

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.11.2019

PRONOUNCED ON : 27.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE **R.PONGIAPPAN**

C.R.P.NPD.No.4185 of 2011
and M.P.No.1 of 2011

1. Santhi
2. Devagai
3. Elango
4. Gomathi

... Petitioners

Vs.

1. V.M.Ravi
 2. Pachiammal (died)
- Recorded as the petitioners
1 to 4 are the legal heirs of
the deceased R2, as per
the order of this Court
dated 12.11.2019 in
C.R.P.4185 of 2011 vide
Memo dated 11.11.2019.



... Respondents

PRAYER : Civil Revision Petition is filed under Section 115 of C.P.C., to set aside the order dated 27.06.2011 in I.A.No.127 of 2009 in O.S.No.59 of 2005 on the file of the Principal Subordinate Court, Salem.

For Petitioners : Mr.K.Selvaraj
For Respondents
For R1 : No appearance
For R2 : Died

ORDER

Aggrieved over the Order dated 27.06.2011 made in I.A.No.127 of 2009 in O.S.No.59 of 2005 on the file of the Principal Subordinate Court, Salem, the petitioners, who are the defendants in the above referred suit, filed this Civil Revision Petition.

2. Before the trial Court, the first respondent in this revision petition, has filed a suit in O.S.No.59 of 2005, as against the first petitioner and her husband viz., Duraisamy and sought for the relief of specific performance, directing the first petitioner and her husband to execute and register a sale deed in favour of the first respondent/plaintiff, after receiving the balance sale consideration of Rs.50,000/- or in alternative, directing them to pay a sum of Rs.2,50,000/- to the first respondent/plaintiff with an interest of 24% per annum from the date of the suit till the date of realisation.

3. On 15.03.2005, since the first petitioner and her husband/defendants did not appear before the trial Court, the learned Principal Subordinate Judge, Salem, passed an order of exparte as against the first petitioner and her husband and decided the suit in favour of the first respondent/plaintiff. Subsequent to the passing of exparte order,

the first petitioner came to the knowledge that an exparte decree has been passed against her and her deceased husband Duraisamy only on 24.12.2008. Immediately along with the legal heirs, she filed an application in I.A.No.127 of 2009, under Section 5 of Limitation Act and pleaded to condone the delay of 3 years 259 days in filing the petition to set aside the exparte decree. The learned Principal Subordinate Judge, Salem, after affording opportunities to the first respondent/ plaintiff and after receiving his objection, by an order dated 27.06.2011, dismissed the application filed by the petitioners herein with cost. Aggrieved over the same, the petitioners are before this Court with the present Civil Revision Petition.

4. The short averments made in the affidavit filed by the petitioners in support of the application filed under Section 5 of Limitation Act, are as follows :-

The first petitioner was residing at Door No.4/1A, Jagir Reddipatti, Mamangam, Anna Nagar 1st Street, Salem-1, along with her husband for the past eight years. For the loan availed from the first respondent herein, the first petitioner and her husband agreed to pay 36% interest and accordingly they paid a sum of Rs.4,000/- per month as interest. The first respondent promised to return the original

agreement dated 24.06.2002, but without giving any intimation, the first respondent obtained the exparte decree without the knowledge of the first petitioner. The exparte decree was obtained by the first respondent behind the back of the petitioners and the suit properties are worth about Rs.90 lakhs and the first respondent cheated the petitioners by getting exorbitant rate of interest.

4.1. The petitioners came to know about the decree only on 23.12.2008 through the encumbrance certificate applied by the said Duraisamy and thereafter he filed a complaint before the Salem Town Crime Branch Police, as against the first respondent. The husband of the first petitioner viz., Duraisamy died on 04.05.2010, leaving the petitioners 3 to 5 as his legal heirs. The petitioners got valid defence in the suit and the delay in filing the application is not wanton or willful but only due to the activity of the first respondent herein.

5. Resisting the claim, the first respondent filed counter affidavit with the following avernments:-

In pursuant to the decree dated 15.03.2005, the first respondent filed an execution petition in E.P.No.134 of 2006 in O.S. No.59 of 2005 and the same was executed by registering the sale deed

in favour of the first respondent/plaintiff. The petitioners/defendants were served with summons and notice both through Court and post, but the petitioners knowingly and wantonly evaded the service of summons and the burden is upon them to prove the same.

5.1. The petitioners created a cooked story that the petitioners had executed the sale agreement in respect of the loan availed by the deceased Duraisamy. But the first respondent did not have any relationship of creditor and debtors with the petitioners. The petitioners lodged complaint before the City Crime Branch, Salem, by suppressing the real fact and the petitioners failed to show sufficient cause to condone the delay in set aside the exparte decree.

6. The learned Principal Subordinate Judge, Salem, after examining the first petitioner as P.W.1 came to the conclusion that for availing the relief under Section 5 of Limitation Act, the petitioners have not shown sufficient cause and further held that the petitioners were refused to receive the notice and also the petitioners have not come to the Court with clean hands and hence the petitioners are not entitled to seek any relief from the Court. Aggrieved over the said findings, the petitioners are before this Court with the present Civil Revision Petition.

7. The learned counsel appearing for the petitioners would contend that initially at the time of institution of suit, the first petitioner and her husband did not receive any notice or summons and only by the said reason, they were not entered appearance before the trial Court. Lodging of complaint against the first respondent has established the fact that they were having relationship of creditor and debtor. In the impugned order, the learned Principal Subordinate Judge, Salem, without appreciating the facts, particularly without mentioning any reasons, straight away came to the conclusion that the petitioners have not shown sufficient cause for condoning the delay.

8. The arguments advanced by the learned counsel appearing for the petitioners are considered. No one has been appeared on behalf of the first respondent.

9. For deciding this present Civil Revision Petition, it is necessary to find out, whether the impugned order passed by the Court below is within the parameter of law or not?

10. In this occasion, it is relevant to rely the judgment dated **20.06.1969** passed by the Full Bench of this Court in **A.A.O.No.5**

of 1962 in the case of **Parasuram Odayar Vs. Appadurai Chetty and others**, which reads as follows:-

"14. For the reasons already Indicated, it is clear that the Legislature intends that there should be an express declaration by the Court that the summons has been duly served, though the exact form of that declaration may be in any convenient form, such as, "It is declared that the defendant has been duly served", or "it is declared that the service is sufficient", or simply "defendant duly served", or "service sufficient". What is important is that the endorsement of the Court itself should indicate that the presiding officer has applied his mind and considers that the summons has been duly served. It is also desirable that before making such a declaration the Court indicates why it makes such a declaration. For instance, it may be that three different process servers had gone on different occasions and on every one of those occasions the judgment-debtor was absent and the Court feels that the judgment-debtor must really have come to know of the matter. "

Applying the said principles with the case in our hands, in this case also, in the exparte decree, the learned Principal Subordinate Judge, Salem, has not stated anything about the mode of service and in respect of the

refusal of notice by the petitioners herein. Further, the said Court has not received any affidavit or any proper sworn statement in respect of the service effected on the petitioners.

11. It is not is dispute that after passing of exparte decree sale deed was executed in favour of the first respondent. In this occasion, it is the duty of the Court concerned to serve the notice to the judgment debtor before executing the sale deed. In this aspect, in the counter affidavit nothing has been stated about the mode of service effected on the petitioners.

12. In the judgment reported in **(2019) 7 SCC 359** in the case **Robin Thapa Vs. Rohit Dora**, our Hon'ble Apex Court has held as follows:-

"7. Ordinarily litigation is based on adjudication on merits of contentions of parties. Litigation should not be terminated by default, either of plaintiff or defendant. Cause of justice requires that as far as possible, adjudication be done on merits."

Similarly in the judgment reported in **(2013) 12 SCC 649** in the case of **Esha Bhattacharjee Vs. Managing Committee of**

Raghunathpur Nafar Academy and others, our Hon'ble Apex Court has held as follows :-

"(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation."

13. In this case also, non mentioning about the service of notice in the execution proceedings by the first respondent and lodging the complaint by the deceased Duraisamy, as against the first respondent under the Exorbitant Interest Act, are culminating factors to decide the issue in this petition. I am of the considered opinion that proper service has not been effected on the petitioners before passing the exparte decree. For determining the right of the parties, it is necessary to set aside the exparte decree dated 15.03.2005 made in O.S.No.59 of 2005. Though the sale deed was executed in favour of the first respondent, as per the verdict rendered by our Hon'ble Apex Court cited supra, the same has to be set aside, since the sale deed was executed after passing an exparte decree.

14. The another fact which has to be decided in this Civil

Revision Petition is that, the learned Principal Subordinate Judge, Salem, at the time of passing an exparte decree did not consider the factual aspects which means that the allegations leveled by the first respondent/plaintiff. Since the suit was filed for the relief of specific performance, according to Section 16(c) of the Specific Relief Act, before the trial Court, the plaintiff has to prove his readiness and willingness for availing the remedy of specific performance. Though the suit was decided as exparte, it is necessary for the first respondent/plaintiff to prove his readiness and willingness before the trial Court. But in the exparte decree passed by the learned Principal Subordinate Judge, Salem, there is no finding in respect of the Section 16(c) of the Specific Relief Act. So on that score also, the exparte decree passed in favour of the first respondent has necessarily to be set aside.

15. In the light of the above discussions, the impugned order dated 27.06.2011 made in I.A.No.127 of 2009 in O.S.No.59 of 2005 passed by the learned Principal Subordinate Judge, Salem, is hereby set aside and the delay of 3 years 259 days in filing the application to set aside the exparte decree is condoned, on condition that the petitioners have to pay the cost of stamp papers purchased by the first respondent towards the execution of the sale deed and Rs.10,000/- (Rupees ten thousand

only) as additional cost, payable to the first respondent, within a period of two weeks from the date of receipt of a copy of this Order. Further, the petitioners are directed to file an application under Order 9 Rule 13 of C.P.C., to set aside the exparte decree within a period of two weeks from the date of receipt of copy of this Order and on such filing of the application, the learned Principal Subordinate Judge, Salem, is directed to decide the said application in accordance with law and if the suit is restored on file, the learned Principal Subordinate Judge, Salem, is further directed to dispose of the suit in O.S.No.59 of 2005, within a period of three months from the date of restoration of the above said suit.

15. With the above directions, this Civil Revision Petition is allowed. Consequently, connected miscellaneous petition is closed.

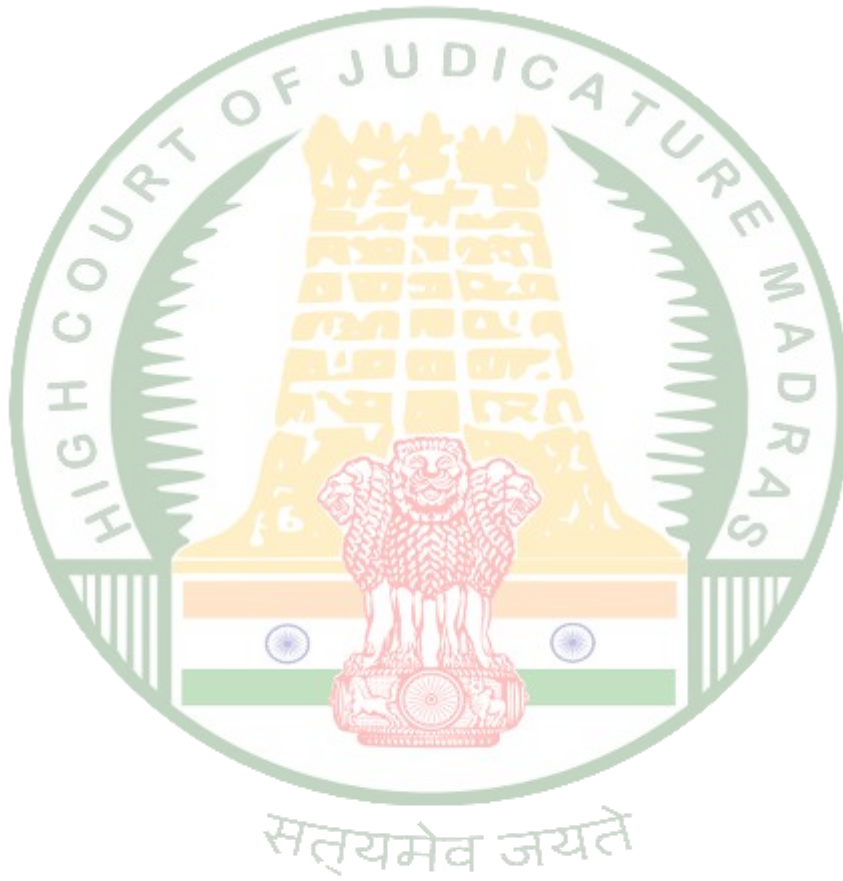
27.11.2019

Index : Yes/No
Internet : Yes/No
Speaking order/Non-speaking order

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To
The Principal Subordinate Court,

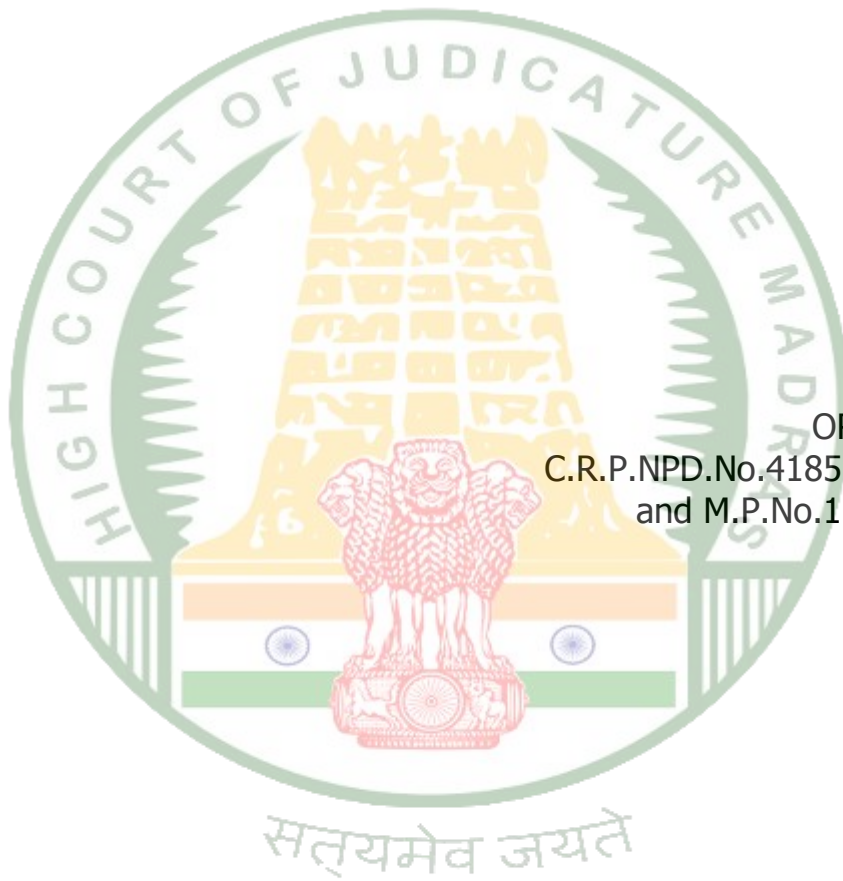
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R.PONGIAPPAN, J

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ORDER IN
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and M.P.No.1 of 2011

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