

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2017

CORAM:

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)Nos.3892 and 3893 of 2013
and
M.P.Nos.1 of 2013 and 1 of 2014
and
CMP.No.10102 of 2016**

V.Senthilkumar ... Petitioner in both the CRPs
Vs.

Margadarasi Chits Private Limited,
A-1, 2nd Floor, Senthil Towers,
1st Avenue, Ashok Nagar,
Chennai-600 083. ... Respondent in both the CRPs

Common Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the common order and decreetal order dated 26.09.2013 and made in E.A.Nos.969 and 970 of 2013 in E.P.No.2710 of 2012 in A.R.C.No.375 of 2011, on the file of the X Assistant Judge, City Civil Court, Chennai respectively.

(In both the CRPs)

For Petitioner : Mr.M.Selvam

For Respondent : Mr.D.Shivakumaran

COMMON ORDER

The judgment debtor No.3 is the Civil Revision Petitioner before this Court. Challenging the orders in two applications in E.A.Nos.969 and 970 of 2013 in E.P.No.2710 of 2012 in A.R.C.No.375 of 2011, on the file of the learned Xth Assistant Judge, City Civil Court, Chennai, this Civil Revision Petition has been filed.

2.The case of the petitioner/judgment debtor No.3 is that the respondent decree holder / Margadarsi Chits Private Limited has filed the Execution Proceedings in E.P.No.2710 of 2012 under Order 21 Rule 37 and 38 of C.P.C. for arrest of the petitioner herein and send him to civil prison till the realization of the entire E.P. amount. Further interest may be granted from the date of realization.

3.It is the case of the petitioner/judgment debtor No.3 is that the said E.P. is not at all maintainable either in law or on facts and liable to be dismissed in limini on the ground that this petitioner/judgment debtor has not borrowed any amount from the decree holder and have not executed any guarantee for the loan obtained by N.Kumar, who is the judgment debtor No.1.

4.It is also further case of the judgment debtor No.3 is that the judgment debtor No.3 is not aware of any transaction between the Judgment debtor No.1 in the E.P. with the decree holder and he has no knowledge about the proceedings against him in A.R.C.No.375 of 2011, since no notice was served in A.R.C. Proceedings and the said order was obtained behind back to the petitioner. The petitioner/judgment debtor also take necessary steps to set aside the exparte order passed in ARC.No.375 of 2011.

5.It is further case of the petitioner/judgment debtor is that when the bailiff of the executing Court came for execution of warrant issued by the learned Xth Assistant Judge, City Civil Court, Chennai, on 25.02.2013, then only the petitioner/judgment debtor No.3 came to know about the E.P. proceedings pending against him. If the proceedings came to known earlier, definitely he would have defended the E.P. on merits. He also further states that on the basis of certain marked exhibits, the petitioner/judgment debtor No.3 was set exparte and the exparte decree has passed against him.

6.The petitioner/judgment debtor No.3 states that when the petitioner used to start early in the morning from his house to do his

work and returning home in the evening only. The postman who served the cover for the hearing date on 26.09.2012 and without serving the notice on the judgment debtor No.3, the postman instead of serving the judgment debtor No.3, he himself made an endorsement "refused" for the reasons best known to him. He also submits that because of the mistake committed by the postal department, this petitioner should not be prejudice. Therefore, he has filed the petition with a delay of 123 days in filing the above application to set aside the exparte order and prayed the Court to condone the delay of 123 days in filing the set aside exparte order dated 26.09.2012 in E.P.No.2710 of 2012.

7.On behalf of the respondent/Branch Manager a counter affidavit has been filed by denying the averments made in the petition. The respondents stated that the grounds raised in the petition is not clear and not given any valid reason for condoning the delay of 123 days, since this petitioner is the opposite party No.3 in the Arbitration case and the notice in the Arbitration proceedings was duly served on the petitioner/judgment debtor, but he had not chosen to appear before the Arbitrator. Therefore, he was set exparte.

8.The notice sent by the Executing Court was returned with an endorsement that 'refused' for the hearing dated 26.09.2012, therefore it made clear that the notice was served properly. The respondent is a company sending hundreds of registered posts everyday and cannot go behind every postman to get endorsement in their favour. The petitioner had mentioned that on 25.02.2013, he came to know about the E.P. proceedings, when the bailiff came to execute the warrant of the Court. But the bailiff endorsed in the warrant for the hearing 27.02.2013, is the petitioner/judgment debtor No.3 has gone out. Therefore, it made presumed that the petitioner has deliberately and wantonly refused to receive the notice and he knows the Execution proceedings right from 26.09.2012, the decree in ARC is also unchallenged and it was final. The respondent/deGREE holder is dealing with public money and answerable to several public who pay the subscription promptly. Therefore, the petitioner/judgment debtor jointly and severally liable to pay the decree amount and hence he prayed for dismissal of the applications.

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9.Considering the case of the petitioner, the learned Xth Assistant Judge, City Civil Court, Chennai, was dismissed the application on the ground that the petitioner/judgment debtor No.3

has stated that he is not aware of the ARC award and the E.P. proceedings. When the bailiff came to his house on 25.02.2013, then only, he wants to set aside the exparte order dated 26.09.2012. As per the award in ARC.No.375 of 2011, which was enclosed in page No.7, it has been found that notice to the petitioner/ judgment debtors properly served, inspite of that, he has not appeared before the Arbitrator, hence, the exparte order has been passed by the Arbitrator. Therefore, it made clear that the petitioner/judgment debtor No.3 has voluntarily refused to receive the notice, even notice in E.P.No.2710 of 2012. Therefore, he has not given any valid reason except the above, the Executing Court does not found any merits in the application. Accordingly, dismissed the said application. Challenging the said order, both the Civil Revision Petitions were filed before this Court for the aforesaid prayer.

10.I heard Mr.M.Selvam, learned counsel appearing for the petitioner and Mr.D.Shivakumaran, learned counsel appearing for the respondent and perused the entire records.

11.Admittedly, the petitioner, who is the judgment debtor No.3 in the E.P. proceedings in E.P.No.2710 of 2012. It is the main

avermment of the petitioner is that he has not aware the ARC proceedings pending before the Arbitrator. He has also stated in the affidavit that if the judgment debtor No.3 has came to know about the ARC proceedings and execution proceedings, definitely he would defend the E.P. on merits.

12. Apart from this, this petition has been filed for only a delay of 123 days in filing the set aside petition. The learned Judge also not given any valid reason for dismissing the application except to states that the petitioner/ judgment debtor No.3 has not taken action for setting aside the Arbitration proceedings in ARC.No.375 of 2011. Therefore, he has no right to file the petition to set aside the proceedings in E.P.No.2710 of 2012 and dismissed the application.

13. Time and again, this Court and the Hon'ble Apex Court held that while dealing with the petition for condonation of delay, the Court below should adopt liberal approach and in this case, it is the only a meagre delay of 123 days delay in filing the petition and should be considered by the learned Judge in liberal manner. When the petitioner himself has come forward by saying that no notice was served in the arbitration proceedings and also in the E.P. proceedings, there is

nothing to happen, the Court can dispose the execution proceedings on merits that too, the respondent/deGREE holder has filed the execution proceedings in E.P.No.2710 of 2012 under Order 21 Rule 37 and 38 of CPC for arrest of the petitioner and send the petitioner/judgment debtor No.3 to civil prison till the realization of the entire E.P. amount.

14.The Executing Court must have looked into the petition like this filed by the decree holder, since he wants to arrest the petitioner which means he has not filed any petition for executing the decree in the A.R.C. The main imputation clearly proved that when the award in A.R.C.No.375 of 2011 was passed directing the petitioner/judgment debtor No.3 to pay the amount, it is bounden duty of the respondent/deGREE holder to file the execution petition for recover the amount based on the award passed in A.R.C.No.375 of 2011, but ignoring the proceedings and only with aim to harassing the petitioner/judgment debtor No.3, this execution petition in E.P.No.2710 of 2012 has been filed for arrest of the petitioner/judgment debtor No.3 under Order 21 Rule 37 and 38 of CPC. The Executing Court has not even posed any question to the respondent/deGREE holder that why he has not filed the execution petition for executing the decree and award in the A.R.C.No.375 of 2011 and what purpose the respondent/deGREE holder

filed the execution petition for arrest of the petitioner.

15. Apart from this, the Court also looked into the petition and also deal the case to recover the award amount in A.R.C.No.375 of 2011. Therefore, it made clear that the respondent/deGREE holder without invoking the execution proceedings in a proper manner which permits to file for executing the decree. Thereafter, if the judgment debtor No.3 has not come forward for payment of amount, then the decree holder is having right to file application for arrest under Order 21 Rule 37 and 38 of CPC.

16. When the petitioner/judgment debtor No.3 has himself come forward for filing the set aside the exparte order in the E.P., the Court must have looked into the matter and pass suitable orders for payment of conditional amount and to set aside the exparte order. But without doing the same, simply dismissed the petition. Therefore, it is totally non application of mind on the part of the Executing Court for which the manner in dealing the execution petition Since, when the judgment debtor himself has come forward by filing the application for setting aside the exparte decree, the Executing Court must have looked into the matter by passing suitable orders directing the payment of some

conditional amount for setting aside the exparte decree. But, the learned Xth Assistant Judge, City Civil Court, Chennai, has totally failed on its attempt as per law. Therefore, this Court warranting interference in the orders passed in E.A.No.969 of 2013 in E.P.No.2710 of 2012 in ARC.No.375 of 2011, dated 26.09.2013 and by giving one more opportunity to the petitioner/judgment debtor No.3, both the civil revision petitions are liable to be allowed.

17.In the result:

(a) both the Civil Revision Petitions are allowed by setting aside the common order and decreetal order in E.A.No.969 of 2013 in E.P.No.2710 of 2012 in ARC.No.375 of 2011, dated 26.09.2013, on the file of the learned Xth Assistant Judge, City Civil Court, Chennai;

(b) the Executing Court viz., Xth Assistant Judge, City Civil Court, Chennai, is directed to proceed the case by directing the respondent/decreet holder by filing affidavit and follow the procedure as per Order 21 Rule 37 and 38 of CPC and giving evidence and thereafter to pass appropriate order in the execution petition in E.P.No.2710 of 2012;

(c) the said exercise shall be done within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

14.02.2017

Note: Issue order copy on 10.01.2018

vs

Index: Yes
Internet: Yes

To

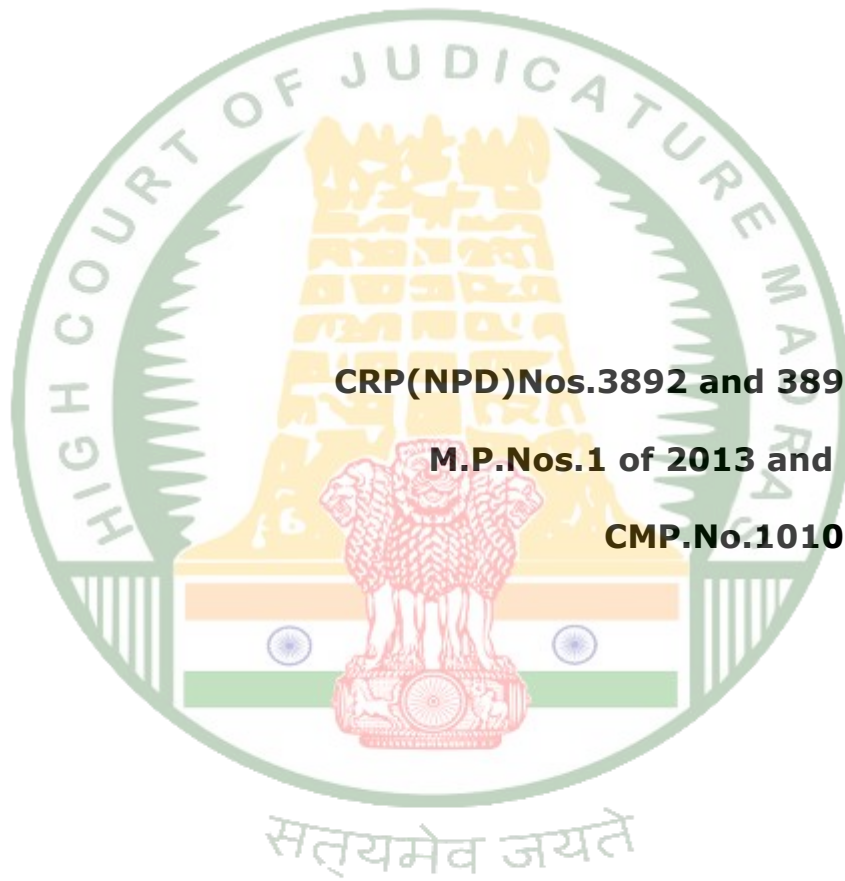
The X Assistant Judge,
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