



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.11.2017

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.M.A. (MD) No.457 of 2016
and
C.M.P. (MD) No.5960 of 2016

Kothainayagi

... Appellant

Vs.

Nagarajan

... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of CPC to set aside the fair and decreetal order passed in IA.No.21 of 2015 in OS.No.11 of 2011 dated 24.06.2015 on the file of the Principal District Judge, Pudukkottai.

For Appellant : Mr.K.N.Govardhanan
For Respondent : No appearance

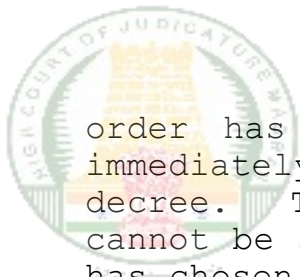
JUDGMENT

The respondent herein is the plaintiff in OS.No.11 of 2011 before the Principal District Judge, Pudukkottai. The suit was one for specific performance of the agreement dated 03.09.2007.

2.The suit agreement was executed by the defendants 1 to 5. The first defendant Lalitha is the mother of the appellant herein. Others are her siblings. The agreement was admittedly not executed by the appellant. In fact, the agreement itself is only for conveying 5/6th share in the suit property in favour of the respondent herein. The age of the appellant is shown as 25 in the plaint.

3.The appellant got married and had shifted to Coimbatore. She was not residing at Pudukkottai when the suit came to be filed. However decree has been passed in the said suit directing the appellant herein also to join with the other defendants and execute the sale deed in favour of the plaintiff. When the appellant herein was not a party to the suit agreement itself, the question of directing her to execute sale deed along with the other executants of the sale agreement would not arise.

4.Admittedly, the appellant was not served with any suit summons. An exparte decree came to be passed on 26.04.2012. To set aside the same, the appellant filed I.A.No.21/2015 in September 2014. The same was opposed by the plaintiff. The respondent/plaintiff herein opposed the said I.A on the ground that it was time barred. The Trial Court in Para 11 of the impugned



order has stated that the set aside petition came to be filed immediately after she came to know about the passing of the exparte decree. Therefore a finding has been given that the application cannot be said to be time barred. Having said so, the Trial Court has chosen to dismiss the I.A. In any event, the Trial Court ought to have seen that the specific case of the appellant was that she did not receive any suit summons. The Trial Court also noted that summons sent to the appellant herein were not served on her and that therefore substitute was resorted to. When the appellant is residing in Coimbatore, obviously she could not have received the said suit summons. The appellant has given convincing and acceptable reasons in the affidavit filed in support of the set aside petition. The conduct of the respondent herein has to be noted. The respondent herein sought specific performance against some one who is admittedly not a party to the agreement. In fact, no cause of action has arisen against the appellant herein. It is not known as to how a decree came to be passed against the appellant. A suit for specific performance cannot be mechanically decreed. It is a discretionary relief. In this case, without even noting that the appellant herein was not a party to the agreement, decree has been passed against her. Of course, the decree dated 26.04.2012 cannot be set aside in toto. The other defendants have executed the sale agreement for conveying their 5/6th share in the suit property.

5. Therefore, it is for the other defendants to workout their rights and remedies in the manner known to law. The decree dated 24.06.2015 made in OS.No.11 of 2011 on the file of Principal District Court, Pudukkottai has to be set aside only insofar as the 1/6th share of the appellant is concerned. The appellant shall now file her written statement in the suit and contest the proceedings as per law. The order dated 24.06.2015 dismissing I.A.No.21 of 2015 made in OS.No.11 of 2011 stands set aside. This appeal is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar

To

1.The Principal District Judge, Pudukkottai.

2.The Record Keeper,

Madurai Bench of Madras High Court,

Madurai.

+1cc to M/s. K.N.GOVARDHANAN dvocate in SR. No. 86667

SKM

JS/JC/SAR.1/23.11.2017/2P-4C

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