

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**C.R.P.(PD)No.1572 of 2013 and
CMP.No.13048 of 2016 and
M.P.No.1 of 2013**

Jayanthi

.. Petitioner

Vs

J.Vijayakumar

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order passed in I.A.No.15568 of 2011 in O.S.No.7416 of 2008 dated 28.03.2012, on the file of XVIII Assistant City Civil Court, Chennai.

For Petitioner : M/s.P.T.Asha
for M/s.C.Latharani

For Respondent : M/s.Dass Law Associates

ORDER

The defendant is the Civil Revision Petitioner has filed the Civil Revision Petition challenging the order passed in I.A.No.15568 of 2011 in O.S.No.7416 of 2008 dated 28.03.2012, on the file of the learned XVIIIth Assistant Judge, City Civil Court, Chennai.

2.The case of the petitioner/defendant is that the respondent/plaintiff has filed the suit in O.S.No.7416 of 2008 against this petitioner/defendant for recovery of possession and also for damages.

3.The petitioner is none other than the sister of the respondent/plaintiff.

4.The respondent/plaintiff has filed the above suit against this petitioner/defendant alleging that the suit schedule of property was originally purchased by the plaintiff's father namely D.Jayaraman in the year 1984 with the funds partly contributed by this respondent/plaintiff, who is the only son of the said D.Jayaraman and the only earning member. The respondent/plaintiff also states that the said Jayaraman have four daughters and one among them this petitioner/defendant herein.

5.The said Jayaraman was retired from his service in the year 1981 from his work and thereafter the respondent/plaintiff had been maintaining every one including this petitioner/defendant. The respondent/plaintiff also states that he has also spent huge amounts for breaching out the debts of his father and on the said property. He

has also states that this respondent/plaintiff has also contributed huge amounts for the marriage of his sisters including this petitioner/defendant.

6.During the life time of his father late D.Jayaraman had executed a deed of absolute settlement in favour of the respondent/plaintiff on 17.07.1996 which was registered as Doc.1630/1996, by settling the said entire suit property absolutely in favour of the plaintiff. Thereafter, this respondent/plaintiff become the sole and absolute owner of the said entire property bearing No.6, New No.11, Vadugu Edayar Street, Mylapore, Chennai-600 004.

7.The respondent/plaintiff also come forward by saying that even at the time of the said settlement deed being executed by his father, this petitioner/defendant had demanded huge amounts and the respondent/plaintiff also given a sum of Rs.1,40,000/- to this petitioner/defendant. Therefore, this petitioner/defendant has sign as a witness in the said settlement deed executed by his respondent/plaintiff's father.

8.Till 2006, the petitioner/defendant was residing at No.22, New No.49, Nadu Street, Mylapore Chennai-4 and the father of the

plaintiff and the defendant late Jayaraman was unwell and seriously ill and at that time in the year 2006, this petitioner/defendant had some problem and to vacate the premises at Nadu Street, Mylapore, therefore, this petitioner/defendant had requested the respondent/plaintiff to permit herself and her family to stay in the suit schedule of property along with his plaintiff's father and the petitioner/defendant promising to vacate as and when the respondent/plaintiff wanted the suit schedule of property.

9. Since the petitioner/defendant is own sister and out of natural love and affection, this respondent/plaintiff allowed and permitted the defendant and her family to reside in the suit property and her leave and licence from 2006 onwards, this respondent/plaintiff also states that his father was died on 19.05.2008 and thereafter the petitioner/defendant is creating trouble, nuisance and damaging the suit schedule of property. Therefore, the respondent/plaintiff states that he did not decide to continue the leave and licence given to the petitioner/defendant and hence for revoke the said leave and licence, this respondent/plaintiff has issued a notice dated 01.07.2008 by revoking the leave and licence with effect from 31.07.2008 and called this petitioner/defendant to quit and deliver the vacant possession of the suit schedule of property within the said time limit that is on or

before 31.07.2008. The respondent/plaintiff has claimed damages for use and occupation from 01.08.2008 at the rate of 5,000/- p.m. till the date of vacating and handing over the vacant possession to this respondent/plaintiff, but the said notice deliberately refused by the petitioner/defendant and the same was returned with the endorsement "refused".

10. Though the respondent/plaintiff is issued the said notice dated 01.07.2008 for revoking the leave and licence and even after the termination of the said leave and licence, this petitioner/defendant has continuing her possession and enjoyment claimed damages for use and occupation from 01.08.2008 at the rate of 5,000/- p.m. till the date of handing over the vacant possession has claimed by the respondent/plaintiff in the said notice dated 01.07.2008. The respondent/plaintiff has also come forward by saying that that the suit schedule of property is located in the very important and valuable locality of Mylapore and command all the location, benefits and amenities. Therefore, the claim for the respondent for damages of the use and occupation at the rate of 5000/- is most reasonable for the suit portion for use and occupation for the suit schedule of property.

11. Therefore, in the above circumstances, he has filed the said suit with a prayer directing this petitioner/defendant to deliver and handover the vacant possession of entire suit schedule of property that is entire property bearing No.6, New No.11, Vadugu Edayar Street, Mylapore, Chennai-600004 and also directing the petitioner/defendant to pay a sum of Rs.5,000/- being the damages for use and occupation from 01.08.2008 to 31.08.2008 and also for future damages for use and occupation at the same rate of 5000/- till the date of vacating and handing over the vacant possession to this petitioner.

12. Initially, this petitioner/defendant has not filed her written statement, therefore he was set exparte originally, later on an application was filed for setting aside the exparte decree along with the condonation delay and the said petition was allowed on condition that this petitioner/defendant has to pay a sum of Rs.1000/- as cost of the allowing of the Section 5 application. The said application was allowed on 15.06.2009, since the petitioner has not filed her written statement along with other petition, therefore the same was posted for filing written statement on 30.06.2011.

13. Thereafter, on the request made by the

petitioner/defendant, the said case was adjourned to 15.07.2011 and even on the said date also this petitioner has not filed written statement but she filed an application for adjournment and therefore considering the request the trial judge is adjourned the petition to 11.08.2011 for filing written statement by this petitioner/defendant.

14. Even on 11.08.2011, this petitioner has not filed her written statement, therefore again the defendant counsel seeking adjournment and accordingly the case was adjourned to 20.08.2011, but on the said date also, this petitioner has not filed the written statement. Therefore, she was set exparte and exparte decree was passed.

15. Challenging the said exparte decree dated 20.08.2011, this petitioner/defendant has filed the present application in I.A.No.15568 of 2011 for setting aside the exparte decree dated 20.08.2011.

16. The case of the petitioner/defendant is that this defendant has not come forward in filing the affidavit in supporting the said application in I.A.No.15568 of 2011, but her junior counsel namely one C.A.Renuka Parameswari D/o C.Ananthasundara Raman having office at 86, Law Chambers, High Court Building, Chennai has filed an

affidavit for supporting the said petition in I.A.No.15568 of 2011.

17.The said junior counsel in her affidavit stating that on 18.08.2011, she came back to Chennai only on 23.08.2011 due to her absence, since the defendant has not put her signature in the written statement and hence she has not filed the written statement on 20.08.2011.

18.The junior counsel C.A.Renuka Parameswari also stated that on the said date of 20.08.2011 she made a representation in the morning to the Court namely 18th Assistant Judge, City Civil Court, Chennai seeking time to file written statement, but the trial Court has not inclined to grant time and hence the defendant was set exparte for non filing of the written statement at 11.15 a.m. Therefore, the non filing of the written statement on 20.08.2011 is neither willful nor wanton, but due to the said reason, this petitioner/defendant was set exparte.

19.For the said application I.A.No.15568 of 2011, the respondent/plaintiff has not filed any counter statement. On hearing both side arguments, the learned Judge was pleased to dismissed the application on 28.03.2012, on the ground that originally the

petitioner/defendant was set exparte and an application was filed to set aside the exparte decree along with the condonation delay which was allowed by the trial Court on condition that the petitioner/defendant to pay a sum of Rs.1000/- as cost to the respondent, and the said order was complied, but thereafter this petition filed under Order 9 Rule 13 of CPC was posted on 15.06.2011, 30.06.2011, 15.07.2011, 11.8.2011 and finally on 20.08.2011, but even then this petitioner/defendant has not chosen to file a written statement hence an exparte decree was passed on 20.08.2011.

20.The learned Judge also states that though the application in I.A.15568 of 2011 was filed for setting aside the exparte decree under Order 9 Rule 13 of C.P.C., for supporting the said petition, the petitioner/defendant has not filed any affidavit for supporting the said petition, but her junior counsel has filed the affidavit, which was not acceptable one. Apart from this, as per the amended Civil Procedure Code the written statement ought to have filed within 90 days from the date of service of summons but even after several opportunity given to this petitioner, she has not chosen to file the written statement, therefore there is no reasonable and justifiable reason in allowing the said application in I.A.No.15568 of 2011 and accordingly

the learned 18th Assistant Judge, City Civil Court, Chennai was pleased to dismissed the said application.

21.Challenging the said order the present Civil Revision Petition was filed by the petitioner/defendant.

22.I heard Smt.P.T.Asha, learned counsel appearing for the petitioner and M/s.Dass Law Associates counsel for the respondent and perused the records.

23.Admittedly, the petitioner/defendant and the respondent/plaintiff are the brother and sisters, the case of the plaintiff in the suit is that the suit schedule of property was given to this plaintiff by way of settlement by his father and this petitioner/defendant was signed as a witness in the settlement deed.

24.Originally, this petitioner/defendant was residing in some other place and due to the problems arosed between the petitioner/defendant and the landlord in the said house, vacated the rental house, thereafter the petitioner/defendant has requested this respondent/plaintiff to permit her to stay in the suit schedule of property for some time and whenever the respondent/plaintiff as

directed this petitioner/defendant to leave and vacate the premises and hand over the vacant possession, but when the respondent/plaintiff has issued a notice to cancel the leave and licence and requested this petitioner/defendant to vacate and hand over the suit schedule of property on or before 31.07.2008, which was not complied with by this petitioner/defendant, therefore he has filed the present suit against this petitioner/defendant.

25.Admittedly, the petitioner/defendant has not filed her written statement, but thereafter, the trial Court has allowed the condone delay application on payment of cost a sum of Rs.1000/-. Later on the petitioner/defendant has not filed her written statement, therefore, she was set exparte again and hence the present application has been filed to supporting her case. The petitioner/defendant has not chosen to file affidavit in I.A.15568 of 2011, but her junior counsel has filed the affidavit.

26.Whether the affidavit filed by the learned counsel for supporting the application, for setting aside the exparte decree can be accepted or not?

27.It is absolute consideration is that in the absence of the

party namely the defendant, the counsel for the party can be filed an affidavit, but normally only to supporting the said petitions filed by the parties along with the party affidavit the counsel can file the affidavit. But in the present case on hand, the junior counsel has directly filed an affidavit for supporting the petition in I.A.No.15568 of 2011.

28.The learned counsel for the parties should not be acted as a party, the learned counsels are the representatives of the parties. The parties have given their Vakalath to the counsels to put forth their case before the concerned Court. Therefore, the party alone should file the affidavit filing to support any petitions filed by the parties, but the present case on hand, the junior counsel who is the advocate of the party filed affidavit.

29.Thus being the case, this Court have looked into the facts and situation of the case, since the junior counsel namely Renuka Parameswari has filed the affidavit and stating the occurrence taken place on 20.08.2011. But, she has not given any details of the case or facts of the case or merits of the cases since she is not the parties, but she is only counsel for the defendant.

30. Apart from this, the learned Judge has not only rejected the said application in I.A.No.15568 of 2011 on the ground of filing of the affidavit filed by the counsel for supporting the petition, but the learned Judge also states that the written statement has not been filed within 90 days as per the amended Civil Procedure Code. But the learned Judge has not looked into the Judgment passed by this Court and the Hon'ble Supreme Court, that if the defendant on petition requesting the Court for extending the time, the trial court can extend the time for filing written statement. Admittedly, on two occasions this petitioner has filed an adjournment petition seeking time to file written statement, which was admitted by the Court, but the junior counsel Renuka Parameswari, who represented on 20.08.2011 before the trial Court with an request to adjourned the case to file affidavit the defendant has not available in the station but that request was not considered and the defendant was set exparte on 11.15 a.m. itself.

31. The trial Court cannot look into the case directly and the failure of the parties for non filing of the written statement. If any representation made by the counsel for seeking time, it is bounded duty of the Court to pass over the case and wait till the rising of the Court, whether the defendant have appeared and filing the written

statement or not than to pass appropriate orders, but the present case on hand, the trial Court namely XVIIIth Assistant Judge, was pleased the order that defendant was set exparte at 11.15 a.m. itself. This was clearly shown by the affidavit sworn by the junior counsel C.A.Renuka Parameswari. Therefore, the learned XVIIIth Assistant Judge, has clearly lack of the judicial view and also acted against the principles of the natural justice.

32.It is admitted fact that both the plaintiff and the defendant are the brother and sisters, the plaintiff has filed the suit only for vacate and deliver the vacant possession of suit schedule of property and also for damages.

33.This petitioner/defendant is not a third party, apart from this the trial Court, namely the 18th Assistant City Civil Court, Chennai ought to have seen that the suit was filed by the plaintiff for recovery of possession and also for damages. Therefore, that suit should not be decided on exparte, but it should be considered only on merits.

34.Time and again, this Court and the Hon'ble Apex Court has categorically held in various cases that the suits like declaration, partition, claiming of recovery of possession and specific performance

suits should not be decided ex parte, but an opportunity should be given to the aggrieved party and decided the case on merits.

35. Therefore, in the interest of justice, it is just and necessary to give an opportunity to the petitioner/defendant, who is the own sister of the respondent/plaintiff and put forth her case before the Court below, I am inclined to set aside the order passed in I.A.15568 of 2011, dated 28.03.2012, on the file of the XVIIIth Assistant Judge, City Civil Court, Chennai, but this petitioner/defendant should compensate for the delay in non filing of the written statement and dragging the proceedings.

36. In the result:

(a) this Civil Revision Petition is allowed by setting aside the order passed in I.A.No.15568 of 2011 in O.S.No.7416 of 2008 dated 28.03.2012, on the file of the learned XVIIIth Assistant Judge, Chennai, on condition that the petitioner should pay a sum of Rs.3000/- as a cost to the respondent/plaintiff within a period of two weeks from today;

(b) on producing of payment receipt, the trial Court namely XVIIIth Assistant Judge, City Civil Court, Chennai, is hereby directed to dispose the suit within a period of two months on day to day basis without giving any adjournment to either parties and both the parties are hereby directed to give their fullest co-operation for early disposal of the suit;

(c) the Executing Court is directed not to proceed the execution proceedings till the disposal of the suit. No costs. Consequently, connected miscellaneous petitions are closed.

15.02.2017

Note: Issue order copy on 22.02.2017.

vs

Index: Yes
Internet: Yes

To

The XVIII Assistant City Civil Court,
Chennai.

M.V.MURALIDARAN,J.

VS

**PRE-DELIVERY ORDER MADE IN
C.R.P.(PD)No.1572 of 2013 and
CMP.No.13048 of 2016 and
M.P.No.1 of 2013**

15.02.2017