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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement Reserved on: 05.01.2017

Judgment Pronounced on: 03.11.2017

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.A.No.3175 of 2009

C.Dhanasekaran .. Appellant/Petitioner/2<sup>nd</sup>defendant

Vs.

V.V.Ekambaram .. Respondent / Respondent / Plaintiff

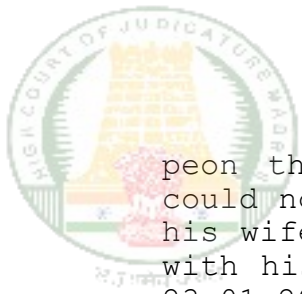
Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 CPC., against the fair and decretal order passed in I.A.No.8 of 2009 in O.S.No.7370 of 1996 on the file of IV Judge, Fast Track Court at Chennai dated 11.08.2009.

For Appellant : Mr.N.Ramanujam  
For Respondent : Mr.S.Mahimai Raj

#### JUDGMENT

1. The respondent had filed a suit for specific performance against appellant's father in O.S.7370/1996 before learned III Additional Judge, City Civil Court, Chennai. Consequent to the death of the defendant, his legal heirs were impleaded as defendants 2 to 4. The appellant herein is one of the sons. On 22-01-2009, the suit was decreed exparte. For setting aside the said exparte decree the appellant had filed I.A.8/2009 before the Additional District and Sessions Court [Fast Tack Court No.IV], Court, Chennai. This was contested by the respondent. On 11-08-2009, Vide the impugned order, the said I.A.8/2009 was dismissed. Challenging the same the second defendant has preferred this appeal.

2. In his affidavit filed in support of his application filed under Order IX Rule 13 CPC, it is averred that on 06-01-2009, the case posted before the trial court for enquiry in I.A.129/2003, that this application was dismissed by the Court notwithstanding a certain direction given by this Court in CRP (PD) 2083/2004. In the meantime, his counsel who was on record till then declined to continue. Hence he had to engage a new counsel. The case was posted to 19-01-2009. On that day, the appellant had attended the court. He was then informed by Court



peon that the case was adjourned to 23-01-2009. He however, could not access the A- Diary. Be that as it may on 19-01-2009, his wife was admitted in the hospital and therefore he had to be with his wife. Even on 22-01-2009, he was in the hospital. On 23-01-2009, he again came to appear before the Court along with his counsel as per his earlier information. It was then he came to know that the suit was decreed exparte on the previous day., i.e. on 22-01-2009. The non-appearance of the appellant had taken place in the circumstances stated above.

3. Refuting strongly, the respondent/plaintiff had countered the averments of the appellant wherein he had stated:

- The suit was originally laid for specific performance against Ramasamy, the father of the appellant before the original side of this Court in C.S.556/1991. Subsequently, on grounds of amendment to the pecuniary jurisdiction, the suit was transferred to the City Civil Court, where it was taken on file as O.S.No:7370 of 1996.
- Under the agreement, possession of the suit property was handed over to the respondent. Hence when the suit was pending before this Court, an Application was filed seeking ad-interim prohibitory injunction against the defendant from disturbing respondent's possession. An interim injunction was granted. However, this was violated by the defendant. Therefore a contempt proceedings were initiated, the defendant was found guilty and a sentence for a term in civil prison was ordered, and the same was challenged by the contemnor in appeal. It ended in the Court modifying the sentence into one of fine of Rs.2,000/- . It was after this proceedings, the suit was transferred to the City Civil Court.
- Passing of exparte decree in this suit has not been event on a solitary occasion. Barring the present instance, the suit was decreed exparte at least thrice on 03-09-1999, 09-09-2000 and 12-09-2006. In each of the occasions, the trial court has showed indulgence and set aside the decrees it had passed. In between the appellant had filed I.A.129/2003 to refer the LHT impression of his father in the sale agreement for to ascertain its genuineness though an expert. This was dismissed by the trial court. The appellant challenged this order in CRP 2083/2004 before this Court. On 10-04-2006, the said CRP was allowed with a direction that the suit be disposed of within six months. Ever since, this I.A. repeatedly came to be posted for taking steps to the expert. The appellant however, would not do it. Consequently, on 06-01-2009, this I.A. was dismissed and the case stood adjourned to 19-01-2009. By then, the respondent/plaintiff had been even cross examined to a substantial extent. On 22-01-2009, a memo



was filed in the court to treat the evidence already available on record as evidence for the plaintiff. Since the appellant/2<sup>nd</sup> defendant was absent, the suit was decreed ex parte.

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4. Dismissing this application, the learned District Judge in his order had quoted from Charles Dicken's "Block House", to express his anguish over appellant's attitude.

5. Now, before this Court the learned counsel for the appellant would argue that the appellant had produced medical records to show that his wife was admitted in the hospital on 22-01-2009, that as a dutiful husband he had to be with his wife which was his priority on that day, and hence it constituted a valid reason for his absence for non-appearance on that day. The trial Court had ignored the evidentiary material produced and appeared to have been influenced by the earlier exparte decrees passed by the trial court. Citing the judgment of the Supreme Court in G.P.Srivatsava Vs Shri R.K.Raizada & Others [2000(II) CTC 27], the learned counsel argued that while deciding an application for setting aside an exparte decree, the Court ought to consider only the reason for the absence of the defendant on the particular instance and should not let to be prejudiced by what had happened earlier.

6. Per contra, the learned counsel for the respondent reiterated each of the facts that were averred in the counter of the respondent and added that the sale agreement that was sought to be specifically enforced was dated 25-10-1989, that the suit itself was instituted in 1991, and till 2009, i.e. for about 18 years, the defendant for a short time, and his son, the appellant herein for a substantial period, had managed to drag the proceedings. Further after the demise of the defendant Ramaswamy, appellant along with his bother and sister were impleaded in the suit as his legal representatives, that the other two did not contest the suit and only the defendant has been contesting the suit, that the since the passing of the expartee decree, the respondent had filed the E.P. before the Execution Court, and had the sale deed executed by the Court. It was also submitted that one of the common technique that the appellant employs to delay the proceedings is to change his counsel as frequently as he could afford.

7. Heard both sides. What is striking is that nowhere the sequence of events that were averred in the affidavit of the respondent was disputed, though the personal impressions that the respondent might have added to them in his narrative might have been.



8. This appellant is not innocent. He is far too familiar with the way our system functions. He has honed his skills to perfection in protracting a civil suit, and in the process has exposed the efficiency or inadequacy of it in our system.

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9. There is no dispute that procedure law should not be used as a tool to discipline litigants, since it essentially seeks to ensure that fairness is done to rival parties to the litigation. This responsibility to balance fairness as between rival parties is more with the trial court where physical presence and participation of the litigants is required, if not insisted. It is hence if a suit is dismissed for default or is decreed *ex parte*, remedies are provided for reversing the consequences. The justness of the cause that is required to be shown in those instances is the measure of fairness that the Courts extend to the litigant. Having stated thus, it needs to be added that procedural fairness should not be let to be abused as to interfere with Courts' accountability to the society where it is obligated to present its balance sheet of performance. A judicial delay is not just an aspect of injustice to one of the parties to the litigation but to the society that has invested all its trust in it as well.

10. If justice must be understood in terms of level of peace it can generate and sustain in a complex democracy like ours, then there must be anxiety on the part of the Courts to preserve the cause of action or right of defence. A man locked in litigation does not lose his right to live. He will have his own daily battle to sustain his life, and the litigation *per se* is one in the many that he may have to negotiate. He attempts to arrange his priorities, and on the date of posting of his litigation, he is expected to give top priority to his appearance. This may what the Procedural law may tell him. But Procedural law dictates only the proceedings in a legal forum by whatever name it is called, and not the lives of the litigants. It is hence, Courts in their anxiety do substantial justice rush to preserve a cause of action or right of defence.

11. However, what if a litigant schemes to defeat this procedural fairness in the very name of fairness? This is the attitude that the appellant has put on exhibition in this case and with considerable arrogance. One classical instance of his attitude is that he had filed a certain application for obtaining the opinion of a finger print expert on the genuineness of his father's LHT impression in the sale agreement on which the respondent/plaintiff has found his cause of action. It was filed in 2003. This is about 12 years after the suit was laid. The trial court dismissed it. The matter came to this Court and it allowed the application of the appellant in 2006. And for about next three years, this appellant dragged the matter for just taking steps to the expert. And, the trial



Court has been generously granting him time unmindful of the unfair treatment meted out to the other side.

12. There appears a pattern to appellant's approach. He would keep changing his counsel and in between be without counsel for some time, and on each occasion Court would be lenient to him and enable him to engage a counsel. Then it would grant adjournment to the newly appointed counsel of the appellant in the name of accommodation, even though there is no provision in CPC that permits it. On three times earlier he was set exparte and on each of the occasions the decree was set aside and he was granted an opportunity to contest. Does it not reflect a pattern to appellant's conduct? This modus operandi designed, developed and successfully put in operation by the appellant for abusing the judicial process and exploiting the procedural fairness of CPC, cannot be let to leave a trail for other litigants with similar temptations to follow. This game of the appellant shall end, and it has rightly ended.

13. As to the authority in G.P.Srivatsava Vs Shri R.K.Raizada & Others [2000(II) CTC 27], it cannot be canvassed by the appellant that this judgement of the Supreme Court condones abuse of judicial process. Each authority has its factual setting, and it is not given to the appellant to attempt at telescoping one that is set to different set of facts to the one before this Court.

14. In the end this Court finds no merit in the appeal and the same is dismissed with cost of Rs.10,000/- and the order in I.A.No.8 of 2009 in O.S.No.7370 of 1996 on the file of IV Judge, Fast Track Court, Chennai, is hereby confirmed.

Sd/-  
Assistant Registrar(CS II)

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Sub Assistant Registrar

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To:

1.The IV Judge  
Fast Track Court, Chennai

2.The Section Officer,  
VR Section,  
High Court, Madras - 600 104.



+2 ccs to Mr.N.Ramanujam Advocate sr 78208  
+1 cc to Mr.S.Mahimai Raj Advocate sr 78211

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