

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP (NPD) Nos.2906 and 4476 of 2014

and
MP Nos.1 and 1 of 2014

1.Jayakumar
2. Arthanari
3. Murugesan

... Petitioners in
C.R.P. (NPD). 2906 of 2014

1. Madheswaran
2. Sidheshraja

... Petitioners in
C.R.P. (NPD). 4476 of 2014

versus

Kanthasamy

.... Respondent in both CRPs

Prayer in C.R.P. ((NPD)) No.2906 of 2014 : Civil Revision Petition has been filed under Article 227 of the Constitution of India against the return of the E.A. SR. No.850 of 2014 in E.P. No.8 of 2013 in O.S. No.57 of 2011, dated 07.03.2014 on the file of the District Munsif Court at Rasipuram.

Prayer in C.R.P. ((NPD)) No.4476 of 2014 : Civil Revision Petition has been filed under Section 115 of the Civil Procedure Code, to set aside the Fair and decretal order dated 18.12.2013 made in I.A. No.486 of 2013 in O.S. No.57 of 2011, on the file of the District Munsif Court at Rasipuram.

For Petitioners in CRP ((NPD)) No.2906 of 2014 : Mr.C. Prabakaran

For Petitioners in CRP ((NPD)) No.4476 of 2014 : Mr.R. Murali

For Respondent in both CRPs

:Mr.D. Shivakumaran

COMMON ORDER

CRP (NPD) No.4476 of 2014 has been filed by the petitioners aggrieved by the order dated 18.12.2013 passed by the District Munsif Court as Rasipuram in I.A. No.486 of 2013 in O.S. No.57 of 2011.

2. CRP (NPD) No.2906 of 2014 has been filed by the petitioners challenging the order dated 07.03.2014 passed by the District Munsif Court, Rasipuram in E.A. SR No.850 of 2014 in E.P. No.8 of 2013 in O.S. No.57 of 2011.

Brief facts leading to the filing of these Civil Revision Petitions

3. The petitioners in CRP (NPD) No.4476 of 2014 are the defendants 5 and 6 in the suit O.S. No.57 of 2011 filed by the respondent / plaintiff. The said suit was filed for declaration and injunction. The declaration was sought for to declare the sale deed executed by the 1st petitioner / 5th defendant in favour of the 2nd petitioner / 6th petitioner as null and void. Further, the respondent has also sought for declaration of title as well as delivery of possession of the suit schedule property. Since, the petitioners / defendants 5 and 6 remained ex-parte in the suit, an ex-parte decree, dated 16.10.2012 came to be passed against them in favour of the respondent / plaintiff. Thereafter, the petitioners filed I.A.No.486 of

2013 to condone the delay of 166 days in filing an application to set aside the ex-parte decree dated 16.10.2012 passed in O.S. No.57 of 2011.

4. As seen from the affidavit filed in support of I.A. No.486 of 2013, the reason given by the petitioners for condoning the delay is that the 1st petitioner was not in station and the 2nd petitioner was ill. A counter affidavit was also filed by the respondent / plaintiff in I.A. No.486 of 2013 denying the allegations contained in the affidavit filed in support of I.A. No.486 of 2013.

5. By order dated 18.12.2013, the Trial Court dismissed I.A.No.486 of 2013 filed by the petitioners in CRP (NPD) No.4476 of 2014 on the ground that sufficient reasons have not been given for condonation of delay. Aggrieved by the order dated 18.12.2013 passed in I.A. No.486 of 2013 in O.S.No.57 of 2011, CRP (NPD) No.4476 of 2014 has been filed under Section 115 of the Civil Procedure Code.

6. After the passing of the ex-parte decree, dated 16.10.2012 in O.S. No.57 of 2011, the respondent / plaintiff filed E.P. No.8 of 2013

before the District Munsif Court, Rasipuram, to execute the decree for declaration and for possession. It is represented by the learned counsel for the respondent/plaintiff that the respondent has already executed the ex-parte decree passed in O.S.No.57 of 2011 and delivery of possession has already been recorded in favour of the respondent / plaintiff and as on date, the respondent / plaintiff is in possession of the property.

7. In E.P. No.8 of 2013 filed by the respondent / plaintiff to execute the ex-parte decree dated 16.10.2012 passed in O.S. No.57 of 2011, the petitioners in CRP (NPD) No.2906 of 2014, who are the defendants 1 to 3 in the suit O.S. No.57 of 2011, filed an application under Order 21, Rule 106 CPC to set aside the ex-parte order of delivery of possession dated 30.01.2014 passed in the execution petition. The said application viz., unnumbered R.E.A. of 2014 in E.P. No.8 of 2013, was returned by the Registry of the Execution Court on 07.03.2012. Aggrieved by the said return of the application filed under Order 21, Rule 106 CPC, the petitioners preferred revision in CRP (NPD) No.2906 of 2014.

8. Since the issues involved in both Civil Revision Petitions are

one and the same, both the Civil Revision Petitions are disposed of by a common order.

9. Heard Mr.C.Prabakaran, learned counsel for the petitioners in CRP (NPD) No.2906 of 2014 and Mr.R.Murali, learned counsel for the petitioners in CRP (NPD) No.4476 of 2014 and Mr.D.Shivakumaran, learned counsel for the Respondent in both Civil Revision Petitions.

Discussion :

10. Admittedly, the suit has been filed by the respondent / plaintiff in O.S. No.57 of 2011 for declaration, injunction and for delivery of possession in respect of the suit schedule property. The declaration sought for by the respondent / plaintiff in the suit is to declare the sale deed dated 17.03.2011, executed by the 5th defendant, who is the 1st petitioner in CRP (NPD) 4476 of 2014 in favour of the 6th defendant, who is the 2nd petitioner in the same Civil Revision Petition, as null and void. The respondent / plaintiff in the same suit has also sought for declaration of title in respect of suit schedule property and also sought for delivery of possession as well as mandatory injunction and permanent injunction.

11. It is the case of the respondent /plaintiff that the 5th defendant in the suit had fraudulently got a sale deed executed in

favour of the 6th defendant as the power of attorney of the respondent / plaintiff, when the respondent / plaintiff had never executed a Power of attorney or agreed to sell the property to 6th defendant. It is their case that under the guise of arranging a loan, the 5th defendant has got the sale deed fraudulently executed in favour of the 6th defendant. Despite service of suit summons, the petitioners failed to defend the suit by filing a written statement. The petitioners were set ex-parte in the suit on 05.03.2012 and an ex-parte decree came to be passed on 16.10.2012 and this fact has not been disputed by the learned counsel for the petitioners in CRP NPD No.4476 of 2014 before this Court. After the ex-parte decree came to be passed, the petitioners have filed I.A. No.486 of 2013 in O.S. No.57 of 2011 seeking to condone the delay of 166 days in filing an application to set aside the ex-parte decree dated 16.10.2012. The reason given in the affidavit for the delay is that the petitioners were suffering from illness and were also not in station.

12. A counter affidavit has also been filed denying the allegations contained in the affidavit filed in support of I.A.No.486 of 2013. The Trial Court has dismissed I.A. No.486 of 2013 in O.S. No.57 of 2011 on the ground that no sufficient reasons have been given for the condonation of the delay.

13. Being a suit for declaration and possession that too in respect of a sale deed, which already stands in the name of the 6th defendant in the suit, the Trial Court ought to have considered this factor before dismissing the application. As seen from the impugned order, the Trial Court has dismissed the application I.A. No.486 of 2013 only on the ground that the written statement has not been filed by the petitioners along with the application to condone the delay of 166 days in filing an application to set aside the ex-parte decree. As observed earlier, the Trial Court has not considered the nature of the suit before dismissing I.A. No.486 of 2013. A party who otherwise may have a good case on merits should not be made to suffer on account of an ex-parte decree passed against him. Further, the delay being only 166 days and reasons given in the affidavit are acceptable, this Court is of the considered view that the Trial Court ought to have allowed the condone delay application.

14. It is also brought to the notice of this Court by the learned counsel for the respondent / plaintiff that the respondent / plaintiff has already taken possession of the property pursuant to the ex-parte decree dated 16.10.2012 and the delivery of possession has also been

recorded. Even though the respondent / plaintiff has taken possession of the property, being a suit for declaration, to declare the sale deed standing in the name of the 6th defendant as null and void, a suit cannot be disposed of in the absence of the petitioners / defendants, when a sale deed stands in the name of the 6th defendant. It is also an admitted fact that the parent documents pertaining to the suit schedule property are also in the custody of petitioners / defendants, as is evident from the prayer sought for in the plaint for mandatory injunction to hand over the custody of the parent title deeds to the respondent / plaintiff. All these factors were not duly considered by the Trial Court in the impugned order. Further the delay is only 166 days in filing an application to set aside the ex-parte decree.

15. The learned counsel for the respondent drew the attention of this Court to the judgment of the Hon'ble Supreme in the case of **ATCOM Technologies Limited versus Y.A. Chunawala & Co. & Others** reported in **CDJ 2018 SC 513**. After considering the judgment cited supra, this Court is of the considered view that the said judgment is not applicable to the facts of the instant case, as the said judgment was considering a delay of 15 years and 54 days and further the suit filed in that case was a suit for money. In the case on hand,

the delay is only 166 days and the suit is one for declaration to declare the sale deed as null and void. Therefore, the facts of the judgment cited by the learned counsel for the respondent are not applicable to the facts of the instant case. But considering the indifference and laxity shown by the petitioners in contesting the suit O.S. No.57 of 2011, this Court is of the considered view that costs will have to be imposed on the petitioners for allowing CRP (NPD) No.4476 of 2014.

16. Unnumbered REA No. of 2014 in E.P. No.8 of 2013 has also been returned by the Executing Court on the ground that the E.P. has already been closed as the delivery has been recorded in favour of the respondent / plaintiff. CRP (NPD) No.2906 of 2014 has been filed against the order dated 07.03.2014 passed in unnumbered REA of 2014 in E.P. No.8 of 2013. Since, the respondent / plaintiff has already taken possession of the suit schedule property, pursuant to the ex-parte decree dated 16.10.2012 his possession, till the disposal of the suit in O.S. No.857 of 2011, cannot be disturbed, even though the instant Civil Revision Petitions have been allowed by this Court by a conditional order.

Conclusion:

17. In the result, the following directions are issued:

(a) the impugned order, dated 18.12.2013 in I.A. No.486 of 2013 in O.S. No.57 of 2011 is hereby set aside on condition that the petitioners in CRP (NPD) No.4476 of 2014 pay a sum of Rs.25,000/- to the respondent / plaintiff on or before 09.08.2019,

(b) In default of payment of costs, Rs.25,000/- by the petitioners in CRP (NPD) No.4476 of 2014 to the respondent within the stipulated time mentioned above, both the Civil Revision Petitions shall stand automatically dismissed.

(c) The petitioners are directed to file the Written statement in the suit O.S. No.57 of 2011, within a period of two weeks from the date of receipt of a copy of this order and after filing of such written statement, the Trial Court shall frame issues, within a period of four weeks thereafter and after framing of issues, shall dispose of the suit, within a period of three months thereafter, and statusquo as on date regarding possession of the suit property shall be maintained by the parties to the suit.

(d) in view of allowing CRP (NPD) Nos.2906 and 4476 of 2014, the Trial Court is also directed to restore I.A. No.486 of 2013 in O.S.

No.57 of 2011 without insisting for any separate application to set aside the ex-parte decree, dated 16.10.2012.

(f) Consequently, connected miscellaneous petitions in CRP (NPD) Nos.2906 and 4476 of 2014 are closed.

26.07.2019

Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
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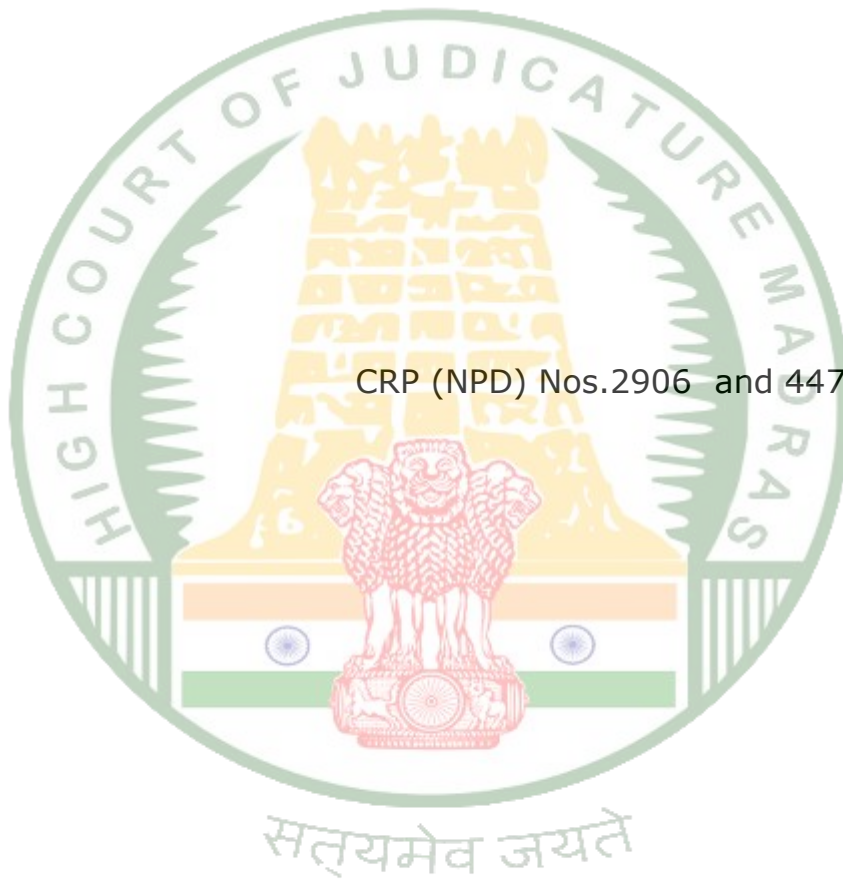
To
The District Munsif,
Rasipuram.



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ABDUL QUDDHOSE, J.

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