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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.04.2018

(Reserved on 09.02.2018)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (NPD) (MD) No.10 of 2018

and

CMP (MD) No.61 of 2018

Nadar Mahajana Sangam,
Kamaraj Polytechnic College Paribalana Sabai,
Reg.No.56/1983 by its Secretary,
T.Udayakumar,
43/2, Meenakshi Salai,
Irulappapuram,
Kottar Post,
Nagarcoil.

... Revision Petitioner/Respondent/
Petitioner/Plaintiff

vs.

G.Karikol Raj ... Respondent/Petitioner/1st Respondent/
1st Defendant

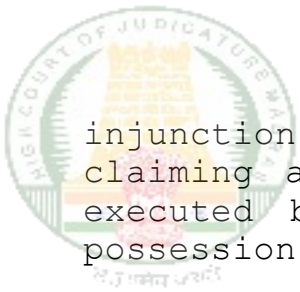
Petition filed under Section 115 of the Code of Civil Procedure, against the petition and order in I.A.No.492/2017 in I.A.No.509/2016 in O.S.No.676/2016 dated 13.11.2017 on the file of the Second Additional Sub Court, Madurai.

For Petitioner : Mr.S.Jeyasingh
For Respondent : Mr.B.Saravanan

ORDER

This revision petition has been filed against the petition and order in I.A.No.492/2017 in I.A.No.509/2016 in O.S.No.676/2016 dated 13.11.2017 on the file of the Second Additional Sub Court, Madurai.

2.The petitioner is the plaintiff in O.S.No.676/2016 on the file of II Additional Sub Court, Madurai. The said suit was filed against the respondent herein/1st defendant, one T.Selva Kumar and the District Registrar(Societies), Madurai South, Madurai, who are defendants 2 and 3 respectively, to declare the general body meeting held on 05.12.2015 in the petitioner society as valid and for permanent injunction. The petitioner is the elected secretary of the Nadar Mahajana Sangam, Kamaraj Polytechnic College Paribalana Sabai, which is a government aided private polytechnic college. While so, the defendants 1 and 2 attempted to intervene into the day to day affairs of the society and tried to vacate the petitioner from the office of the society. Hence, the petitioner filed the present suit along with I.A.No.509/2016 for temporary



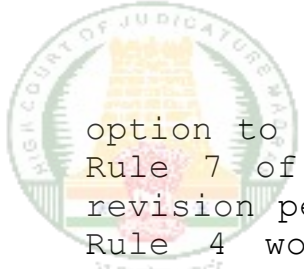
injunction restraining the defendants, their men, agents from claiming any rights over the suit society through any document executed by them and also from interfering with the peaceful possession and enjoyment of the petitioner in the suit society.

3. In the interlocutory application, the respondent herein/1st defendant appeared through his counsel on 07.11.2016 and two other defendants were absent and they were set *exparte*. The respondent herein had continuously got adjournments for filing counter and written statement in this case. Finally, on 23.10.2017, the learned Additional Sub Judge allowed I.A.No.509/2016 *exparte* holding that despite sufficient opportunities, the respondent did not file counter. Thereafter, the respondent filed I.A.No.492/2017 in I.A.No.509/2016 to set aside the order passed in I.A.No.509/2016, in which, the revision petitioner filed detailed counter affidavit raising the question of maintainability of the set aside petition.

4. Learned counsel for the petitioner would submit that Order 9 Rule 7 CPC, will generally apply for setting aside the *ex parte* decree made in the suit proceeding only and it will not apply for the *exparte* orders passed in the interlocutory applications. To set aside the order passed in the injunction petition, the Civil Procedure Code provides a separate provision namely, Order 43 Rule 1(r) CPC which is an appeal remedy. Therefore, learned counsel for the petitioner contends that the respondent ought to have invoked Order 43 Rule 1(r) CPC by filing appeal and I.A.No.492/2017 filed under Order 9 Rule 7 and Section 151 CPC is not maintainable. In support of his contentions, learned counsel for the petitioner relied upon the judgment in *Jaswant Singh and others vs. Parkash Kaur and another* reported in AIR 2017 SC 5275.

5. Learned counsel for the respondent would submit that the respondent filed petition in I.A.No.492/2017 to set aside the *exparte* order in I.A.No.509/2016 and the same was allowed on payment of cost of Rs.1,000/- to the petitioner and the respondent complied with the same and therefore, I.A.No.492/2017 was allowed. According to the learned counsel, the Trial Court is vested with the powers under Order 39 Rule 4 to discharge, vary or to set aside the order of injunction on the application made by any party dissatisfied with such order.

6. On the contention of the petitioner that the *exparte* order passed in the interlocutory application is only appealable order under Order 43 Rule 1(r) CPC and therefore, I.A.No.492/2017 filed under Order 9 Rule 7 and Section 151 CPC is not maintainable, learned counsel for the respondent submitted that Order 43 Rule 1(r) provides that an appeal shall lie from an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order 39. The law is well settled that the party aggrieved is entitled to exercise his



option to file a petition either under Order 39 Rule 4 or Order 9 Rule 7 of CPC or to file an appeal. If the contention of the revision petitioner is accepted, then the provision under Order 39 Rule 4 would be rendered redundant. Further, Section 141 CPC provides that the procedure provided in the court in regard to suits shall be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction. Therefore, the respondent can file petition to set aside the ex-parte order in the interlocutory application either under Order 39 Rule 4 or under Order 9 Rule 7 of CPC and there is no illegality in the order passed by the Trial Court entertaining such petition. Therefore, the judgment relied on by the petitioner reported in AIR 2017 SC 5275 is not applicable to this case as the facts of the present case is different from the reported judgment.

7. In support of his contention, learned counsel for the respondent relied on the following judgments:-

(i) Abdul Shukoor Sahib vs. Umachander and others reported in 1976 SCC Online Mad 58 : (1976) 89 LW 330.

(ii) Iranagouda Basanagouda Biradar vs. Basanagouda Veeranagouda Biradar reported in 1995 SCC Online Kar 486.

8. Heard the learned counsel for the petitioner as well as the respondent and perused the materials available on record.

9. This Court in several judgments has held that no appeal lies against an ex parte order of injunction under Order 39 Rules 1 and 2 CPC and the remedy for the aggrieved person even if he is a stranger is to move the trial Court of the first instance. A similar view has been taken in the case of *Vokkaligara Sanggha vs. Pradeep* reported in ILR 1994 KAR 1653, wherein, this Court has held that order in the nature of mandatory injunction will not lose its character though the order is passed by invoking Order 39 Rules 1 and 2 CPC and therefore, the only remedy to the appellants therein is to approach the jurisdictional court and file an application for setting aside the order under Order 39, Rule 4 CPC and without invoking such procedure, if any appeal is filed, it is not maintainable.

10. Perusal of the records shows that the interim order has been granted ex parte stating that the respondent did not file his counter but not on merits and therefore, the judgment relied on by the petitioner is not applicable to the present facts and circumstances of the case. The only remedy available to the respondent is to file a petition to set aside the ex parte order before the Trial Court which has been rightly done by the respondent as has been settled by this Court in various cases. Therefore, the order of the learned Judge does not warrant any



Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

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/True Copy/

Sub Assistant Registrar

To

The II Additional Sub Judge,
Madurai.

+1cc to Mr.S.Jeyasingh ,Advocate Sr.No.61559

+1cc to Mr.B.Saravanan, Advocate Sr.No.61595

BALA

VB/SV/MMS/SAR1/18/04/2018/4P/4C

order made in
CRP (NPD) (MD) No.10 of 2018
17.04.2018