

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 02.03.2018

ORDER PRONOUNCED ON : 09.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.No.1543 of 2018

in

C.S No.829 of 2010

S.Rajesh Kumar

...Applicant / plaintiff

Vs.

1.C.Bakthavatchalam

2.B.Chandrasekar

3.M/s.Sree Varadaraja Benefit Fund Ltd.,
Rep. by Director - Secretar,
No.149/1, Old No.63/1,
Purasaiwalkam High Road,
Chennai - 600 007.

...Respondents / defendants

सत्यमेव जयते

PRAYER:-

Application is filed under Order XIV Rule 8 of the Original Side Rules r/w. Section 151 of Code of Civil Procedure, praying to strike down the defense raised by the defendants 1 and 2 and decree the suit in C.S.No.829 of 2010 as prayed for or on the alternative direct the defendants 1 and 2 to furnish bank guarantee or other immovable property as collateral security for due compliance of the orders passed in O.A.No.6587 of 2010 in C.S.No.829 of 2010.

For Applicant : Mr.S.Udayakumar

For Respondents : Mr.Kovi Ramalingam for R1 and R2
Mr.N.M.C.Babu for R3.

ORDER

This application has been taken out by the plaintiff in the suit seeking to strike out the defence of the defendants 1 and 2 and decree the suit as prayed for or in the alternative to direct the defendants 1 and 2 to furnish Bank guarantee or other immovable property as collateral security for due compliance of the order passed in O.A.No.6587 of 2010 in C.S.No.829 of 2010.

2. The suit in C.S.No.829 of 2010 has been filed by the applicant herein seeking a declaration that he is the absolute owner of the property having purchased the same in the auction sale conducted by the 3rd defendant under a registered sale deed dated 20.07.2009 bearing document No.2613 of 2009, for recovery of possession and to direct the defendants to pay a sum of Rs.25,000/- per month as damages for use and occupation from 20.07.2009 viz., the date of purchase till dated of handing over vacant possession.

3. Pending the suit an application in A.No.6587 of 2010 was filed by the plaintiff to direct the defendants to pay a sum of Rs.25,000/- per month as damages for use and occupation of the suit premises.

4. The claim of the plaintiff is that the defendants 1 and 2 who are the owners of the suit property had borrowed monies by mortgaging the property in favour of M/s. Sree Varadaraja Benefit Fund Ltd. The mortgage deed empowered the mortgagee viz., M/s. Sree Varadaraja Benefit Fund Ltd., to sell the property without intervention of the Court as envisaged under Section 69 of the Transfer of Property Act. Exercising the said power, it is claimed by the plaintiff, that M/s. Sree Varadaraja Benefit Fund Ltd., had requested the auctioneers viz., M/s. Jagdish Auctioneers & Co. to sell the property by public auction.

5. It is also claimed that the said auctioneer had put up the property for auction on 11.07.2009 and the plaintiff was a successful bidder at Rs.10,10,000/-. It is also claimed by the plaintiff that he had paid the entire sale consideration and a sale deed was executed by the said M/s. Sree Varadaraja Benefit Fund Ltd., in favour of the plaintiff on 20.07.2009 and the same was registered as document No.2613 of 2009 in the Office of the Sub-Registrar, Purasaiwalkam.

6. The plaintiff thus claiming title had come forward with the above suit for declaration and possession. While disposing of the application in A.No.6587 of 2010 by an order dated 04.12.2012, this Court had issued following directions:

“The defendants 1 and 2 are accordingly directed to

pay a sum of Rs.8,000/- (Rupees eight thousand only) per month as mesne profit from the date of filing of the petition. The arrears be paid within four months from today and the defendant No. 1 and 2 shall continue to pay Rs.8,000/- (Rupees eight thousand only) per month during the pendency of the suit.”

7. Claiming that the said order has not been complied with despite lapse of nearly five years the plaintiff has come forward with the present application in A.No.1543 of 2018 seeking to strike out the defence.

8. When this application came for hearing on 21.02.2018, I had granted time to the defendants to comply with the said order dated 04.12.2012 by 01.03.2018. The said order also has not been complied with and it is now stated by the learned counsel for the defendants that they had filed an appeal along with an application to condone the delay challenging the order dated 04.12.2012. Be that as it may, the question now falls for consideration is that whether the defence of the defendants could be struck off for non-compliance with the order dated 04.12.2012.

9. The power of the Court to strike out the defence though not expressly conferred on the Court is undoubtedly available under its inherent powers under Section 151 of the Code of Civil Procedure. The circumstances under which the defence can be struck off has been a subject matter of several decisions of this

Court.

10. In *(Dasari) Venkatacharyulu Vs. Manchala Yesobu and another* reported in *AIR 1932 Madras 263*, a Single Judge of this Court had held that the Court had jurisdiction under Section 151 of the Code of Civil Procedure to strike out the defence. In that case a Civil Revision Petition was filed against an order of the lower Court striking out the defence for non compliance with an order directing the defendant to furnish security in respect of standing crops for which an appointment of receiver was sought for. Since the security was not furnished, the trial Court had issued a warning if the order is not complied with the defence would be struck off. Despite such warning the 3rd defendant in the said suit failed to make the deposit, consequently, his defence was struck off by the Court on 4th March 1930.

11. While dealing with the Civil Revision Petition this Court had pointed out that there is no express provisions in the Code of Civil Procedure which would cover a case of this kind. However, the Court went on to hold that the conduct of the defendant 3 could be taken note of by the Court and the Court had the power under Section 151 of the Code of Civil Procedure to strike out the defence. While disposing of the Civil Revision Petition this Court had observed as follows:

“All that I can say is that this is one of the orders

which the Court would be entitled to make in order to see that the ends of justice are satisfied or that the process of the Court is not abused. ”

12. However, a Division Bench of this Court in ***R.T.Ramayya Servai Vs. R.Sama Ayyar and others*** reported in ***AIR(34) 1947 Madras 92*** had doubted the correctness of the decision in ***AIR 1932 Madras 263***. The Division Bench had observed that whether the extreme step of striking out defence could be exercised by the Court in the cases where the defendant fails to comply with certain order which directs him to pay a certain amount to the receiver. In doing so the Division Bench observed as follows:

“If the defendant did not pay the amount in spite of repeated orders it may be that he rendered himself liable to be proceeded against for contempt of Court. The proper procedure would have been to direct the receiver to take possession forthwith and to take other proceedings for recovery of the amount due from the defendant. But does not justify the drastic order of striking out the defence if the amount ordered to be paid was not paid within the time given.”

13. In ***Samou Jean Pierre Vs. Jacqueline Samou*** reported in ***1994(1) MLJ 382*** another Division Bench of this Court had considered the question whether the defence of the husband could be struck off for non-compliance with an order directing payment of interim maintenance. After considering various

decisions of this Court, the Division Bench had quoted from the judgment of this Court in *Jaganmohan Rao Vs. K.Swarupa* reported in **77 LW 488**, wherein, Chief Justice Ramachandra Iyer had held that striking out a defence is a serious matter, and it has to be done after taking every circumstance into consideration, the Division Bench has also extracted a portion of the judgment in *Jaganmohan Rao Vs. K.Swarupa* case which reads as follows:

“ At the same time, I am of opinion that the order of the learned Judge is not in accordance with sound rule of procedure. Striking out a defence is a serious matter, and it has to be done after taking every circumstances into consideration. There can be no anticipatory or conditional order for striking out a defence for the simple reason that the Court has got to consider the materials as they exist on the date when the order for striking out is passed. In the present case, what the learned Judge had done is to strike out the defence a month after the date of the order if a particular thing was not done. An order of that kind would preclude even the Court from taking into account the relevant circumstances on the date when the order is to become operative whether the default should be condoned or not. It is extremely undesirable that Courts should so bind themselves. While, therefore, holding that it will be competent for the Court in a matrimonial action to strike out the defence if there be proved contumacy on the part of the party, I must also say that an order striking out the defence must be a present and not a prospective order to

come into existence on an uncertain event happening or not happening. Such conditional orders are no doubt passed in discretionary matters; but they are inappropriate to orders contemplating a striking out of a defence to an action. Plating a striking out of a defence to an action. I am, therefore, unable to sustain the order of the lower court.....”

14. In **Hema Vs. Parthasarathy** reported in **2002 (4) LW 839**, this Court had considered the effect of the failure on part of the husband to comply with an order directing payment of maintenance to the wife, where the husband had filed the main original Petition for divorce. The question that arose was whether the main proceedings could be dismissed for non-compliance with the order directing payment of interim maintenance and after considering various decisions of this Court the Hon'ble Mr. Justice A.S.Venkatachalamoorthy as he then was had observed as follows:

“ 11. True, in the Act there is no provision to the effect that in the event of default committed by a party in complying with the order of the Court, it would be open to the Court to dismiss the petition or strike off the defence, as the case may be. But at the same time, it has to be remembered that the Court is not powerless. Under Section 151 of the Code of Civil Procedure, which is indisputably applicable to proceedings under the Act, the Court may exercise its powers for serving the ends of justice or for prevention of the abuse of the process of

Court. Of course, in this case, it cannot be said that the respondent had done something which would amount to abuse of process of Court. But, in order to serve the ends of justice, in a case of this nature, the Court can consider the request to dismiss the petition filed by the respondent/ husband.

14. Hence the legal position is that if the husband fails to make payment of interim maintenance or litigation expense, as ordered by the Court, then the wife can file an application praying the Court to dismiss the petition or strike of the defence, as the case may be. In such case, the Court will consider the same and dispose it of on merits. In case if the Court comes to the conclusion that the application has to be allowed, then it should not straightway pass an order but give another opportunity giving reasonable time, minimum of three weeks, so that the husband, if he desires to make the payment, can do so. Only on his failure to make the payment, the original petition can be dismissed or defence can be struck off. ”

15. The legal position that emerges from the judgments cited above is that, of course, the Court is possessed of the powers to strike out the defence in an appropriate case but the same cannot be done just for the asking. It should be shown that the order, the non-compliance of which is complained of, expressly stated that such non-compliance would result in the defence being struck off. That is not the case here. The order dated 04.12.2012 passed by this Court does not say that the result of non-compliance would be striking off the

defence of the defendants. Therefore, at this distant point of time, I do not think that it would be proper to visit the defendants with the serious consequence of striking out the defence.

16. It is also stated that the defendants have questioned the very sale and have filed a suit for redemption of mortgage which is pending before the City Civil Court, Chennai. This being so, I do not think that this is a fit case where defence of the defendants could be struck off for non-compliance of the order dated 04.12.2012. Leaving it open to the plaintiff to workout his rights regarding non-compliance of the order dated 04.12.2012, this application stands dismissed.

09.03.2018

dsa

Index : Yes / No

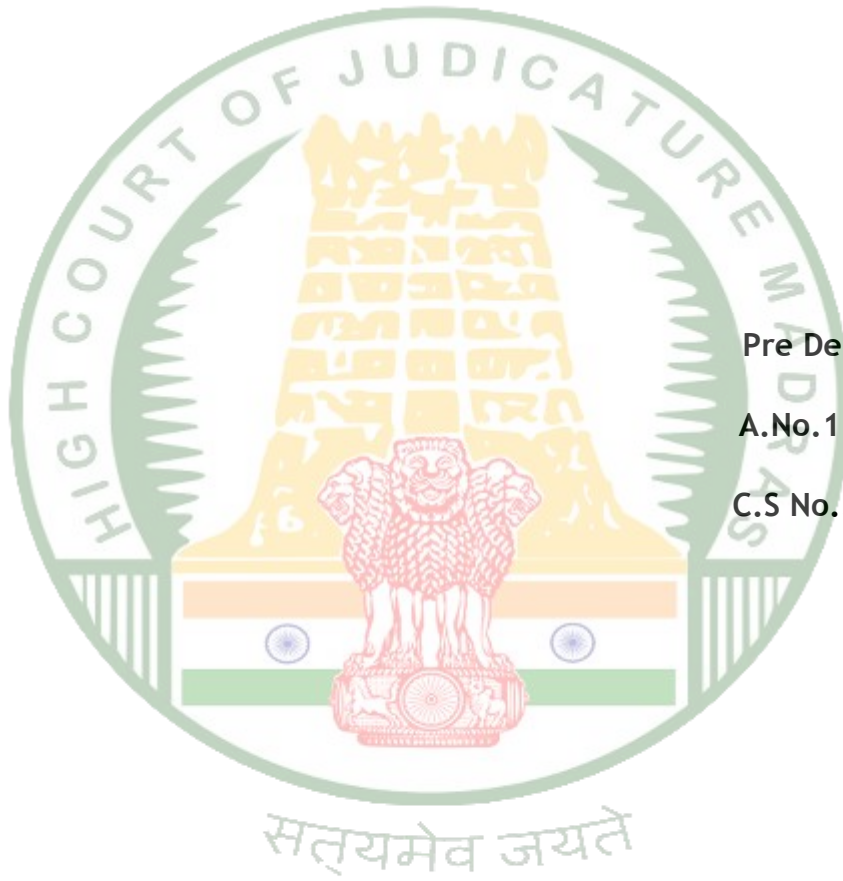
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R.SUBRAMANIAN,J.

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Pre Delivery Order
in
A.No.1543 of 2018
in
C.S No.329 of 2010

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