

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:09.03.2018

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL  
AND  
THE HONOURABLE Mr. JUSTICE S.VAIDYANATHAN

O.S.A.No.13 of 2018

S.Mukanchand Bothra ... Appellant

Vs.

1.M.Pawan Kothari ... contesting Respondent

2.Jhaveri Lal

3.Bhimsa

4.Rattan

(Respondents 2 to 4 given up) ... Respondents 2 to 4

Prayer: Appeal filed under Order XXXVI Rule 9 of the O.S. Rules r/w Clause 15 of the Letters Patent against the Order dated 11.12.2017 made in Application No.4639 of 2017 in C.S.No.703 of 2003 on the file of this Court.

For Appellant : Power Agent -  
Mr.M.Gagan Bothra

For 1<sup>st</sup> Respondent : Mr.Nagusha

For RR 2 to 4 : Given up

JUDGMENT

[Judgment of the Court was delivered by M.VENUGOPAL, J.]

The Appellant/Plaintiff has focussed the present Original Side Appeal (as an aggrieved person) as against the impugned order dated 11.12.2017 in Application No.4639 of 2017 in C.S.No.703 of 2003 passed by the Learned Single Judge in allowing the Application and thereby setting aside the Exparte Decree passed in the main suit.

2.At the outset, this Court points out that at the request of the Appellant/Plaintiff, the Respondents 2 to 4 are given up in this Appeal.

3.Earlier, the Learned Single Judge, while passing the impugned order in Application No.4639 of 2017 in C.S.No.703 of 2003 had observed the following:

"Pursuant to the order dated 21.11.2017, publication has been effected in one issue of 'News today' as well as 'Malai Murasu'. Despite such service, the 1<sup>st</sup> Respondent/Plaintiff has not chosen to appear."

and considering the reasons assigned in the affidavit and the nature of the Exparte is one for suit property, had set aside the said 'Exparte Decree'.

4.Assailing the correctness, validity and legality of the impugned order dated 11.12.2017 in Application No.4639 of 2017 in C.S.No.703 of 2009 passed by the Learned Single Judge, the Appellant/Plaintiff has filed the present Original Side Appeal by taking a plea that the Appellant was arrested in a false case and was detained under Act 14 of 1982 and was in Prison till November, 2017.

5.The Appellant takes a plea that the Learned Single Judge had failed to appreciate that on 11.12.2017 when the case was 'Listed', the Appellant/Plaintiff's name was not printed in the cause list, but the cause list reads as "Notice sent - Service awaited" and hence, there should have been a direction to the Registry to print the name of the Appellant, which is the usual practice, followed in this Court.

6.The Appellant proceeds to point out that the Learned Single Judge erred in not observing in the impugned order in Application No.4639 of 2017 that the notice was issued to the Appellant/Plaintiff dated 03.11.2017 requiring his appearance on 20.11.2017 and at that point of time, the Appellant/Plaintiff and his son were in Prison. Also, it is projected on the side of the Appellant that he had furnished a detailed reply from the Prison through the Jailor to the Respondent stating that he would not be in a position to appear since he was in Prison and therefore, sought time. In this regard, the Respondent had failed to produce the said letter before this Court and if the Respondent had furnished the said letter, then, the Learned Single Judge would have known the fact situation and granted time for the appearance of the Appellant/Plaintiff.

7. On behalf of the Appellant, it is represented that the Learned Single Judge erred in Law by directly allowing the Application No.4639 of 2017 without impleading the Applicant in the main suit in C.S.No.703 of 2003. Apart from that, the Learned Single Judge had failed to appreciate that the Applicant is a third party to the decree obtained by the Appellant/Plaintiff.

8. It is the stand of the Appellant that the Respondent based on the order passed in Application No.4639 of 2017 dated 11.12.2017 had again started the construction in that suit property which is against the order passed in Application No.1052 of 2016 in E.P.No.111 of 2016. According to the Appellant, this Court had passed an order of injunction restraining the Defendants or his agents, representatives from putting up construction pending disposal of the Execution Proceedings and in short, the Respondent had given a complete go-by to the order passed by this Court in Application No.1052 of 2017, which is still alive, in force and binding on the Respondent.

9. Per contra, it is the submission of the Learned Counsel for the 1<sup>st</sup> Respondent that the 1<sup>st</sup> Respondent/Applicant is the absolute owner of the vacant building site at premises bearing Door No.45 Old No. 23, Veerappan Street, Sowcarpet, Chennai - 600 079, measuring an extent of 1584 square feet, having obtained the same by way of registered Settlement Deed dated 27.01.2016 executed by his parents viz., I.Manakchand Jain and M.Manju. Originally, the said property was purchased by his parents through registered sale deed dated 07.10.2003 from Jawarlal P.Muthu and 4 others.

10. The Learned Counsel for the 1<sup>st</sup> Respondent strenuously contends that subsequent to the 1<sup>st</sup> Respondent purchasing the property has become the owner of the property and that he had obtained an approved plan from the concerned development authorities for putting up construction in the property in question. Also, on 10.06.2017 the 1<sup>st</sup> Respondent had commenced the construction work in his property and the 1<sup>st</sup> Respondent/Plaintiff's representatives had raised their objections to him from carrying out the work of construction in his property which is mentioned as B Schedule property in the above suit by stating that the 1<sup>st</sup> Respondent/Plaintiff had obtained a Decree for permanent injunction in C.S.No.703 of 2003 on the file of this Court against his parents' vendors that the construction in his property shall be made only by leaving 3 feet gap from the 1<sup>st</sup> Respondent's property.

11. The Learned Counsel for the 1<sup>st</sup> Respondent proceeds to point out that on 14.06.2017 the Appellant/Plaintiff (1<sup>st</sup> Respondent) having obtained an approved building plan for the construction of ground floor and first floor building in his

property which is described as A schedule property in the suit Plaintiff, had illegally constructed 6 storied building in his property had filed the suit in C.S.No.703 of 2003 on the file of this Court seeking relief of damages and permanent injunction by restraining some of his parents' vendors viz., Jawaharlal P. Mehta and Bhismachandra P. Mehta by misdescribing them as Jhaveri Lal and Bhisma, had obtained an Exparte Decree and Judgment dated 06.03.2008 against them as well as one Rattan, who is no way connected with his property.

12.Further, the Learned Counsel for the 1<sup>st</sup> Respondent brings it to the notice of this Court that the Appellant/Plaintiff (1<sup>st</sup> Respondent in A.No.4639 of 2017) had filed the suit in C.S.No.703 of 2003 on 06.10.2003, but on the other hand, the property was purchased by the 1<sup>st</sup> Respondent's parents on the next day viz., 07.10.2003 without any knowledge about the suit filed by the Appellant/Plaintiff against some of his parents' vendors in the manner aforesaid. Moreover, none of the vendors of his parents had also ever disclosed anything about the suit instituted by the Appellant/Plaintiff against them or about its disposal on 06.03.2008 and therefore, the 1<sup>st</sup> Respondent's parents would not either implead themselves as parties to the suit or could they defend the suit under Order 22 Rule 10 of the Civil Procedure Code as they are the transferees pendente lite.

13.The principal plea taken on behalf of the 1<sup>st</sup> Respondent is that the 1<sup>st</sup> Respondent, in his Application No.4639 of 2017 in C.S.No.703 of 2003 on the file of this Court, at paragraph 8, had averred inter alia that his right and interest in the B schedule property greatly affected because of the Exparte Judgment and Decree suffered by this parents' vendors and since the Defendants 1 and 2 had not taken any steps to set aside the Exparte Decree and since he is claiming title over the B schedule property under the Defendants 1 and 2, who are his predecessor in title in the above suit, he had filed the Application to set aside the Exparte Judgment and Decree dated 06.03.2008 within the limitation period of 30 days from the date of his knowledge on 14.06.2017.

14.According to the Learned Counsel for the 1<sup>st</sup> Respondent/Applicant, the Learned Single Judge took into consideration of the reasons ascribed by the 1<sup>st</sup> Respondent/Applicant in Application No.4639 of 2017 and ultimately, allowed the said Application, by setting aside the Exparte Decree passed in the suit.

15.The Learned Counsel for the 1<sup>st</sup> Respondent projects a legal argument that the Appellant/Plaintiff had not shown any sufficient reason as to how effectively he was prevented from

taking part in the proceedings in Application No.4639 of 2017, when it was dealt with by the Learned Single Judge on 11.12.2017. Further, the Appellant/Plaintiff had not stated that he was on Jail on the date of passing of the order by the Learned Single Judge on 11.12.2017. However, he had only stated that he was in Jail on 08.11.2017. As such, the Appellant/Plaintiff had not ascribed any sufficient or good reason that prevented him to appear before this Court at the time of passing of the order in Application No.4639 of 2017.

16.It is to be borne in mind that a representative of Defendant can apply under Order 9 Rule 13 of the Civil Procedure Code as per decision S.Venkatasubbaier V. S.Krishnamurthy, (1915) ILR 38 Mad 442. Likewise, a person deriving title through Plaintiff can apply under Order 9 Rule 9 of the Civil Procedure Code, as per decision Yellapragada Gopalakrishnamurthi V. Pettu Poda Madireddi and others reported in AIR 1949 Mad 882.

17.In fact, the purpose of Section 146 of the Civil Procedure Code is to facilitate the exercise of the rights by individuals to whom they come to be vested by devolution or assignment and being a beneficial provision should be construed liberally, as per decision of the Hon'ble Supreme Court in Sailabala V. Nirmala, AIR 1958 SC 394.

18.Suffice it for this Court to point out that the expression claiming under Section 146 of the Civil Procedure Code is wide enough to include cases of devolution and assignment specified in Order 22 Rule 10 C.P.C.

19.It is to be pointed out that when a Court of Law deals with an Application/Petition to set aside the Exparte Decree, when it hears the parties and also even in the absence of concerned Party/ Litigant, it is open to pass an appropriate detailed reasoned order as it deems fit and proper, of course, based on the facts and circumstances of the case which float on the surface, in a given case.

20.Ordinarily, an order passed by a Court of Law ought to be a reasoned one. Atleast, an outline of process of reasoning ought to be there. It cannot be gainsaid that a reasoned order will have an appearance of Justice. Even an unreasoned order may be just from the perspective of a Litigant who had obtained an order in his favour. But, in so far as the aggrieved person is concerned, if necessary reasons are not reflected in the particular order/ impugned order passed by the Competent Court, then, undoubtedly, the said affected Party/Litigant, as 'An aggrieved person', is entitled to challenge the correctness of the order, in the manner known to Law and in accordance with Law.

21.As far as the present case is concerned, this Court, on going through the impugned order dated 11.12.2017 in Application No.4639 of 2017, is of the considered view that the Learned Single Judge, after observing that pursuant to the order dated 21.11.2017, publication was effected in one issue of 'News Today' as well as 'Malai Murasu' and despite such service, the Appellant/ Plaintiff (1<sup>st</sup> Respondent) has not chosen to appear and 'considering the reasons assigned in the affidavit and the nature of the Exparte Decree is one for suit property', had accordingly set aside the same, in a cryptic manner, which, in the considered opinion of this Court, is not per se a correct one in the eye of Law.

22.Viewed in that perspective, this Court, without traversing upon the merits and contentions of the subject matter in issue and also not delving deep any further, simpliciter, is inclined to interfere with the impugned order dated 11.12.2017 in Application No.4639 of 2017 and sets aside the same.

23.In fine, the Original Side Appeal is allowed, leaving the parties to bear their own costs. The Impugned Order dated 11.12.2017 in Application No.4639 of 2017 is set aside. The matter is remitted back to the Learned Single Judge for fresh consideration of Application No.4639 of 2017 in accordance with Law, as expeditiously as possible. Further, the Learned Single Judge is requested to pass fresh orders in A.No.4639 of 2017, of course, after providing necessary opportunity to the respective parties. It is open to the Appellant to file counter to the Application No.4639 of 2017. Also, liberty is granted to the parties to raise all factual and legal pleas before the Learned Single Judge.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

Sgl  
TO  
THE SUB ASSISTANT REGISTRAR,  
ORIGINAL SIDE, HIGH COURT, MADRAS.

+2cc to Mr.S.MUKANCHAND BOTHRA, P-IN-P, S.R.No.18090  
+1cc to Mr.N.NAGUSHA, Advocate, S.R.No. 18315

O.S.A.No.13 of 2018

RSI (CO)  
TR(15/03/2018)