

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on : 25.11.2019

Orders Pronounced on : 04.12.2019

CORAM

THE HON'BLE MR. JUSTICE R.PONGIAPPAN

CRP.NPD.No.586 of 2013

1.G.Mohammed Ismail(died)
2.Althaf Ahamed
3.Apsar Banu
4.Ashraf Banu @ S.Banumathy
(Petitioners 2 to 4 brought on record as LR's
of the deceased sole petitioner, viz.,
G.Mohammed Ismail vide court order dated
29.04.2019 made in CMP.Nos.10526, 10531
and 10537 of 2019 in CRP.NPD.No.586
of 2013 (NSKJ) ...Petitioners

Vs.

M.Usha Nandhini ...Respondent

PRAYER:

The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 30.03.2011 passed in I.A.No.486 of 2009 in O.S.No.266 of 2003 on the file of the Court of III Additional Subordinate Judge, Coimbatore.

For Petitioners : Mr.T.Murugamanickam,
Senior Counsel
for M/s.Sarvabhauman Associates

For Respondent : Mr.P.Rajavelu,
for Mr.R.Senniappan

ORDER:

The defendant in O.S.No.266 of 2003 on the file of the III Additional Sub Court, Coimbatore is the first petitioner herein. Originally the respondent in this Civil Revision Petition instituted the said suit as against the first petitioner for the relief of specific performance directing the defendant to execute sale deed in favour of the plaintiff in respect to the suit property within a specific period. During the course of trial proceedings, for the reason that the first petitioner has not appeared before the trial court, on 13.02.2004 the learned III Additional Subordinate Judge, Coimbatore passed an exparte decree against the first Petitioner. Subsequent to that, based on the said decree, the respondent filed an execution application in EA.No.17 of 2005 and consequently on 10.08.2006 sale deed has been executed in favour of the respondent.

2.Only thereafter the first petitioner herein moved the application before the III Additional Sub Court, Coimbatore in IA.No.486 of 2009 under Section 5 of Limitation Act to condone the delay of 1873 days in filing the application to set aside the exparte decree. The learned III Additional Subordinate Judge, Coimbatore after affording an opportunity to the first revision petitioner by order dated 30.03.2011 dismissed the application filed by the first revision petitioner.

3.In the impugned order passed by the learned III Additional Subordinate Judge, Coimbatore, it was held even after serving with the notice to the petitioner on 10.02.2004, he has not appeared before the court for defending his suit. Hence, it cannot be stated that the petitioner has approached the Court with sufficient cause and ultimately application filed by the first revision petitioner was dismissed. Aggrieved over the said order the revision petitioners are before this Court with the present Civil Revision Petition. In the affidavit filed in support of the application filed under Section 5 of Limitation Act, the petitioner has stated as in earlier to the litigation started with the respondent, the suit schedule property was leased

to one P.K.V. Mohan, who is the husband of the present respondent. Since the Coimbatore Corporation is not executed sale deed, at that time the petitioner herein gave power of attorney in favour of P.K.V.Mohan. After execution of power of attorney, the attitude of the husband of the respondent was entirely changed. However as early as 1997 the said PKV Mohan assured to pay the sale amount. Only in 1997, the suit schedule property was converted as ladies hostel. When the same was complained before the Police Station, they assured to enquire the same. In the meantime on 17.10.1997 the petitioner cancelled the power of attorney and the same was registered in Document No.535 of 1997. After cancellation of power of attorney, the same was intimated to the said P.K.V.Mohan directly. However, the husband of the respondent requested further time for vacating the suit property. Only in the said circumstances, the summon in respect to O.S.No.828 of 2000 was issued to the petitioner.

4.On go through the details of the case, the first petitioner came to the knowledge as the husband of the respondent herein entered with the sale agreement with her husband. The said sale

agreement executed between the respondent and her husband is a fabricated one and only to defeat the right of the first petitioner. Based on the said agreement, the suit has been filed against the first petitioner for the relief of permanent injunction. However, the said suit was dismissed on 22.10.2002 and thereafter no appeal was preferred against the said order.

5. On 14.02.2008, one Saddik Ulla entered into a sale agreement with the first revision petitioner and paid Rs.7,50,000/- as advance for the purchase of the suit schedule property. After execution of sale agreement, the said Saddik Ulla informed the first petitioner in the year 2008 as the suit schedule property was sold to the respondent herein based on the sale agreement made between the respondent and her husband. When the same was questioned before the respondent, she threatened the first revision petitioner. In respect to the suit filed by the respondent, the first petitioner has not received any summon. Only in the year 2008, the first petitioner came to the knowledge that the sale deed was executed in favour of the respondent by the court. Immediately after knowing the execution of sale deed by the court, the first petitioner

attempted to know the details of the case filed by the respondent. In spite of repeated efforts made by the learned counsel appearing for the first petitioner, he has not been given with the particulars by the staff working in the court. Hence, the first petitioner lodged so many complaints against the higher authorities and only thereafter he filed application to condone the delay, in which the impugned order was passed.

6. Resisting the claim of the petitioner, the respondent herein filed counter before the trial court and states as only with an idea of giving incessant trouble and annoyance to the respondent, the application was filed by the petitioner. He would further contend that the petitioner has not shown any sufficient cause. The petitioner was in the habit of changing his residence often to various distant places in Coimbatore City. Several summons to him to various addresses were sent and the petitioner is clever enough in not receiving the same. Paper publication and other modes as contemplated under Order 5 of Civil Procedure Code has been complied with. Each and every day's delay is to be explained in the petition by giving legal evidence in the court and convincingly prove

the averments in the affidavit. It is not believable that only in the recent days he came across the decretal order of the suit. Averments contained in the affidavit filed by the petitioner requires conclusive proof. According to him, the petition filed by the petitioner deserves to be dismissed. Having considered the materials placed before him, the learned III Additional Subordinate Judge, Coimbatore by order dated 30.03.2010 dismissed the application filed by the first petitioner. In the impugned order he has stated that before passing the exparte decree, private notice was served to the petitioner and it amounts to proper service, thereby filing the application to condone the delay of 1873 days after executing the sale deed is unwarranted.

7.Today when the petition is came up for hearing, the learned counsel appearing for the petitioners is present and would contend that without effecting proper service to the first petitioner, the court below passed an exparte decree. Further after made paper publication in one Tamil issue, the sale deed also been executed in favour of the respondent, which is also erroneous in law. The learned counsel would further contend that now the petitioners are

ready to pay the expenses which was spent by the respondent for executing the sale deed towards the purchase of stamp papers. In this regard, the learned counsel appearing for the petitioners relied upon the judgment of our Hon'ble Apex Court in the case of **Robin Thapa Vs. Rohit Dora** reported in **(2019) 7 SCC 359**, wherein the Hon'ble Apex Court has held as follows:

“Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits.”

8. Further, he would rely upon the judgment of this Court in the case of **Padmavathi Ammal and Ors Vs. N.Dhinakara Rao and Ors** reported in **MANU/TN/7285/2007**, in which this Court has held as follows:

“Non appearance of the Petitioners in the suit stage appears to be bonafide. Private notice is said to have been served upon the first Petitioner. No sanctity could be attached to such service of private notice upon the first Petitioner. Private notice though permissible is not effectual as Court notice or RAPD. Where summons was not duly served on the Petitioners, they cannot possibly appear in the Court when the suit was taken up for hearing or at the subsequent dates. The fact that the first Petitioner had received private notice,

cannot be the reason for declining to condone the delay. As such, no negligence nor inaction could be attributed to the Petitioners.”

9. Contrary to the said submissions, the learned counsel appearing for the respondent would contend that in the impugned order passed by the court below, it was correctly held as the petitioner was received with the private notice. Further at the time before executing the sale deed by the court, notice was sent to the petitioner through paper publication. He would further contend that in respect to the response of the petitioner, he has stated that inconsistent averments in the affidavit and in the additional affidavit filed before the court below. In the said circumstances, it cannot be termed as the petitioner is not effected with the private notice.

10. Upon considering the arguments advanced by either side, it is necessary to see whether private notice was effected on the petitioner before passing the order of ex parte decree on 13.02.2004. In this regard, as already observed, in the impugned order, the court below categorically held that private notice was served to the petitioner. In this aspect in the additional typed set filed by the petitioner, he has enclosed the copy of the receipt

issued by the professional courier. As per the endorsement found in the receipt, it appears that the petitioner was received with notice. However in the said receipt the date and time has not been mentioned. One another aspect in this petition which is necessary to see that the signature found in the vakalat filed by the petitioner and the signature found in the counter filed before the court below is entirely different from the signature found in the receipt issued by the professional courier. On perusing all the signatures in the above documents elicit the fact that the signature found in the receipt is not belongs to the first petitioner. However in the affidavit dated 30.04.2009 filed by the first petitioner he has stated that for the past ten years he was residing in Vadavalli village in the same address, but in the additional affidavit filed by the petitioner he has stated from 2002 to 2009, he was residing in four addresses.

11.It is true in respect to the residential address of the petitioner, the petitioner has stated different versions. However, wherever the petitioner was residing, it is for the respondent to find out the address and send notice to the correct address in which the

petitioner was residing. But in this case, the petitioner has not done the said job correctly before passing exparte decree. Therefore considering the fact that the private notice was not at all effected and also for the reason that the signature found in the receipt issued by the courier is entirely different from the signature found in the vakalat and counter affidavit creates a doubt whether the private service was effected on the petitioner before passing exparte decree. More than that, the learned counsel appearing for the petitioners fairly conceded that before executing sale deed in favour of the respondent, for serving notice, only paper publication was effected. So, the said circumstances also reveal the doubt why the respondent has not taken any steps to send notice to respondent directly from the court, in which the execution proceedings are initiated or through the post.

12.Since the husband of the respondent is a tenant under the first petitioner before starting disputes between them, it cannot be said that finding of the residential address of the first petitioner is very difficult task to the respondent. One another aspect which is necessary to be considered in this application is the alleged sale

agreement executed between the husband and wife. Further at the time of executing the sale agreement, the entire amount was paid by the respondent to her husband. If really the same was true one, it is necessary for the husband of the respondent to settle the accounts to the petitioner. In this regard, there is no submission on the side of the respondent.

13. Moreover, as per the documents exhibited before the trial court, the petitioner has proved, only after various efforts, the case records pertain to the Civil Revision Petition has been identified by the court below and then only the application filed by the petitioner was numbered. It is a well settled principle that the length of delay is not a material to decide this type of application. The only issue to be decided for deciding the application filed under Section 5 of Limitation Act is whether the petitioner who filed the application has projected sufficient cause or not. On applying the said principles with the case in our hand, in this case also the delay may be a huge one, as already observed for the reasons stated above, I am of the opinion that the petitioner has projected sufficient cause for allowing this application. More than that, today when at the time of

argument, the learned counsel appearing for the petitioners submitted that the petitioners are willing to deposit the entire expenses borne by the respondent at the time of executing the sale deed. In this occasion, it is necessary and useful to see the judgment of our Hon'ble Apex Court in the case of **Robin Thapa Vs. Rohit Dora** reported in **2019 (6) CTC 344**, in which in the same situation our Hon'ble Apex Court has held and directed the petitioner to pay the stamp duty borne by the respondent and Rs.10,000/- towards registration expenses. So, this Court also having the same duty to decide this petition as decided by our Hon'ble Apex Court.

14. Therefore, the petitioners are directed to deposit the value of the stamp paper which was deposited by the respondent for the execution of sale deed with registration fees. The petitioners are further directed to deposit a sum of Rs.50,000/- as cost to be paid to the respondent. The entire amount will also be deposited before the III Additional Subordinate Court, Coimbatore within a period of one month from today. Upon depositing the above amounts, it is open to the respondent to withdraw the same and the sale deed will

stand set aside. In case, the above amount is not deposited within the stipulated period, the petition filed by the petitioners will stand dismissed and the impugned order will stand confirmed.

15.Further, the learned III Additional Subordinate Judge, Coimbatore is directed as after collecting the particulars from the respondent in respect of the value of stamp paper and registration charges, furnish the same to the petitioners so as to comply the direction passed already. The trial court will take up the suit and dispose the same as expeditiously as possible at any rate, within a period of three months from the date on which the respondent brings fulfilment of above said conditions to the notice of the trial court.

16.The Civil Revision Petition is disposed of accordingly. No costs.

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04.12.2019

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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To
The learned III Additional Subordinate Judge,
Coimbatore.



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R.PONGIAPPAN,J.

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Pre Delivery order made in
CRP.NPD.No.586 of 2013

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