

N THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.03.2019

PRONOUNCED ON : 05.04.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P.(PD).No.3847 of 2014

and

M.P.No.1 of 2015

1.Chandra
2.Kanmani
3.Balamani
4.Kasthuri

... Petitioners

vs.

M.Devendran

... Respondent

PRAYER: Civil Revision petition is filed under Article 227 of the Constitution of India, to set aside the order and decretal order passed in I.A.No.836 of 2013 in O.S.No.16 of 2000 on the file of I Additional Sub Court, Salem dated 24.06.2014.

For Petitioners : Mr.R.Nalliyappan

For Respondent : Mr.Rahul K.Jain for
M/s.VikraM U.Jain

ORDER

The present civil revision petition is directed against the impugned fair and decretal order dated 24.06.2014 in I.A.No.836 of 2013 in O.S.No.16 of 2000 passed by the I Additional Subordinate Judge, Salem.

2. By the impugned order the Court has dismissed the above application filed by the petitioner to set aside *exparte* decree dated 18.07.2005.

3. The respondent/plaintiff had filed O.S.No.16 of 2000 before the 1st Additional Subordinate Judge, Salem against late N.Govindan and G.Shanmugam.

4. The first defendant died on 11.06.2000. The petitioners were therefore impleaded as defendants as other legal representatives of the first defendant. The second defendant is also the other legal representative of the 1st defendant. He is not a party in the present Civil Revision Petition.

5. The suit was filed for specific relief to execute the sale deed in favour of the respondent/plaintiff in terms of the sale agreement dated 06.09.1999 and for a permanent injunction and to allow the possession after duly receiving the balance sale consideration.

6. The respondent/plaintiff had also filed I.A.No.32 of 2000 under Order 39 Rules 1 and 2 and Section 151 of C.P.C for an ad-interim injunction, to restrain the defendants 1 and 2 from encumbering the suit schedule property by way of sale agreement, sale mortgage till the disposal of the suit.

7. Since during the pendency of the suit, the first defendant died on 11.06.2000 the suit abated at the expiry of 90th day. Therefore, the respondent/plaintiff filed I.A.No.833 of 2000 to implead the petitioners as proposed parties as defendant Nos.3 to 7 in their capacity as legal representatives of the deceased 1st defendant. The said application was later allowed exparte on 27.02.2004.

8. Meantime, on 30.03.2001, the respondent/plaintiff filed two applications viz., I.A.No.365 of 2001 to condone the delay in filing the impleading petition to implead the petitioners and I.A.No.366 of 2001 to set aside the abatement of the suit on account of abatement of suit after the deceased 1st defendant. These applications were later allowed on 27.10.2003.

9. Thereafter, on 30.03.2004, the respondent/plaintiff filed I.A.No.242 of 2004 to permit him and amend the plaint pursuant to impleading the

petitioners and other legal representatives of the deceased 1st defendant. This application was also allowed *exparte* on 20.04.2004.

10. Meanwhile, the suit was also dismissed for non payment of batta as against defendants 3, 4 and 7 on 04.01.2005.

11. Therefore, the respondent/plaintiff filed I.A.No.90 of 2005 under Order 9 Rule 9 r/w Section 151 of C.P.C. to restore the suit dismissed on 04.01.2005. The petitioner were called absent and set *exparte* and hence the said application was also allowed *exparte* on 01.04.2005.

12. The petitioners were eventually called absent and set *exparte* on 10.06.2005 and the suit was directed to be listed on 28.06.2005.

13. On 28.06.2005, the counsel for the second defendant reported that the second defendant had taken back the file and had chosen not to file written statement and reported no instructions.

14. Hence, the second defendant was also called absent and set *exparte* and the suit was directed to be listed on 05.07.2005 under the caption for “recording *exparte* evidence”.

15. On 18.07.2005, the plaintiff was examined as P.W.1 and thereafter documents were marked as Exs.A1 to A8. The suit was decreed *exparte* on 18.07.2005.

16. The Court however passed a cryptic Judgment which reads as under :

“ P.W.1 examined. Ex.A1-8 marked. Heard. Records perused. The plaintiff is directed to deposit the sale consideration balance amount within a month. After that the defendant is directed to execute the sale deed in favour of the plaintiff within a month. Suit is decreed as prayed for with cost.”

17. The decree was therefore drafted based on the said judgment. There is no discussion on merits by the court while decreeing the suit *exparte* in favour of the respondent/plaintiff. The respondent had also not sought for an alternative relief for refund of the amount paid as advance.

18. Thereafter, on 23.09.2013, the petitioners along with impleaded defendants 4 to 7) filed I.A.No.836 of 2013 under Section 5 of the Limitation Act to condone the delay of 2959 days in filing the petition to set aside the *exparte* decree on 18.07.2005 and the same was dismissed on 24.06.2014.

19. This application was filed after the respondent had filed EP and at the time of attempting to take delivery of the property in terms of the decree.

20. In the said I.A, the respondent/plaintiff contested the proceeding on merits and stated that the petitioner knew about of the decree passed on 18.07.2005 and they did not come forward to file the application earlier and therefore there was no sufficient cause for condoning the delay of 2959 days to set aside the *exparte* decree passed on 18.07.2005.

21. The Court below after hearing both sides has held as follows in para 11 and 12:

“11. The records would also go to show that the summons to the newly impleaded defendants 5 and 6 upon them, for the hearing on 24.09.2004.

12. The summons for the other defendants D3, D4 and D7 also served upon them for the hearing on 10.06.2005. There are endorsements to that effect in the docket sheet. D5 and D6 were set *exparte* on 24.06.2004 D3, D4 and D7 were set *exparte* on 10.06.2005.”

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22. As far as the judgment and decree dated 18.7.2005 is concerned it bears no discussion on merits of the case. Therefore, this court was inclined to allow the present civil revision petition on 27.2.2019 subject to payment of cost to the respondent and had reserved the case for passing a speaking order.

23. A week later, the learned counsel for the petitioner mentioned and requested that the he would like to make additional submissions and therefore be given one more opportunity. Thereafter, the case was listed on 15.3.2019. 27.08.2004.

24. The case was thereafter heard at length on 19.3.2019 and again on 20.03.2019. After hearing the arguments on behalf of the respondent, the case was reserved for passing orders and accordingly this order is being passed. The records of the lower court were also called for and scrutinised.

25. As per Serial Nos.19(notes paper), 49 to 54 ,72 and 73, on 06/07/2004 fresh summons were ordered on the petitioners by 23.07.2004 and batta was paid for D3 to D7 (for the petitioners). The case was adjourned to 27.08.2004.

26. The summons sent to Defendants 2, 3, 4 and 7 (petitioners) were returned with an endorsement as "No such addressee". However, there is also endorsements suggesting service of suit summons on the 2nd and 3rd.

27. There are also acknowledgment cards evidencing receipt of notice of hearing fixed on 24.09.2004 by the petitioners except the 1st petitioner.

They however elate to one of the many applications filed by the respondent that were pending.

28. Similarly, there are unserved covers for hearing fixed on 10.06.2005. Therefore, it cannot be construed that there was service of summons.

29. On 24.09.2004, some of the petitioners were called absent and fresh summons was ordered and the hearing was fixed to 15.10.2004.

30. On 01.04.2005, it was reported that the summons were issued to Pushpa, Petitioner No.1 and 4 were refused. On 10.06.2005, they were called absent and set *exparte*.

31. The Court has assumed that the summons were served on the petitioners based on endorsement in the Court bundle. The observation of the lower Court that the burden was heavily upon the petitioners to prove the non service of summons upon them would be unfair except to the extent of actual service of summons on some of the petitioner.

32. The learned counsel for the petitioner submitted that after passing of the decree, Respondent filed E.P.No.115 of 2006 before the Additional Sub Court and deposited balance sale consideration.

33. The learned counsel for the petitioner submitted that in the said E.P notice was served on petitioners herein. Though they were called upon them to execute and register sale deed in favour of Respondent, they did not come forward as a result sale deed dated 22.12.2006 registered as Document No.101 of 2007 was also executed by the Court favour of respondent herein.

34. It was further submitted that after execution and registration of the aforesaid sale deed the respondent herein filed E.P.No.67 of 2007 for taking delivery of suit property and notices were sent to their respective addresses mentioned in the present Civil Revision Petition. Since, the petitioners evaded of summons substituted service was carried out one issue of 'Malai Malar' dated 06.08.2007 and even after substituted service, the petitioners did not enter appearance and hence they were set exparte.

35. It was further submitted that after orders in R.E.A.No.117 of 2008 in R.E.P.No.67 of 2007 was passed and to defeat the decree passed in favour of respondent in O.S.No.16 of 2006, the petitioners preferred I.A.No.836 of 2013 to condone the delay of 2959 days to set aside the exparte decree.

36. The learned counsel for the respondent therefore submitted that as per the judgment of the Hon'ble Supreme Court in **Deodhar vs. Parag and Ors**, 2016 SAR (Civil) 603, under similar circumstances the Court held that

“practically, nothing remained in the matter since the conveyance had already been executed on 24.09.2014. It appears that this fact was not brought to the notice of the High Court. Therefore, as on the date of order passed by the High Court, the said appeal had already been rendered infructuous. In that view of the matter, nothing survived in the appeal and hence, it was unnecessary on the part of the High Court to condone the delay.” The learned counsel therefore submitted that the present Civil Revision Petition liable to be dismissed.

37. The learned counsel for the petitioners relied on the decision of this Court rendered in **Meenakshisundaram Textiles vs Valliammal Textiles Ltd.** 2011 (3) CTC 168, wherein the Court held that *“in terms of the above provisions, every judgment should contain a concise statement of the case, the points for determination, decision thereon and the reasons for such decision. A judgment which does not contain the bare minimum facts, the point for determination, the evidence adduced and the application of those facts and evidence for deciding the issue would not qualify it to be called as “judgment”. The judgment should contain the brief summary of the facts, the evidence produced by the Plaintiff in support of his claim and the reasoning of the learned Judge either for decreeing the Suit or its dismissal. The Civil Procedure Code does not say that the Court is bound to grant a decree in case the Defendant is absent. Judgment means cognitive process of reading a*

decision or drawing conclusion. Judgment is the basic requirement for a Court and it means a decision or conclusion reached after consideration and deliberation. To put it differently, the basics of a judgment are to support by most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived.” The Court further observed that “*from the above discussions, it is manifestly clear that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any Appeal, the decree is executable. In that sense, there is no difference between a judgment and decree and an ex parte judgment and decree. In view of the above, in the event the Defendant is set ex parte, the Court should be extra careful in such case and it should consider the pleadings and evidence and arrive at a finding as to whether the Plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required in a contested matter, an ex parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment.”.*

38. As far as service of summons is concerned, there are no direct records to show that there was sufficient service of summons on all of the petitioners. Further, the suit itself was dismissed on 04.01.2005 and was

restored only on 01.04.2005 pursuant to an *exparte* order in I.A.No.90 of 2005. In the said application, private notice was returned with an endorsement “Refused”. Except the 1st petitioner, the court notice was served on and all of the petitioners and the petitioner.

39. Thus, it is doubtful whether summons were served on all the defendants, particularly, in view of the fact that the suit abated on an earlier occasion and thereafter dismissed on 04.01.2005 .

40. At the same time, from the records it is also evident that the suit summons had been issued on the original defendants and therefore nothing precluded the Court to dispense with summons on the petitioners under Order 22 Rule 4(4) of the of the CPC on an application. Order 22 Rule 4(4) of the of the CPC reads as under:-

4. Procedure in case of death of one of several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

41. In *T. Gnanavel v. T.S. Kanagaraj*, (2009) 14 SCC 294, the Hon'ble Supreme Court held as follows:-

26. In view of our discussions made hereinabove and after going through the provisions under Order 22 Rule 4(4) CPC, as discussed herein earlier, and in view of the principles laid down by the aforesaid decision, it is, therefore, clear that if exemption, which is provided under Order 22 Rule 4(4) CPC is obtained from the court before the delivery of the judgment, in that case, it would be open to the court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. That being the position, we are, therefore, of the view that since in this case, admittedly, exemption was obtained after the judgment was pronounced, the provision of Order 22 Rule 4(4) CPC would not be attracted.

42. Even as per the decision of the Hon'ble Supreme court in **Sushil K.Charavarthy (D) thr. Lrs vs M/s.Tej Properties Pvt. Ltd.** (2013) 9 SCC 642 cited by the learned counsel for the respondent, the Court can pass *exparte* decree without impleading legal representatives of the deceased first defendant under Order 2 Rule 4(4) of CPC subject to mandatory compliance of the said provision.

43. The learned counsel for the respondent referred to the several decisions of the Hon'ble Supreme Court and this Court and stated that condonation of delay cannot be granted as a matter of routine.

44. The learned counsel for the respondent relied upon the decision in **G.Jayaraman s. Devarajan**, 2007 (2) CTC 643 (Mad) wherein it was held that while condoning the delay, the discretion must not be exercised in any arbitrary or vague or fanciful manner but must be exercised with vigilance and circumspection.

45. The learned counsel for the respondent also referred to the decision of this Court reported in **Valarmathi and two others vz. Anandan and one another**, 2016(5) CTC 481 (Mad), wherein this Court refused to condone the delay of 343 days in filing the application to set aside *exparte* decree preliminary.

46. The learned counsel also referred to another decision of the Hon'ble Supreme Court in ***U.SowriReddy (Dead) by LRs. vs. B.Suseelamma and Others***, (2011) 14 SCC 126 wherein it was held as follows:-

“In our opinion the impugned order of the High Court cannot be sustained. It appears that the High Court ignored the deposit of Rs 18,000 on 6-11-2001 in pursuance of the order dated 2-11-2001 and failed to take into account the order dated 11-12-2001 of the learned Additional Senior Civil Judge dismissing Execution Petition No. 17 of 1996 and also did not take into consideration the earlier order dated 10-4-1998 in Civil Revision Petition No. 3957 of 1998. In our opinion the High Court was not justified in interfering in a civil revision petition under Section 115 CPC when the amount of Rs 18,000 was deposited on 6-11-2001 as per order dated 2-11-2001.”

47. However, the said decision cannot be applied to the fact of the case. The learned counsel for the respondent has submitted that the powers of the Court interfere is very limited under Section 115 of C.P.C.

48. In this connection, he also referred to the decision of the Hon'ble Supreme Court in ***AmbadasKhanduji Shinde and others vs. Ashok Sadashiv Mamurkar and Others***, (2017) 14 SCC 132. In para 14, it was held that “*the High Court cannot interfere with the concurrent factual findings while exercising jurisdiction under Section 115 of the Civil Procedure Code. It is settled law that revisional jurisdiction of the High Court is restricted to cases*

of illegal or irregular exercise of jurisdiction by the subordinate courts. Under Section 115 of the Civil Procedure Code, it is not open for the High Court to correct errors of facts or law unless they go to root of the issue of jurisdiction. In the facts on hand, the courts below have passed reasoned orders well within the jurisdiction conferred upon them. We arrive at the conclusion that the High Court committed error in interfering with the judgment and decree of the trial court.”

49. The learned counsel also referred to another decision of the Honble Supreme court reported in **Sushil K.Charavarty (D) thr. LRs. vs. M/s.Tej Properties Pvt.Ltd.**,2013(4) JT 580 : 2013(2) ICC 525.

50. The learned counsel for the respondent submitted that only remedy if any that was available to the petitioners were to file a suit under Order 21 Rule 90 of CPC or in the alternative, file an appeal against the exparte decree.

51. The learned counsel also drew attention of the decision of the Hon'ble Supreme court in **Hindustan Petroleum Corporation Limited vs Dilbahar Singh** (2014) 9 SCC 78, wherein it has been held that the revisional powers of the court is not cloaked with powers of an appellate Court. Particularly, reference was made in Paragraph 30, wherein it was held as follows:-

“ 30. We have already noted in the earlier part of the judgment that although there is some difference in the language employed by the three Rent Control Acts under consideration which provide for revisional jurisdiction but, in our view, the revisional power of the High Court under these Acts is substantially similar and broadly such power has the same scope save and except the power to invoke revisional jurisdiction suo motu unless so provided expressly. None of these statutes confer on revisional authority the power as wide as that of the appellate court or appellate authority despite such power being wider than that provided in Section 115 of the Code of Civil Procedure. The provision under consideration does not permit the High Court to invoke the revisional jurisdiction as the cloak of an appeal in disguise. Revision does not lie under these provisions to bring the orders of the trial court/Rent Controller and the appellate court/appellate authority for rehearing of the issues raised in the original proceedings.”

52. The relief by way of specific performance is a discretionary remedy and not ought to be granted as a matter of routine even if a parties are set exparte. Therefore, the Court should not have decreed the suit for specific performance mechanically.

53. It should have applied its mind and given its reasons before decreeing the suit. A cursory glance of the records would show that an agreement dated 06.09.1999 is said to have been signed by late N.Govindan and G.Shanmugam(D1 and D2) with the respondent/plaintiff and the recitals in the agreement are in the background of a subsisting loan with the Urban Co-operative Bank and therefore respondent/plaintiff paid an amount of

Rs.70,000/- as advance to the 1st defendant to discharge the said loan and agreed to pay the balance before 31.01.2000 failing which, the advance paid would stand forfeited if he failed to pay the amount balance on or before 31.01.2000.

54. The respondent had issued legal notice dated 03.12.1999 to the original defendant and thereafter instituted the suit for specific performance on 11.01.2000.

55. The respondent deposited the balance amount of Rs.3,63,000/- only on 22.07.2005 and it is thereafter the sale deed was executed by the Court on 22.12.2006 in favour of the respondent.

56. Though, the application to condone the delay of 2959 days in setting aside the exparte decree dated 18.07.2005 was filed at the stage of taking possession, the court should have seen the entire background of the case before dismissing the application to condone the delay. It is not the length of delay which should weigh and hold sway but the sufficient cause to condone delay.

57. Since the judgment and decree is unreasoned and shows total non

application of mind, I am of the view, the Court should have condoned the delay.

58. It would have been different, if the lower Court had decided the case on merits while decreeing the suit in which case the scope for interference under Section 115 would have been very limited.

59. Even if the petitioners were recalcitrant and were evading the notice and Court summons, the respondent could have requested the lower Court to exercise its power under Order 22 Rule 4(4) of the CPC and thereafter the lower Court could have passed a decree on merits after discussion. However, the Lower Court had failed to exercise to the discretion at that stage. Therefore, I find sufficient grounds to interfere in this revision petition.

60. Consequently, I am of the view that ends of justice would be met, if the suit is restored to the file before the learned 1st Additional Subordinate Judge, Salem, for permitting the petitioners to file their written statement subject to payment of Rs.37,800/- being the stamp duty paid for execution of the sale deed along with registration Charges and a further a sum of Rs.50,000/- towards cost to the respondent and for showing cavalier attitude and for being recalcitrant in participating earlier. The amount is rounded off to Rs.90,000/- and shall be deposited to the Account of the above suit within a

period of four weeks from the date of receipt of this order. On such deposit being made, the respondent shall be entitled to receive the same. The petitioners shall also file their written statement within such time. In case, the petitioners comply with the same, the learned I Additional Sub Judge, Salem shall take up the case and decide the case on merits within a period of six months thereafter. In case of failure by the petitioners, this order shall automatically cease to have effect at the expiry of the aforesaid period.

61. The respondent is at liberty to amend the plaint if advised for the alternate relief for refund of the advance amount paid by him to the 1st defendant from his legal representatives.

62. Accordingly, the civil revision petition is allowed. The impugned fair and decretal order passed by the I Additional Sub Court, Salem in I.A.No.836 of 2013 in O.S.No.16 of 2000 is hereby set aside. No cost. Consequently, connected miscellaneous petition is closed.

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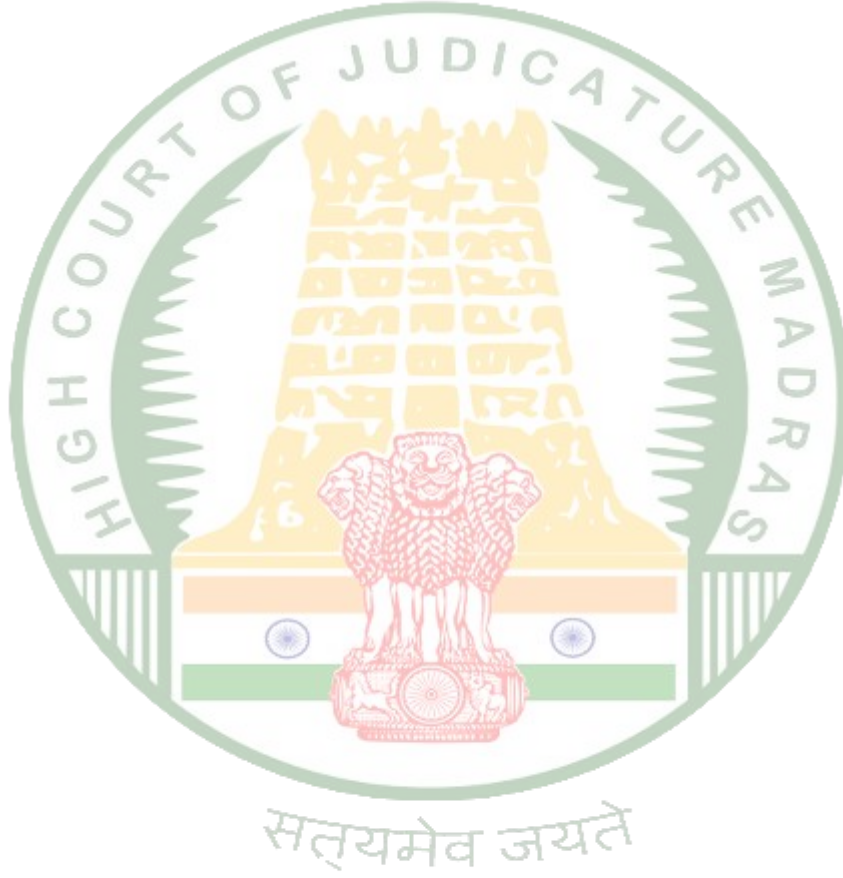
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Index :Yes/No
Internet :Yes/No
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To

1. I Additional Sub Court, Salem.

2.The Section Officer, V.R.Section, High Court, Madras.



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Pre-delivery order in
C.R.P.(PD).No.3847 of 2014
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