the present application, which is not maintainable and it is devoid of merits and hence, prayed for dismissal of the application.

5. The learned Judge considering the averments made in the affidavit, counter affidavit, materials on record and the judgment reported in **2005 (1) CTC 368 in the case of Bhanu Kumar Jain Vs. Archana Kumar & Anr.**, relied on by the learned counsel appearing for the respondent, dismissed the application holding that the reason given by the petitioners is not valid. The learned Judge further held that the judgment reported in **2005 (1) CTC 368 in the case of Bhanu Kumar Jain Vs. Archana Kumar & Anr.** is squarely applicable to the facts of the present case.

6. Against the order of dismissal dated 24.06.2011 made in I.A.No.119 of 2011, the present civil revision petition is filed by the petitioners.

7. The learned counsel appearing for the petitioners submitted that the learned Judge ought to have seen that the petitioners have given acceptable and valid reason for non-appearance on 15.12.2009, on the assurance given by the respondent. The judgment relied on by the learned counsel for the respondent reported in **2005 (1) CTC 368 in the case of Bhanu Kumar Jain Vs. Archana Kumar & Anr.** is not applicable to the facts of the present case. The Advocate was appointed as Court guardian for the third petitioner and he had no knowledge of the proceedings and he cannot be said that the suit was contested on merits on behalf of the third petitioner. The petitioners are the legal heirs of the deceased Jayaprakash, who alleged to have borrowed money from the respondent and they must be given an opportunity to put forth their case on merits. The Court guardian did not contest the suit on behalf of the third petitioner and therefore any decree passed in their absence will be only an ex parte decree.

8. The learned counsel for the respondent submitted that the respondent did not give any assurance to the first petitioner that he will withdraw the suit and informed them not to appear before the Court on 15.12.2009. The first petitioner was hale and healthy and it is not correct to state that she was suffering from jaundice. The suit was contested on behalf of the third petitioner and learned Judge has rightly dismissed the application.

9. Heard the learned counsel appearing for the petitioners as well as the respondent and perused the materials on record.

10. From the materials on record, it is seen that the petitioners have filed I.A.No.119 of 2011 to set aside the exparte order. According to them, on the assurance given by the respondent to the first petitioner, the petitioners did not appear before the Court on 15.12.2009. The first petitioner was subsequently suffering from Jaundice. The respondent is contending that the first petitioner is hale and healthy and the reasons given by the petitioners are not correct. The respondent denied that she gave assurance that she will withdraw the suit.

11. It is to be noted that the third petitioner is minor and an Advocate was appointed as Court guardian and he filed written statement on behalf of the third petitioner. There is nothing on record to show that the Court guardian got instructions from the third petitioner or first petitioner, who is mother of the third petitioner, for preparing the written statement and also nothing on record to show that from whom the Court guardian got instructions to prepare and file written statement on behalf of the third petitioner. Similarly, there is nothing on record to show that on whose instructions, the Court guardian informed that no oral evidence on behalf of the third petitioner. The first petitioner has stated that already she filed application to remove the appointment of Court Guardian on behalf of the third petitioner and to appoint her as guardian for the third petitioner. This was not denied by the respondent. The petitioners have come out with the application to set aside the exparte order. In the circumstances, an opportunity must be given to the petitioners to put forth their case on merits.

12. In the result, the Civil Revision Petition is allowed by

setting aside the fair and decretal order dated 24.06.2011 made in I.A.No.119 of 2011 in O.S.No.291 of 2009. The learned Principal District Munsif, Thirukoilur, is directed to dispose the suit as expeditiously as possible, in any event not later than four months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No

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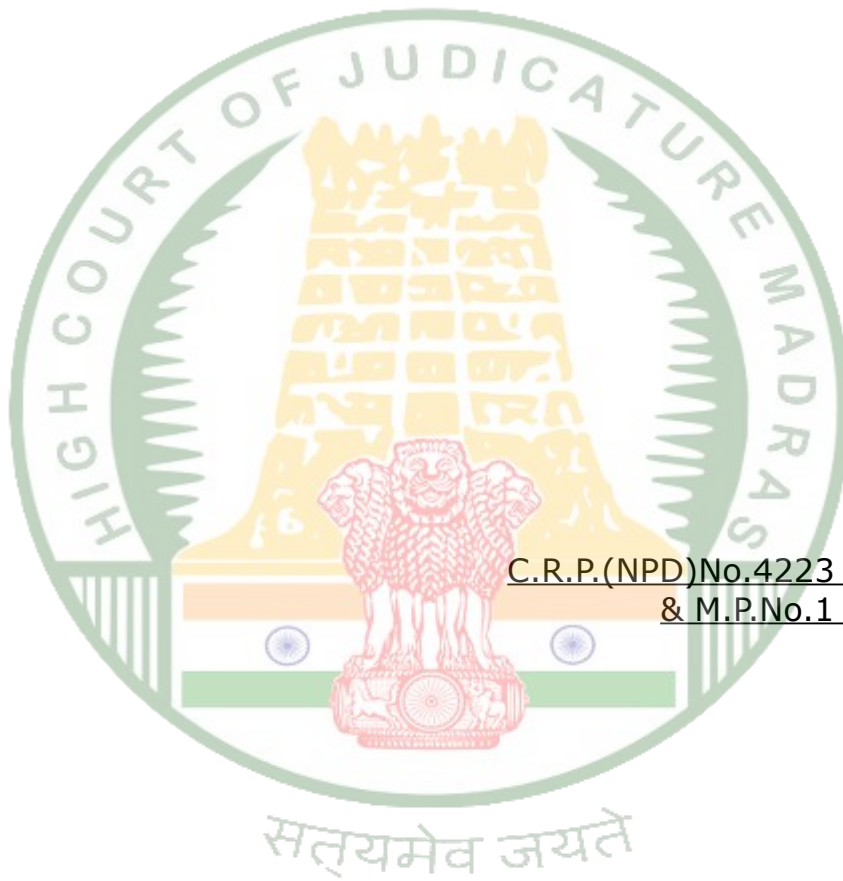
The Principal District Munsif, Thirukoilur.



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V.M.VELUMANI, J.

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