

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.3192 of 2012
and
M.P.No.1 of 2012**

K.Subbaiyan

.. Petitioner

Vs.

R.Thiyagarajan

..Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order and decree of the learned Principal Subordinate Judge, Coimbatore District in I.A.No.123 of 2010 in O.S.No.387 of 2004, dismissing the application to condone delay, begs to prefer this memorandum of Civil Revision Petition.

For Petitioner : Mr.N.Rajavadivelu

For Respondent : Mr.S.Arjun
for Mr.S.Gunalan

ORDER

This civil revision petition is directed against an Order of dismissal of revision petitioner's application filed under section 5 of limitation act sought to condone the delay of 1322 days in filing an

application to set aside an ex parte Decree dated 09.01.2006 passed against him in O.S.No.337 of 2004 on the file of the learned Principal Sub-Ordinate Judge, Coimbatore.

2.On perusal of records, it is found that the above suit for specific performance was filed by the respondent herein as plaintiff basing upon a sale agreement said to have entered with revision petitioner as vendee in respect of suit schedule property for a sale consideration of Rs.2,25,000/-.

3.According to respondent/plaintiff Sale consideration was arrived at Rs.2,25,000/- and he paid Rs.2,00,000/- as advance amount on the date of agreement i.e., on 04.03.2001 and it was agreed to pay the balance sale consideration of Rs.25,000/- within a period of 1 year thereon.

4.According to respondent/plaintiff, the revision petitioner refused to receive the balance amount, despite of his offering to pay the balance amount within the agreed time. Therefore the respondent has filed the above suit.

5.In the said suit the revision petitioner/defendant entered appearance and filed written statement contending that the transaction between the respondent and himself is purely a loan transaction and further contented that he neither entered in to any sale agreement nor received any advance amount as stated in plaint.

6.In the said circumstance the revision petitioner/defendants failed to further conduct the case and he was called absent and set ex parte by the trial Court and accordingly an ex parte decree was passed against him on 09.01.2006.

7.Whereas, thereafter petitioner came up with an application to set aside the said ex parte decree made against him and however as there was delay in filing the said application, his application was supported by an application under section 5 of Limitation Act to condone the delay so caused in filing the above application to set aside the ex parte decree.

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8.It appear that the reason projected by revision petitioner behind his nonappearance before Trial Court and failure to defend the suit was because of his medical ailment that he suffered from Lumbo

Sacral disc prolapse and that he was under treatment on the contemporary period of his absence.

9.The said application was resisted by respondent/plaintiff contending that the reason projected is untenable and untrue being invented for the purpose of filing the instant application under section 5 of Limitation Act.

10.The learned trial Judge on appraisal of above contention and pleadings rejected revision petitioner's contention holding that the reason projected is not satisfactory and thereby dismissed the application by the impugned order herein.

11.I heard Mr.N.Rajavadivelu, learned counsel for the petitioner and Mr.S.Arjun for Mr.S.Gunalan, learned counsel for the respondent and perused the entire materials available on record.

12.At this juncture on close perusal of records and the impugned order it disclose that subsequent to the above Ex-parte decree dated 09.01.2006, the respondent/plaintiff filed an Execution Petition in E.P.No.123 of 2007 on the file of Subordinate Court, Coimbatore for

getting the sale deed executed by depositing the balance sale consideration in to Court.

13.It is again found that however the sale deed in favor of Respondent was unable to be executed as the schedule of property denoted in the Decree mismatched with the schedule of property stated in plaint schedule. Consequently the respondent has also filed an Interlocutory application before trial Court in I.A.No.744 of 2009 to amend the Decree and the same is pending consideration.

14.Admittedly the suit is one for specific performance and that there can be doubt that execution of a sale deed in consonance with an ex parte decree would adversely affect and would result irreparable loss to the defendant/revision petitioner, when they had set up a specific plea that the transaction was but a loan and not a sale agreement.

15.More so it is found that the sale deed is not executed and the Execution petition is unable to be proceeded in lieu of pendency of I.A.No.744 of 2009.

16. Having found that the revision petitioner has appeared before trial Court and has filed written statement in time and that the revision petitioner has made a specific denial that there was no agreement entered between the respondent and the revision petitioner and that it was a loan transaction, I am of considered opinion that the defendant/revision petitioner can be given a chance to defend the case and face a decree on merits which would be doing of substantial justice.

17. Further this Court also takes account of the age of the revision petitioner that presently he would be around 73 years old as at the time of filing of above application he was 63 years old and hence this Court do not disbelieve the medical ailment projected by the revision petitioner that claiming to have suffered from Lumbo sacral disc prolapse.

18. In the result:

(a) this Civil Revision Petition is allowed on condition that the petitioner shall pay a sum of Rs.15,000/- as cost to the learned counsel appearing for the respondent, within a period of one month from the date of receipt of a copy of this order;

(b) the trial Court is directed to number the set aside application and to pass orders within a period of two months thereafter, by giving notice to either parties. Consequently, connected miscellaneous petition is closed.

01.02.2017

Internet:Yes/No
Index:Yes/No

vs

To

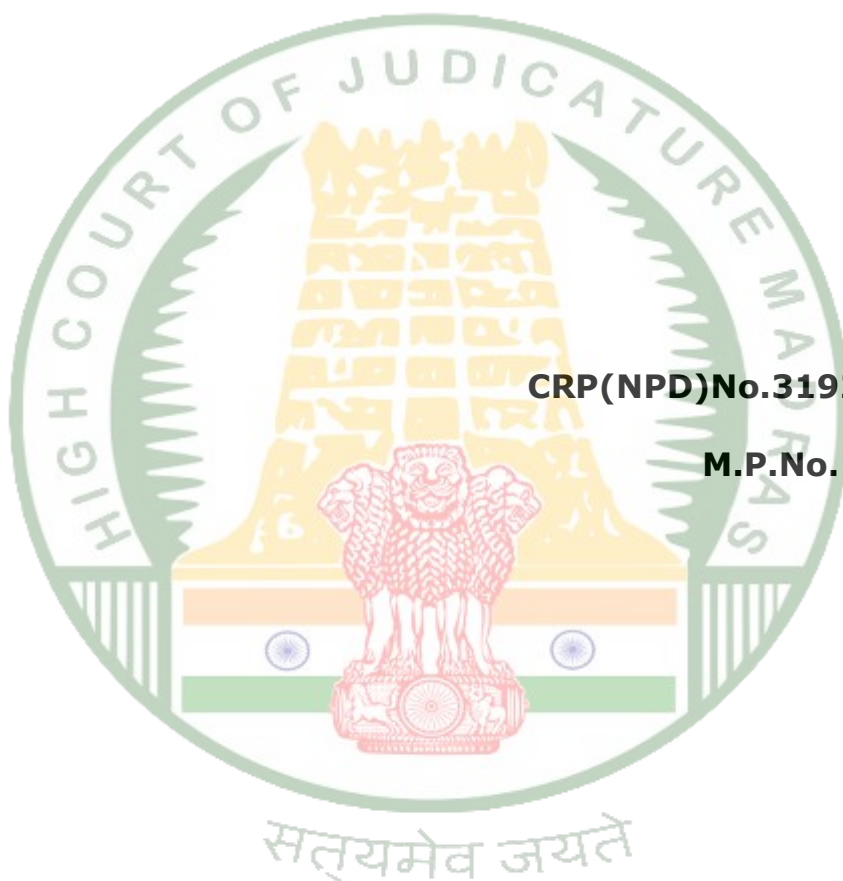
The Principal Sub-Ordinate Judge,
Coimbatore.



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M.V.MURALIDARAN, J.

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