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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on: 26.10.2017

Orders Pronounced on: 02.11.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Review Application Civil (MD) No.155 of 2017

and

C.M.P.No.6235 of 2017

in

C.R.P (NPD) (MD) 638 of 2017

P.Muthammal (Died),
Nachi Muthammal

... Petitioner/Petitioner

Vs.

Tamilnadu Cherakula Vellala Sangam,
(Regn.No.3/1944), Rep.by its Secretary,
Singanallur, Kurichi,
Coimbatore District.

... Respondent/Respondent

Review Application filed under Order 47 Rule 1 and 2 r/w
Section 114 of Code of Civil Procedure, praying to review the order
dated 21.04.2017 passed in C.R.P.(NPD) (MD) No.638 of 2017 on the
file of this Court.

Prayer in CRP(MD) . 638/ 2017 :

This Civil Revision Petition is filed under section 115 of
C.P.C., praying to set aside the order dated 08.11.2016 passed in
E.A.No.463 of 2011 in E.A.No.296 of 2007 in E.P.No.149 of 2007 in
O.S.No.32 of 1985 by the Subordinate Court, Palani.

For Petitioner .. Mr.S.Parthasarathy, Sr. Counsel
for M/s.N.Damodaran

For Respondents .. Ms.Anand Chandrasekar
for M/s.Sarva Bhauman Associates

**O R D E R**

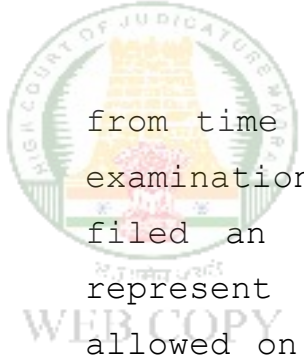
This Review Petition is arising out of the order of dismissal passed by this Court in C.R.P.(NPD) (MD) No.638 of 2017, dated 21.04.2017.

2. The background of the case is as follows:-

Tamil Nadu Cherakula Vellala Sangam/plaintiff in O.S.No.32 of 1985 on the file of the Subordinate Court, Palani, sought for declaration and possession of the suit scheduled property and for future damages, which was in a possession of one P.Muthammal and others. The suit was contested and decreed in favour of the plaintiff. The appeal preferred by the aggrieved defendant was also dismissed in A.S.No.888 of 1987 on 08.07.1997. Thereafter, the decree holder has filed E.P.No.96 of 2001 for delivery of possession, in which, Nachi Muthammal, as the legal representative of Muthammal (deceased), has filed an application invoking Section 47 of C.P.C., and two other applications under order 21 Rule 106 and Section 151 of C.P.C.

3. The subject matter of the revision petition before this Court is, in respect of the application filed under Section 47 C.P.C., which was taken on file by the District Munsif Court, Palani and numbered as E.A.No.424 of 2005, later, the case was transferred to Sub-Court, Palani. Both the Execution Petition and Execution Application were renumbered as E.P.No.149 of 2007 and E.A.No.296 of 2007.

4. The main crux of the application filed under Section 47 C.P.C., numbered as E.A.No.424 of 2005 and renumbered as E.A.No.296 of 2007 is that the decree obtained by the plaintiff is null and void since, the plaintiff society has become defunct and it has no legal entity to pursue the Execution Petition. This application was pending for adjudication since 2005. Initially, Muthammal herself has filed proof affidavit in lieu of her chief-examination on 27.10.2009 and the matter was adjourned for recording her evidence



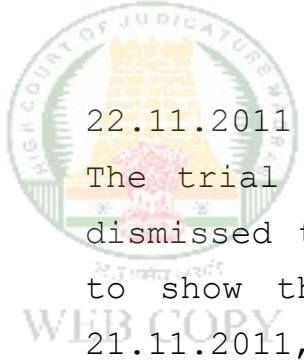
from time to time. However, she did not submit herself for cross-examination till 04.08.2011. Meanwhile, one T.S.Venkatramanan, has filed an application as power of attorney of Muthummam and to represent Muthummam. That application in E.A.No.156 of 2011 was allowed on 25.07.2011 and the matter was posted for examination of the petitioner.

5. From records, it appears that on 09.08.2011, T.S.Venkatramanan has filed proof affidavit and the matter was adjourned for cross examination on 16.08.2011. Subsequently, posted on 09.08.2011, 16.08.2011, 22.08.2011, 19.09.2011 and 21.11.2011. In all these dates, there was no progress and when the case was adjourned from 09.08.2011 to 21.11.2011 neither the petitioner nor his counsel was present. Hence, the Execution Court has dismissed the application E.A.No.296 of 2007 for non-prosecution.

6. Aggrieved by this order, an application has been taken out in E.A.No.463 of 2011 to restore E.A.No.296 of 2007 on file. The reasons stated in the affidavit accompanied with the application for restoration is that, the petitioner had gone for medical treatment to Chennai and he returned to Palani and came to know about the dismissal of the application. When he came back to Palani and enquired his counsel on record, he told him that he was engaged in some other Court on that day, so was not able to represent him. Hence his non appearance is not willful but due to act of god.

7. The said application was contested by the decree holder. The petitioner/power of attorney of the petitioner was examined on oath and he has filed three documents to substantiate the averments made in his affidavit, viz., the reasons for non appearance. One among the 3 documents is the information obtained from the Information office of Agricultural Commissioner office at Chennai.

8. The said document indicates that the petitioner came to the office of Agricultural Commissioner at Chepauk, in person on



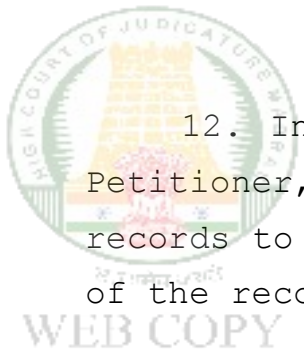
22.11.2011 and perused certain documents and took photo copy of it. The trial Court after considering the pleadings and evidence, has dismissed the application on the ground that there was no evidence to show the petitioner T.S.Venkatramanan has gone to Chennai on 21.11.2011, the day on which the matter was posted for his cross-examination. The information from Agricultural Commissioner Office, Chepauk indicates that the petitioner T.S.Venkatramanan was present in the office only on the next day. Likewise, the medical certificate also does not indicate that T.S.Venkatramanan was in the hospital at Chennai on 21.11.2011. Aggrieved by the said order, Revision Petition was filed before this Court.

9. This Court after careful consideration of the records as well as the order impugned, has held that there is no error or illegality in the order passed by the trial Court. Hence, dismissed the Revision Petition.

10. Unsatisfied with the order, the present Review Petition is filed on the ground that the petitioner/judgment debtor is not responsible for the delay in the progress of the execution petition. Sufficient cause for non appearance for the hearing date had been adduced. The decree holder society has become defunct since 1987, the execution proceedings would not be proceeded. Further, when there is a legal bar to execute the decree, by dismissing the application without affording opportunity has lead to facilitating execution of unexecutable decree. Instead of disposing the application on merits, dismissing it on technicalities at its threshold has been deprecated by the Supreme Court. Hence, the order passed by this Court on 21.04.2017 has to be reviewed.

11. In support of his submission, the learned Senior Counsel appearing for petitioner has relied upon the judgment of the Hon'ble Supreme Court in Improvement Trust, Ludhiana vs Ujagar Singh & Ors,

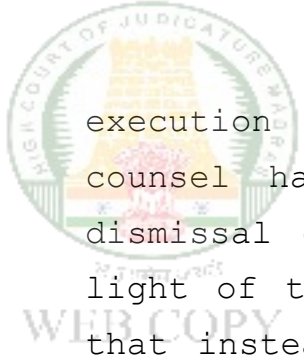
(2010) 6 SCC 786.



12. In the light of the above submission made by the Revision Petitioner, the Court has once again gone through the material records to ensure, 'whether, there is any error apparent on the face of the record to review the earlier order ?'

13. Unfortunately, the revision petitioner is unable to point out any such error. The contention of the revision petitioner is that the delay in disposing the petition was not attributable to him, itself is false and as pointed out earlier, the execution petition has been filed in the year 2001 and the application under Section 47 C.P.C., filed in the year 2005 had been successfully kept pending and even after the original petition has filed, her proof affidavit in lieu of examination in chief she did not appear again for cross-examination but later has introduced her power agent T.S.Venkataramanan to represent her. He at last filed fresh proof affidavit on 09.08.2011 but did not mount the witness box to be cross examined in spite of five adjournments. On 21.11.2011 neither he nor his counsel was present. In the affidavit, he claims that after his return from Chennai he enquired his counsel and came to know about the dismissal of the application. The specific averment in the affidavit is that on 21.11.2011, he was at Chennai, taking treatment, whereas the information received under RTI indicate that on 22.11.2011, he was at Agricultural Commissioner Office, Chepauk to peruse records and to take photo copy of it. This evidence adduced by him itself establishes the falsehood in the affidavit. The trial Court has taken note of this and dismissed his application which has been confirmed by this Court for the very same reason. It is unfortunate, the petitioner attempts to reopen the matter which has already been considered by both the Courts. The records produced by the respondent indicates that the society is not a defunct society. Its registration has been regularised.

14. In respect of the judgment cited by the learned Senior Counsel, that judgment arises in the matter to condonation of delay in filing application to set aside an ex-parte order in the



execution Court. On facts, the Supreme Court has found that the counsel has not informed the party about the hearing date of dismissal of the application. Hence, the delay has crept. In the light of the said fact, the Hon'ble Supreme Court has thought fit that instead of dismissing the case on the ground of delay, fair opportunity should be given to the party to contest the matter on merits. The relevant observation in the said judgment is extracted here under:

"Had there been an intimation sent to the appellant by Mr.P.K.Jain, its erstwhile Advocate, and if even thereafter appellant had acted callously then we could have understood the negligent attitude of the appellant but that was not the case here. No sooner the appellant came to know about the dismissal of its objection filed before the Executing 1 Court, under Order 21 Rule 90 of the CPC it made enquiries and filed the appeal. While considering the application for condonation of delay no straight jacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. Each case has to be weighed from its facts and the circumstances in which the party acts and behaves. From the conduct behaviour and attitude of the appellant it cannot be said that it had been absolutely callous and negligent in prosecuting the matter.

2. After all, justice can be done only when the matter is fought on merits and in accordance with law rather than to dispose it of on such technicalities and that too at the threshold. Both sides had tried to argue the matter on merits but we refrain ourselves from touching the merits of the matter as that can best be done by the Executing Court which had denied an opportunity to the appellant to lead evidence and to prove the issues so formulated.



3. In our opinion, ends of justice would be met by setting aside the impugned orders and matter is remitted to the Executing Court to consider and dispose of appellant's objections filed under order 21 Rule 90 of CPC on merits and in accordance with law, at an early date. It is pertinent to point out that unless mala fides are writ large on the conduct of the party, generally as a normal 1 rule, delay should be condoned. In the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it on such technicalities."

15. The facts before this Court, is entirely different. In a contesting matter, while the witness has already examined in chief and matter is adjourned for cross-examination abruptly, both, the counsel as well as the party abstained the Court. Taking note of the adjournments granted earlier and duration of pendency of the application, the Court has taken a conscious decision on merits to dismiss the application. Not being satisfied with the reason for non appearance, the Court has dismissed the petition. This Court after considering the affidavit, documents relied on by the petitioner and the dismissal order of the trial Court, dismissed the revision petition as it deserves no merit for interference.

16. While exercising the power under Section 114 CPC to review the earlier order, there must be an error apparent on the face of the record. This Court find no such error in its earlier order to review. Hence, the review petition dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (RTI)

/True Copy/



To

The Sub Judge, Palani.

சுப்பிரீம் நீதிமன்றம்

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The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to M/S.N.DAMOTHARAN, Advocate SR.No.85502.

+1cc to M/S.SARVABHAUMAN ASSOCIATES, Advocate SR.No.

Judgment made in
Rev.APLC.(MD) No.155 of 2017
and C.M.P.No.6235 of 2017 in
C.R.P (NPD) (MD) 638 of 2017

02.11.2017

AT/gr

SDS/SKN:RSK/SAR 1/14.11.2017/8P/5C