



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :02.11.2017

CORAM

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A(MD) No.1099 of 2011

and

M.P.(MD) No.1 of 2011

J.Samuel Devarajan

... Appellant / Petitioner

Vs.

D.Nagendran (Died)

1.Rajeswari

2.Nagaraj

... Respondents / Respondents

(Cause title accepted vide order dated
22.11.2010 made in M.P.(MD)No.1/2010 in
C.M.A.(MD)SR.No.36334/2010)

PRAYER:- Civil Miscellaneous Appeal filed under Order 43 Rule 1(d) of Civil Procedure Code, against the fair and decreetal order dated 16.11.2009 passed in I.A.No.79 of 2009 in O.S.No.57 of 2005 by the learned Additional District Judge, (Fast Tract Court No.I), Thoothukudi.

For Appellant : Mr.G.Prabhu Rajadurai

For Respondents : No appearance

J U D G M E N T

The Civil Miscellaneous Appeal has been filed under Order 43 Rule 1(d) of Civil Procedure Code, against the fair and decreetal order, dated 16.11.2009 passed in I.A.No.79 of 2009 in O.S.No.57 of 2005 by the learned Additional District Judge, (Fast Tract Court No.I), Thoothukudi, on various grounds:

"a. The lower Court ought exceeded in its jurisdiction in its directing the petitioner to deposit 1/3rd of the decree amount as cost which is onerous and unconscionable.

b. The lower Court failed to consider that such a condition is impossible to fulfill and as such takes away the right of the petitioner to defend his case of merits.

c. The lower Court failed to consider that any condition for setting aside an application to set-aside the exparte is to be reasonable and cannot be linked to the subject matter of the suit.



d. The lower Court overlooked that the petitioner property already been attached before judgement and other reasons."

2. The learned counsel for the appellant herein would submit that the learned Additional District Judge, (Fast Tract Court No.I), Thoothukudi, allowed the Interlocutory Application No.79 of 2009, it is seen that in O.S.No.57 of 2005 wherein, the plaintiff has filed a suit and the Court has passed a decree in favour of the plaintiff directing the defendant /appellant herein to pay a sum of Rs.33,80,300/- at the rate of 12% per annum and Rs.22,00,000/- from the order date to till the date of realisation and pay the plaintiff the cost of the suit. Before the trial the matter was listed on 23.06.2009, for cross examination of PW1 on 22.06.2009 this appellant had contacted his counsel and asked him to seek an adjournment stating that connected in C.R.P.No.621 of 2009 was posted on 17.07.2009. Hence, the learned counsel sought an adjournment. The counsel filed a petition for seeking adjournment and the same was dismissed and the appellant was set exparte and the decree was passed on 29.06.2009. The appellant has contacted the lawyer to verify the next date of hearing and only come to know that he was set exparte on 29.06.2009 itself, hence, an Interlocutory Application to set aside the exparte order has filed in I.A.No.79 of 2009. On 01.07.2009, the counsel for the appellant filed an application I.A.79 of 2009 on the file of Additional District Judge (Fast Tract Court No.I), Thoothukudi. On 16.11.2009 the learned Judge passed the order stating that the application is hereby allowed on condition that the petitioner in that I.A.No.79 of 2009, shall deposit 1/3rd of the decree amount on or before 16.11.2009 failing which his application shall stand automatically dismissed. No costs. Call on 16.11.2009. But, on 16.11.2009 payment of 1/3rd decree amount was not paid due to his inability to mobilize the amount. Hence the application was dismissed. The appellant counsel submits that petitioner could not pay the amount on 16.11.2009 since the amount was huge and for non payment the petition was dismissed with out any further order.

3. Against the order of the lower Court, this Civil Miscellaneous Appeal has been filed. The Court notice and the private notice was served on the other plaintiff namely Rajeshwari and Nagaraj/ respondents herein. There is no advocate representing them has filed any vakalat and their names are printed and their names were also called out, no one appeared. Hence, the appeal is taken up for final disposal and after hearing the learned counsel appearing for the appellant, this Court orders as follows:

4. The order of the lower Court has to be set-aside since the application filed petition, which a period of limitation i.e. within thirty days and the period for payment of 1/3rd of decree amount was very short period and the lower Court ought to have



given some more time. Since the amount to be deposited was a huge amount (i.e.) the 1/3rd of the amount works out at Rs.11,15,490/-.

5. This Court feels that this amount is to be deposited is not reasonable and could not be paid within the said time. The lower Court ought to have given some more time and passed without considering the plight of the defendant, the lower Court, seems to have passed an order without any reason and if, some more breathing time had been given to the defendant, he would have had a chance to defend his case. This Court has finds that the lower Court has not given sufficient reasons for passing such order and hence this Court finds infirmity in the order of the lower Court. The learned counsel would cite the Judgments in Palanisamy Vs. Muthusamy Gounder reported in 2010(5) CTC 853, P.Krishnan Vs. Indian Overseas Bank, Trichy, reported in 1997-1-L.W.173, D.K.Bhaskaran Vs. Barton Trust reported in 2007(5) CTC 198, C.Seerangan Vs. M.Subramaniam reported in 2010-4-L.W-119.

6. This Court is of the opinion that the lower Court order is very harsh on the appellant/petitioner/defendant and the same is set aside and the suit is remanded back to the lower Court for speedy disposal. This Court concludes that the appellant/defendant should be given an opportunity to defend his case and the appellant/defendant is directed to pay a cost of Rs.10,000/- (Rupees Ten Thousand only) to the respondents/plaintiffs within a period of two weeks from the date of receipt of a copy of this order and the 1/3rd of the decretal amount shall be deposited to the credit of lower Court within a period of four weeks thereafter. On such deposit being made by the appellant/defendant, the Trial Court is directed to restore the suit and since the matter is of the year 2005 (original suit No.57 of 2005), the Additional District Court, (Fast Track Court No.I), Thoothukudi is directed to complete the proceedings as expeditiously as possible, preferably within six months after paying the cost. It is seen that the suit was at the stage of trial, hence the parties are directed to co-operate with the proceedings without taking any adjournments.

7. With the above observations and directions, this Civil Miscellaneous Appeal is Allowed. No Costs. Consequently, the connected Miscellaneous Petition M.P.(MD)No.1 of 2011 is closed.

Sd/-
Assistant Registrar(CS-II)

/True Copy/



To

1.The Additional District Judge,
(Fast Tract Court No.I),
Thoothukudi.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to M/S.G.Prabhu Rajadurai, Advocate SR.No. 85327

C.M.A(MD) No.1099 of 2011

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JM/MR KKR/SAR 4/20.12.2017/4P/4C