

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP (NPD)No.2168 of 2016
and
CMP.No.15689 of 2016**

S.Mukanchand Bothra

.. Petitioner

Vs.

1.T.Jayalakshmi

2.Sri Amman Arts and Science College,
Rep. by its Correspondent
T.Jayalakshmi

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order passed by the X Assistant Judge, City Civil Court, Chennai in E.A.No.183 of 2016 in E.P.No.1376 of 2005 in O.S.No.4325 of 2001.

For Petitioner : Mr.M.Gagan Bothra (Party-in-Person)

For Respondents : Mr.P.V.Sanjeev

ORDER

This Civil Revision Petition is filed by the plaintiff/ decree holder. The case of the revision petitioner is that he filed a suit against the respondent herein in O.S.No.4325 of 2011 on the file of the III Assistant Judge, City Civil Court at Madras and the same was dismissed. Against which the respondent herein filed first appeal and the same was also dismissed and against which he filed second appeal before this Court in S.A.No.1380 of 2007 and the same was partly allowed by judgment and decree dated 21.04.2011. After the decree, the revision petitioner filed execution petition in E.P.No.1376 of 2005 before the Xth Assistant Judge, City Civil Court at Chennai to attach the movable properties of the judgment debtor/respondent herein. In the said execution petition, on 26.06.2015 the Execution Court closed the E.P.No.1376 of 2005 and ordered that the precept warrant already issued shall be executed on or before 04.09.2015. Thereafter, an application in E.A.No.5373 of 2015, the time was extended to execute the warrant.

2.The respondent/Judgment Debtor herein aggrieved over the

order dated 26.06.2015 passed by the execution Court, filed E.A.No.183 of 2016 to set aside the same on the ground that he paid a sum of Rs.3,43,064/- by way of demand draft No.961500 dated 22.08.2011 as full and final settlement of the E.P. amount to the counsel for the revision petitioner Mr.T.Dhanasekaran and the same was acknowledged by him on 26.08.2011 in the above second appeal. In spite of receipt of the entire amount in the above execution petition, the revision petitioner failed and neglected to report the same before the lower Court. Hence the respondent herein filed E.A.No.183 of 2016 to set aside the order dated 26.06.2015 passed in E.P.No.1376 of 2005.

3.The objection raised by the revision petitioner to allow the E.A.No.183 of 2016 is that the said application is not at all maintainable in law. As per Order 21 Rule 106 of CPC, set aside application shall be made within 30 days from the date of the order. In the present case the order was passed in the execution petition on 26.06.2015 and he was sought to be set aside by filing application only on 12.01.2016 which is beyond the period of 30 days and the respondents herein have not filed any condone delay petition along with E.A.No.183 of 2016. That apart, Order 21 Rule 1 of CPC deals with mode of paying money under decree. The Order 21 Rule 1 of CPC

stated as follows:-

“[1. Modes of paying money under decree.-

(1) All money, payable under a decree shall be paid as follows, namely:-

(a) by deposit into the Court whose duty it is to execute the decree, or sent to the Court by postal money order or through a bank; or

(b) out of Court, to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evidenced in writing; or

(2) Where any payment is made under clause (a) or clause (c) of sub-rule (1) the judgment-debtor shall give notice thereof to the decree-holder either through the Court or directly to him by registered post, acknowledgment due.

(3) Where money is paid by postal money order or through a bank under clause (a) or clause (b) of sub-rule (1), the money order or payment through bank, as the case may be, shall accurately state the following particulars, namely:-

(a) the number of the original suit;

(b) the names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants;

(c) how the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;

(d) the number of the execution case of the Court, where such case is pending; and

(e) the name and address of the payer.

(4) On any amount paid under clause (a) or clause (c) of sub-rule (1), interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule (2).

(5) On any amount paid under clause (b) of sub-rule (1), interest, if any, shall cease to run from the date of such payment:

Provided that, where the decree-holder refuses to accept the postal money order or payment through a bank, interest shall cease to run from the date on which the money was

tendered to him, or where he avoids acceptance of the postal money order or payment through bank, interest shall cease to run from the date on which the money would have been tendered to him in the ordinary course of business of the postal authorities or the bank, as the case may be.]”

Therefore, the respondents herein have not paid the decree amount as per the mode prescribed under Order 21 Rule 1 of CPC. The main contention of the revision petitioner is that a payment or adjournment, recognized by any Court execute in the decree.

4.The learned trial Judge after hearing the argument on either side was pleased to allow E.A.No.183 of 2016 by order and decree dated 26.04.2016. Against which the present revision petition is filed.

5.I have heard Mr.M.Gagan Bothra, Party-in-Person and Mr.P.V.Sanjeev, learned counsel appearing for the respondents and perused the entire material available on records.

6.It is seen from the records that at the instance of the revision petitioner filed money suit against the respondent herein and the

same was decreed in favour of the revision petitioner. The appeal filed by the respondent herein was dismissed and the 2nd appeal filed by them was partly allowed by modifying the decree to the extent that the defendant shall not be liable to pay interest for the period from 06.04.1998 to 06.06.2001. In the meantime, the revision petitioner filed execution petition in E.P.No.1376 of 2005 to attach the movables of the respondent herein to satisfy the decree amount.

7.After the judgment passed in the above second appeal and in compliance with the judgment of this Court in the above 2nd appeal, the respondent herein paid a sum of Rs.3,43,064/- by way of demand draft No.961500 dated 22.02.2011 drawn on Karur Vysya Bank, Erode towards full and final settlement of the decree amount claimed in the above execution petition in E.P.No.1376 of 2005 to the counsel for the revision petitioner Mr.T.Dhanasekaran on 26.08.2011 and he also acknowledged the receipt of the said D.D.

8.Therefore, according to the respondent herein, the revision petitioner having received the entire amount in the above mentioned execution petition as full and final settlement from the respondents herein, but failed to report the same before the execution Court

closed the E.P.No.1376 of 2005 by obtaining the order that the precept warrant already issued shall be executed on or before 04.09.2015. The time granted by the executing Court was extended by order dated 06.11.2015 in E.A.No.5373 of 2015 at the instance of the revision petitioner without giving notice to the judgment debtor/ respondent herein.

9.By considering the above said facts and circumstances of the case, the learned Sub-Judge was pleased to allow the application filed by the respondent herein in E.A.No.183 of 2016 by holding that the payment made by the judgment debtor/ respondent herein has not been proved as prescribed in the Code of Civil Procedure will be decided only after conducting enquiry in the execution proceedings after giving opportunities to both parties. It is the main contention of the respondent herein that he was not given any notice in the precept warrant order and its extension of time.

10.Challenging the order passed in E.A.No.183 of 2016 by stating that for setting aside the order passed in E.P.No.1376 of 2005, dated 26.06.2015, this civil revision petitioner has filed this petition before this Court.

11.The Civil Revision Petitioner, who is decree holder in E.P.1376 of 2005, though the order was passed on 26.06.2015, but the application in E.A.No.183 of 2016 was filed only on 12.01.2016 i.e. beyond the period of limitation of 30 days and therefore, the application itself is not maintainable for non filing the application to condone the delay of nearly 180 days in filing the petition to set aside the ex parte order as per the provisions contemplated under Order 21 Rule 106 of C.P.C.

12.The Order 21 Rule 106 of C.P.C. says as follows:

"106.Setting aside order passed ex parte, etc.- (1) The applicant, against whom an order is made under sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of Rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall

appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.”

13.It is my absolute view that though the order in E.P.No.1376 of 2005, by issuing precept warrant on 26.06.2015 without ordering notice to the respondent/judgment debtor and when the respondent/judgment debtor has filed petition for setting aside the order dated 26.06.2015 that should be filed within the time limit of 30 days from the date of order, but admittedly, he has filed only after 180 days i.e. 12.01.2016 (beyond the period of limitation of 30 days).

14.As per the limitation Act, any order passed against the

exparte order in the Execution Petition that should be challenged within 30 days from the date of passing the order. But, in the case on hand, the order was passed in E.P.No.1376 of 2005 on 26.06.2015 whereas the set aside petition was filed only on 12.01.2016 i.e. after more than six months. But, without considering the same, the learned Judge has passed wrong order stating that no condone delay petition is necessary to file petition under Order 21 Rule 1 of CPC and there is no delay in filing the said application is not acceptable one. Therefore, the very order passed by the learned Xth Assistant Judge, City Civil Court, Chennai in E.A.No.183 of 2016 for setting aside the exparte order in E.P.No.1376 of 2005, dated 26.06.2015, is totally wrong and it is liable to be set aside.

15. Accordingly, though the order in E.P.No.1376 of 2005, dated 26.04.2016 was passed without giving notice to the respondent/decree holder. In the interest of justice, to give one more opportunity to the respondent/judgment debtor, the matter is remand back to the Xth Assistant Judge, City Civil Court, Chennai, by giving direction to the respondent/judgment debtor to file condone delay application and after filing the delay petition, the learned Xth Assistant Judge, City Civil Court, Chennai, to consider the respondent/judgment debtor application in I.A.No.183 of 2016 on merits.

16.In the result:

(a) this civil revision Petition is allowed by setting aside the order passed in E.A.No.183 of 2016 in E.P.NO.1376 of 2005 dated 26.04.2016 on the file of the Xth Assistant Judge, City Civil Court, Chennai;

(b) the matter is remand back to the learned X Assistant Judge, City Civil Court, Chennai, for fresh consideration in E.A.No.183 of 2016, by giving direction to the respondent/judgment debtor to file an application for condone the delay and after considering the said condone delay application, the learned Judge is hereby directed to consider the application in I.A.No.183 of 2016 on merits. No costs. Consequently, connected miscellaneous petition is closed.

07.02.2017

Note:Issue order copy on 14.06.2017

Index:Yes

Internet:Yes

vs

To

The Xth Assistant Judge,
City Civil Court, Chennai.

M.V.MURALIDARAN, J.

VS

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