

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 25.03.2019

C O R A M
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

CMA. No.1885 of 2019
and C.M.P.No.6452 of 2019

Somasundaram ... Appellant/Petitioner/7th Defendant

Vs.

Parameswari Ammal (Deceased)

1.B.Chandra Kumar

2.B.Lakshminarayanan

3.B.UdyaSurian

4.B.MayuraPriyan

5.B.Prem Kumar

6.B.Prameela

7.M.A.Rukmani

8.M.A.Srinivasan

9.M.A.Venkatakrishnan

10.M.A.Narasimhan

11.M.A.Parthasarathy

12.D.C.Foundation (P) Ltd.,
Rep.by its Directors
1. V.Ramamoorthy
2. L.N.Janakar
Basement, Gokul Arcade,
No.33, Sardar Patel Road,
Adyar, Chennai - 600 020.

... Respondents/Respondents/
Defendants 1 to 6

PRAYER: Civil Miscellaneous Appeal filed under Order XLIII Rule 1 of Civil Procedure Code to set aside the order and Decree dated 04.02.2019 made in I.A.No.261 of 2018 in O.S.No.8721 of 2010 on the file of the XVIII Additional, City Civil Judge, Chennai by allowing I.A.No.261 of 2018 so as to enable the

appellant to contest the suit on merits.

For Appellant : Mr. Thiageswaran for
M/s.Waron and Sai Rams

For Respondents: Mr.Perumbulavil Radhakrishnan
[for RR1 to 6 caveators]

J U D G M E N T

This Civil Miscellaneous Appeal has been filed seeking to set aside the order and Decree dated 04.02.2019 made in I.A.No.261 of 2018 in O.S.No.8721 of 2010 on the file of the XVIII Additional, City Civil Judge, Chennai by allowing I.A.No.261 of 2018 .

2. This case is a classic example of the mistake on the part of Advocate. An additional affidavit filed to this effect has been taken on record.

3. The appellant/7th defendant was set ex-parte on 03.07.2018. Despite the time available for him, the appellant has failed to file his written statement and also a petition to set aside the exparte order. On evidence an ex-parte decree came to be passed on 01.09.2018. Even after that the appellant has not filed the petition to set aside exparte decree with written statement. The appellant filed an Interlocutory Application to set aside the ex-parte decree, only on 07.09.2018 without written statement. The Registry could not number the application for want of written statement. After a period of two months, the written statement came to be filed only on 16.11.2018. Now that the appellant has come with an affidavit that written statement was misplaced and therefore, it could be filed in time along with the Interlocutory Application filed for setting aside the ex-parte decree. For the fault of the advocate, the litigant shall not suffer and an undertaking is given to compensate the hardship caused to the respondents.

4. The learned counsel for the respondents would submit that it is the third time the ex-parte order is being set aside. It is the desire of the respondents that the issue be decided at the earliest and seek a direction to the trial Court to complete the trial within the time stipulated by this Court. He has already filed proof affidavit in support of the case while letting in exparte evidence and marked the documents. Even that can be taken as his chief examination and he ready for cross examination.

5. This Court has considered the submissions.

6. The Hon'ble Supreme Court reported in 1981 AIR 1400 [Rafiq & Another Vs. Munshilal & Another], wherein it is held as under:-

" It is not proper that an innocent litigant, after doing everything in his power to effectively participate in his proceedings by entrusting his case to the Advocate, should be made to suffer for the inaction, deliberate omission or misdemeanour of his agent. For whatever reason the Advocate might have absented himself from the Court, the innocent litigant could not be allowed to suffer injustice for the fault of his Advocate.

The respondent's costs should be recovered from the Advocate who absented himself from Court."

7. Considering the submissions made, this Court is of the considered opinion that for the fault of the advocate, the litigant shall not suffer. At the same time, this Court is also conscious that the litigant shall not take leverage on the lenient view taken by the Court and protract this proceedings. In view of the same, the ex-parte decree passed on 01.09.2018 is set aside, on payment of cost of Rs.50,000/- [Rupees fifty thousand only] payable by appellant counsel to the respondent's counsel within a period of two weeks and the appellant is directed to produce the proof of compliance before the trial Court. The trial Court is directed to treat the proof affidavit filed during the ex-parte evidence as chief examination and the appellant shall commence his cross-examination immediately. However, a direction is issued to the trial Court to commence the trial not later than 05.04.2019 and complete the same by 28.06.2019. The appellant shall co-operate for completion of trial without taking frequent adjournments.

8. Accordingly, the Civil Miscellaneous Appeal is disposed of with the above direction. No costs. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते
Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

bri

To

The XVIII Additional,
City Civil Judge,
Chennai.

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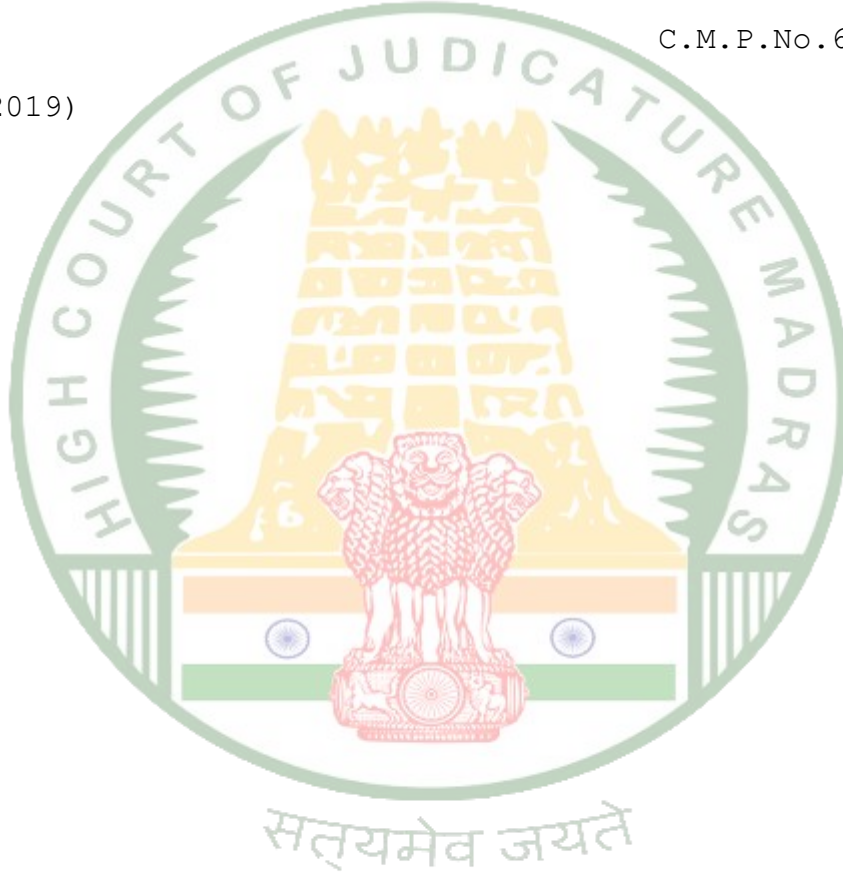
The Section Officer,
VR Section,
High Court,
Madras-104.

+1cc to M/s.Waron and Sai Rams, Advocate, S.R.No.27903

+1cc to Mr.Perumbulvail Radhakrishnan, Advocate, S.R.No.27892

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RRS (28/3/2019)



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