



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.02.2018

CORAM:

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THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P (MD) No.351 of 2018 (NPD)

and

C.M.P (MD) No.1597 of 2018

T.Paramasivam

... Petitioner/Respondent/Defendant

Vs.

M.Vadivel

... Respondent/Petitioner/Plaintiff

PRAYER: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to set aside the fair and decreetal order dated 27.11.2017 passed in E.P.No.80 of 2016 in O.S.No.250 of 2013 on the file of the District Munsif Court, Palani and to allow the same.

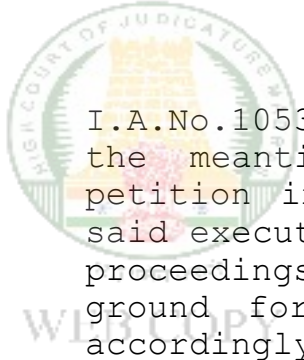
For Petitioner : Mr.C.Gangai Amaran

ORDER

This Civil Revision Petition has been filed by the revision petitioner / defendant as against the order allowing the execution petition filed by the respondent / plaintiff.

2. The facts of the case, in nutshell, are as follows:

The respondent / plaintiff has filed the suit in O.S.No.250 of 2013 for permanent and mandatory injunction to remove the encroachment. An ex parte decree was passed in favour of the respondent / plaintiff on 27.02.2015. For setting aside the said ex parte decree, the revision petitioner / defendant had filed an application in I.A.No.788 of 2015. Due to non appearance on the side of the revision petitioner / defendant, the said petition was dismissed for default on 14.09.2015. The revision petitioner / defendant had filed an application in I.A.No.1053 of 2015 to restore the application in I.A.No.788 of 2015 and the same was allowed with a condition to pay a sum of Rs.500/- to the respondent / defendant within a stipulated time. As there was no representation on either side and the conditional order was not complied with, the Court below has dismissed the said petition for default. For filing a petition to set aside the said order, there was a delay of 16 days. The revision petitioner / defendant, therefore, filed I.A.No.1193 of 2016 to condone the delay in filing a petition to restore



I.A.No.1053 of 2015 and now the same is pending for adjudication. In the meantime, the respondent / plaintiff has filed execution petition in E.P.No.80 of 2016 and after hearing both sides, the said execution petition was allowed holding that the pendency of the proceedings for setting aside the *ex parte* decree, cannot be a ground for rejecting the relief of delivery of possession and accordingly, ordered for delivery on 06.01.2018. Aggrieved by that order, the revision petitioner / defendant has filed this civil revision petition.

3. Heard the learned counsel for petitioner and perused the records carefully.

4. The only ground on which the revision petitioner / defendant sought to set aside the order passed by the Court below is that in view of the pendency of the proceedings for setting aside the *ex parte* decree, the execution proceeding ought not to have been proceeded with by the Court below.

5. The suit is of the year 2013. The *ex parte* decree came to be passed on 27.02.2015. Though the revision petitioner / defendant has filed the petition to set aside the *ex parte* decree in time, he has failed to proceed with the same with due diligent which was also resulted in subsequent proceedings. The respondent / defendant has filed the execution petition only in the year 2016. The pendency of the proceedings for setting aside the *ex parte* decree cannot be a ground for not proceeding with the execution petition. The Court below has rejected the said contention of the revision petitioner / defendant, by relying on the decision of this Court reported in 2013-5-LW-478, wherein also it has been held as follows:

" ... As per Order 21 Rule 11(2) CPC, Execution Application was filed only by the respondents / decree-holders, seeking delivery of possession, pursuant to the sale deed, being executing through Court. In the Counter, the revision petitioner, who is the respondent/judgement - debtor before the Court below has stated that he had filed an application to set aside the *ex parte* decree and there was a delay of 309 days in filing the said application and hence, he filed an application in I.A.No.446 of 2008 under Section 5 of Limitation Act to condone the delay and on that ground, he pleaded to dismiss the E.P. Filing a petition under Order 9 Rule 13 of the Code of Civil Procedure along with the petition under Section 5 of Limitation Act to condone the delay is not a legal defence before the Executing Court, when the matter is posted for delivery of possession....."

6. The Court below, after analysing the entire facts and circumstances of the case, has rightly allowed the petition. This Court does not find any reason to interfere with the order passed by the Court below.



7. In view of the above, this Civil Revision Petition is dismissed at the stage of admission itself. No costs. Consequently, connected Miscellaneous Petition is also dismissed.

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Sd/-
Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

To

The District Munsif,
Palani.

+ 1 CC TO Mr.C.GANGAI AMARAN, ADVOCATE IN SR No. 50036

GCG

TE/JC/SAR-4 : 20/04/2018 : 3P/3C

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