



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.01.2018
(Reserved on 16.11.2017)

WEB COPY

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (NPD) (MD) No.485 of 2017
and
CMP (MD) No.2311 of 2017

Bindhu ...Revision Petitioner/ Petitioner/
Respondent/Defendant.

vs.

S.S.Vijilal ... Respondent/Respondent/Petitioner/
Plaintiff

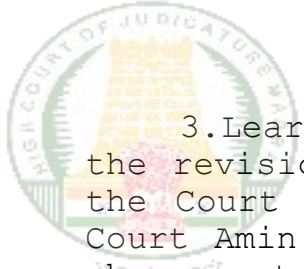
Petition filed under Section 115 of the Civil Procedure Code, to call for the records pertaining to the fair and decreetal order passed by the Sub Court, Kuzhithurai, in E.A.No.223 of 2014 in E.P.No.1 of 2012 in O.S.No.77 of 2011 dated 11.01.2017.

For Petitioner : Mr.K.P.Narayanakumar
For Respondent : Ms.J.Anandhavalli

ORDER

This revision petition has been filed to call for the records pertaining to the fair and decreetal order passed by the Sub Court, Kuzhithurai, in E.A.No.223 of 2014 in E.P.No.1 of 2012 in O.S.No.77 of 2011 dated 11.01.2017.

2.The revision petitioner is defendant and the respondent is plaintiff in O.S.No.77 of 2011 on the file of the Sub Court, Kuzhithurai. The suit is for specific performance of contract of sale. The plaintiff sent Ex.A2-suit notice to the defendant and the defendant refused it which has been marked as Ex.A3. The defendant called absent and set ex parte and the suit was decreed ex parte by judgment dated 21.09.2011. Thereafter, the decree-holder/respondent herein filed E.P.No.1 of 2012 for execution of sale deed, in which paper publication was effected. Subsequently, the respondent/plaintiff filed E.A.No.359 of 2013 for delivery of the property. After knowledge of passing of the ex parte decree, the defendant filed a petition to set aside the ex parte decree with a petition to condone the delay of 458 days in filing the petition to set aside the ex parte decree. The Trial Court declined to condone the delay and dismissed the petition, against which, the defendant has come up with the present revision petition.



3. Learned counsel for the revision petitioner contended that the revision petitioner has not received any notice or summon from the Court either in the suit or EP proceedings and only when the Court Amin visited to evict her from the plaint schedule property, she came to know about the ex parte decree. It is further contended that the revision petitioner purchased the property on 22.03.2011 from one Stanly John after payment of due sale consideration. While so, a sale agreement dated 11.04.2011 was created fraudulently by the respondent by forging the signature of the revision petitioner that is after 20 days from the date of sale deed.

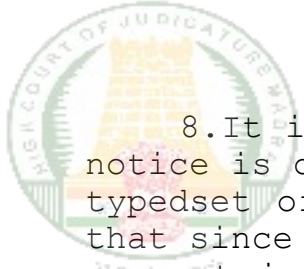
4. Learned counsel for the revision petitioner further contended that the revision petitioner is ready to compare her signature in the sale agreement with the admitted sale deed of the petitioner. According to him, comparison of signature without disturbing the present proceedings before the Execution Court will help the respondent/decreed holder, if he approached the court with clean hands and if the respondent refused for comparison of signature, then adverse inference has to be drawn against him.

5. It is his further contention that although the Trial Court accepted the illness certificate of the petitioner that she suffered from illness and took treatment between 20.10.2011 and 15.03.2014, held that the petitioner should have contacted her Advocate and filed the petition in time.

6. In support of his contentions, the learned counsel relied upon the following judgments:-

- 1) S. Nirmaladevi vs. T.R. Rangasamy reported in 2017 (3) CTC 445.
- 2) Esha Bhattacharjee vs. Managing Committee of Raghunathpur reported in 2013 (5) CTC 547.
- 3) Pavayammal vs. S.N. Chockalingam reported in 2009 (5) CTC 414.
- 4) Ajay Kumar Gulecha vs. J. Vijayakumar reported in 2015 (1) CTC 811.
- 5) Surya Devi Rai vs. Ram Chander Rai reported in (2003) 6 SCC 675.
- 6) Industrial Credit and Investment Corporation of India Ltd., vs. Grapco Industries Ltd., reported in (1999) 4 SCC 710.
- 7) Indian Bank vs. M/s. Satyam Fibres (India) Pvt Ltd., dated 9th August 1996.

7. Per contra, learned counsel for the respondent contended that the allegations of the revision petitioner that she has no knowledge about the suit and EP proceedings is false since she herself refused to receive the notice in suit and EP and therefore, holding that service is sufficient, suit has been decreed ex parte and in E.P., delivery has been ordered. It is further contended that from the medical certificate produced by the revision petitioner, the Trial Court held that the same does not prove the factum of immobilization during the relevant point of time to condone the delay.



8.It is further submitted that the allegation of non service of notice is disproved through paragraph 6 at page 15 of the additional typedset of papers filed by the petitioner, wherein, it is averred that since the petitioner was laid up due to illness, the petitioner was not in a position to appear before the Court on 16.08.2011 and 20.09.2011. The said averment would go to show that she was aware of the filing of the suit. The finding of the Trial Court in the suit and E.P, regarding refusal of notice by the revision petitioner remains unchallenged in this revision. It is also contended that the allegation of fraud and genuineness of the agreement being question of fact, the same can be ascertained only after considering the oral and documentary evidence let in by the parties.

9.In support of his contentions, the learned counsel for the respondent relied upon the following judgments:-

- 1)R.Ramachandran vs. G.Hariharan reported in (2001) 2 MLJ 417.
- 2)Kushro S.Gandhi vs. N.A.Gajdar reported in CDJ 1968 SC 184.
- 3)P.T.Thomas vs. Thomas Job reported in CDJ 2005 SC 564.
- 4)G.Jayaraman vs. Devarajan reported in CDJ 2007 MHC 742.
- 5)A.P.Ramasamy vs. Dhanalakshmi reported in CDJ 2003 MHC 1639.
- 6)T.Subramanian vs. S.Janakiammal (CRP(MD)No.1900 of 2012 dated 06.11.2012)

10.Heard the learned counsel for the parties and perused the materials available on record.

11.Though the learned counsel for the petitioner as well as the respondent had argued many other things, the only issue to be decided in this case is whether the notice has been served on the petitioner or not.

12.Perusal of the record shows that suit notice has been refused by the petitioner and whether the refusal has been attested by any witness or not, is not known. When there is no proof to show that the suit notice has been refused by the petitioner, the contention of the petitioner that the notice has not been served cannot be brushed aside easily. Though the learned counsel for the respondent has stated that E.P notice was also refused by the petitioner, perusal of the endorsement in E.P shows that the notice is unclaimed.

13.The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.



14.Learned counsel for the respondent has argued that in paragraph 5 at page 15 of the additional typedset of papers, the petitioner has stated that she took treatment under the Senior Civil Surgeon, Government Hospital, Arumanai and at paragraph 6, she has stated that due to illness, she was not in a position to appear before the Court on 16.08.2011 and 20.09.2011 and therefore, it is clear that she had knowledge about the proceedings.

15.In my considered opinion, the factum of refusal of suit notice by the petitioner is not proved and the EP notice is said to be unclaimed. It is also not proved that effective notice served on the petitioner. Hence, this Court is of the view ends of would be met by allowing this Civil Revision Petition on terms.

16.Accordingly, the impugned order passed by the Sub Court, Kuzhithurai, in E.A.No.223 of 2014 in E.P.No.1 of 2012 in O.S.No.77 of 2011 dated 11.01.2017, is set aside and E.A.No.223 of 2014 in E.P.No.1 of 2012 in O.S.No.77 of 2011 is allowed on payment of cost of Rs.10,000/- by the revision petitioner to the respondent within a period of six weeks from the date of receipt of the copy of this order, failing which, E.A.No.223 of 2014 shall stand dismissed automatically without further reference to the Court.

With the above direction, this Civil Revision Petition stand allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To
The Subordinat Judge,
Kuzhithurai.

+1CC to Ms.J.Anandhavalli, Advocate, SR.No. 42834

+1CC to Mr.K.P.Narayana Kumar, Advocate, SR.No. 43222

order made in
CRP(NPD) (MD) No.485 of 2017
19.01.2018

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AM/SV MMS/SAR 4/06.02.2018/4P/4C