

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

C.R.P(NPD)No.1965 of 2013

Ayyavoo

... Petitioner/Petitioner

Vs.

Dharmalingam

... Respondent/Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to allow the above C.R.P. and set aside the order and decretal order dated 11.03.2010 made in I.A.No.448 of 1998 in O.S.No.54 of 1995 on the file of the Subordinate Judge, Namakkal.

For Petitioner : Mr.C.Manishankar, Senior Counsel
For Mr.S.Senthil

For Respondent : Mr.Mukunth
For M/s.Sarvabhauman Associates

ORDER

This Civil Revision Petition has been filed against the Fair and Decretal Order dated 11.03.2010 passed in I.A.No.448 of 1998 in O.S.No.54 of 1995 on the file of the Subordinate Judge, Namakkal

dismissing the application filed by the revision petitioner to set aside the ex parte decree dated 10.02.1997.

2. The suit has been laid for enforcing the agreement dated 23.10.1991. The fact remains that the suit has been laid only in the year 1995, and the ex-parte decree was passed on 10.02.1997 against the defendant, on the ground that the learned counsel appearing for the defendant informed the court that he has no instruction. The trial Court has decreed the suit in cryptic manner, on the same day. Thereafter, the revision petitioner has filed an application to set aside the ex-parte decree within a period of limitation, and the above application was dismissed for default. Thereafter, the revision petitioner filed in C.M.A.No.14 of 2007 on the file of the Principal District Judge, Namakkal, and the same was allowed and the matter has been remitted back for consideration. Thereafter, it appears on 19.11.2009, the case was taken on file and thereafter, adjourned for 9 hearings since there was no representation for the revision petitioner. The submissions of the respondent was heard and finally the application was dismissed as against which the present civil revision petition has been filed.

3. The learned Senior counsel assisted by Mr.S.Senthil, learned counsel appearing for the revision petitioner would contend that on an earlier occasion when the counsel reported no instructions, no notice whatsoever was issued the revision petitioner and without following the procedure set to him as ex-parte and an ex-parte decree was passed and the revision petitioner filed an application to set aside the ex-parte decree within the limitation period, even the application was dismissed. Thereafter, revision petitioner has filed C.M.A.No.14 of 2007, and the same was allowed by the trial Court and the matter was remitted for a fresh consideration. At the stage also the trial Court has not issued any notice to the parties and adjourned the matter and finally disposed of the application by dismissing it.

4. It is the main contention of the learned senior counsel appearing for the revision petitioner at the relevant point of time the petitioner counsel died. But the trial Court without considering the same has simply dismissed the application. The learned senior counsel further submitted that decree passed ex-parte, cannot stand in the eye of law. The decree has been passed in a cryptic manner in one line and the Specific Performance has been granted. Hence, it is the contention of the learned senior counsel that though normally the

appeal lies against the dismissal of the application filed under Order 9 Rule 13 C.P.C., considering the question that the decree and judgment passed by the learned trial Judge is not in accordance with law and violation of procedure in passing the decree, this Court in exercise of its jurisdiction under Article 227 of the Constitution of India, may interfere with the same and set aside the ex-parte decree.

5. The learned Counsel appearing for the respondent would contend that the revision petition is not maintainable and there is a clear bar under Law, only appeal is maintainable. Further on an earlier occasion he has filed an appeal before the trial court, whereas now the revision petitioner filed the revision which is not maintainable in law and the conduct of the revision petitioner makes it clear that he has not approached the court bonafidely and the decree has been validly executed and Execution Petition is pending for delivery of possession and at this stage, no leniency can be shown to the revision petitioner. Further, learned counsel submitted that there is a clear bar to entertain the revision petition and only appeal will lie. Hence, prayed for dismissal of the revision petition.

6. I have perused the entire materials particularly the plaint, written statement and application filed for the revision petitioner.

7. The challenge has been made to the order of the trial Court dismissing the application filed under Order 9 Rule 13 C.P.C., to set aside the ex-parte decree has been passed on 10.02.1997. It is no doubt that as against dismissal of application filed under Order 9 Rule 13 is only appeal will be maintainable and not revision and there cannot be any dispute. The only aspect false for consideration is when manifest error or illegality is committed by the courts of law in passing an order there is no bar for this court to entertain the revision and pass an order in exercise of its jurisdiction under Article 227 of the Constitution of India.

8. Whether any such manifest illegalities was committed or not, has to be seen in the context of facts and circumstances of each case. In the above background, when the materials seen it is not in dispute that the suit has been laid for enforcement of agreement dated 23.10.1991. It is not disputed by the both side, that the time limit was set out in the agreement is three months. But the suit has

been laid in the year 1995 thereafter, it appears that on the basis of no instruction reported by the learned counsel for the respondents, the defendants set were set ex-parte on 10.02.1997.

9. It is also not disputed that within 30 days period of limitation the revision petitioner has filed an application to set aside the ex-parte judgment. It is curious to note that before passing ex-parte decree when the learned counsel reported no instructions, no notice whatsoever has been issued to the revision petitioner. When the application to set aside the ex-parte decree filed within 30 days and the same was pending, thereafter, once again the above application came to be dismissed for default on 19.10.2000. Then the application has been filed by the revision petitioner to set aside the ex-parte decree, on the ground that on the date on which he was set ex-parte, he was not well and therefore he could not appear before the Court. However, the Court did not accept that and again dismissed the application which culminated into filing C.M.A.No.14 of 2007, which was allowed on 19.11.2009 and the same was remitted back to the trial Court for fresh consideration.

10. It is to be noted that till the C.M.A.No.14 of 2007, was remitted back to the trial Court, many years lapsed. Thereafter, when the matter has been taken on file, no notice whatsoever was sent to the revision petitioner and without serving any notice, the matter got adjourned and finally there was no representation. Submissions of the learned counsel for the respondent in the above application was heard and ultimately this application was dismissed.

11. It is curious to note that when C.M.A.No.14 of 2007 was remitted back, the trial Court ought to have sent notice to the parties. It is the further submission of the learned senior counsel that when the C.M.A.No.14 of 2007 was remitted back, the representing counsel has already died and that was also not taken note of by the trial Court and ultimately, the application has been dismissed as against which the present civil revision petition has been filed.

12. It is to be noted that the trial Court has not issued any notice at the first instance when the learned counsel reported no instructions. Thereafter, when the matter was remitted back after many years at that stage also, not issued any notice. Further, despite that, there was no appearance either by the revision petitioner or by

his counsel. The Court has not issued any notice to the learned counsel to find out whether he is alive or not or whether he is prosecuting the matter. However, facts remains that at the relevant time the learned counsel appearing for the revision petitioner has died. Without ascertaining these facts, once again the valuable right of the parties to set aside the ex-parte decree, has been shut by the trial Court.

13. It is further curious to note that merely because the party was set ex-parte decree, as against defendant is not an automatic the plaintiff has to establish his case to obtain decree and judgment. Admittedly, the suit is filed for specific performance. To enforce such a contract the court has to decide many factors including ready and willingness and other aspects.

14. On a perusal of the decree and judgment passed by the trial Court, this Court is of the view that said decree cannot be sustained in the eye of law. Despite several directions by this Court and Hon'ble Apex Court as to the manner in which the judgment and decree has to be passed the trial Court in this case has mechanically in one line have decreed the suit. It is useful to refer the judgment of the

trial Court which is extracted as follows " ***Evidence of P.W.1 perused. Claim proved. Suit is decreed as prayed for with cost***".

15. It is to be noted that decree in specific performance is in the form of preliminary decree it is continuous till the completion of the sale deed and delivery of the property. Even if the decree is passed in favour of the plaintiff there are many obligations on the part of the decree holder to perform his contract. Admittedly, in this judgment and decree passed by the trial court there is not even a whisper about the manner in which the remaining sale consideration has to be deposited and the time for such deposit is also not mentioned and there is no discussion as to whether the plaintiff was ready and willing and he is entitled to equitable relief. The one line judgment pronounced, is totally contrary to the statue. Such decree and judgment is not a valid judgment and cannot be enforced in the eye of law. It is also one of the reasons which forces this Court to exercise the power under Article 227 of the Constitution of India to interfere the order of the trial Court.

16. Of course, normally the appeal alone is maintainable but, in the circumstances of the given case is sufficient to invoke the jurisdiction under Article 227 of the Constitution of India, this revision is admitted in the year 2013 at the revision is rejected on the technical ground that only the appeal is maintainable it will amount to forcing the parties to unknown destination. Therefore, this Court is of the view that mere non filing the appeal is not a ground to dismiss the revision. Considering the facts and circumstances of the case illegality committed by the trial Court, I am of the view that this is fit case to interfere under Article 227 of the Constitution of India to set aside such manifest error.

17. Accordingly, the order passed by the trial Court in I.A.No.448 of 1998 in O.S.No.54 of 1995, rejecting the application for setting aside the ex-parte decree is set aside. Considering nature of the allegations as discussed above the ex-parte decree is set aside and the defendants are directed to file a written statement within a period of three months from the date of receipt of copy of this order on merits and the trial Court is directed to dispose of the suit within a period of three months from the date of receipt of copy of this order

without influencing the observation of this Court. No costs.

14.02.2019

Index: Yes/No
Speaking/Non-Speaking
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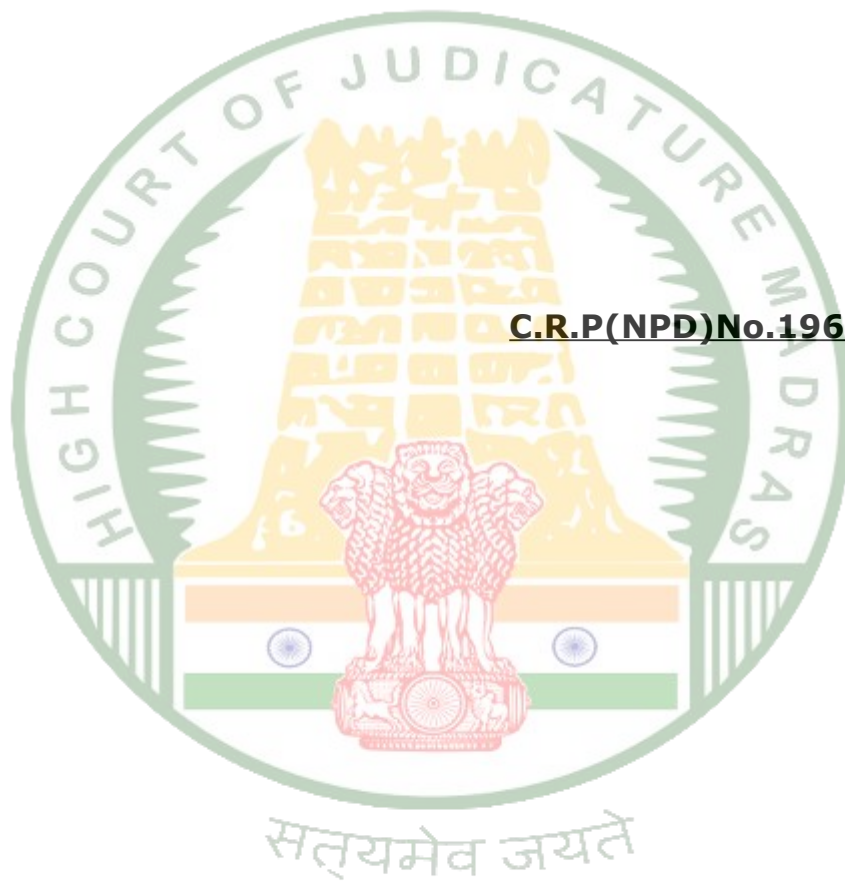
To

1. The Subordinate Judge, Namakkal.
2. The Section Officer, VR Section, Madras High Court.



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N.SATHISH KUMAR, J.



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