

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on : 07.11.2019

Orders Pronounced on : 14.11.2019

CORAM

THE HON'BLE MR. JUSTICE **R.PONGIAPPAN**

CRP.NPD.No.3898 of 2014

and

M.P.No.1 of 2014

1.M.Kumarasamy

2.Minor Sukanya

3.Minor Subash

Minor petitioners are represented by their
Next friend and Father M.Kumarasamy

..Petitioners

Vs.

M.Ramasamy

..Respondent

PRAYER:

The Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure against the order dated 02.09.2014 passed in I.A.No.708 of 2011 in O.S.No.97 of 2002 on the file of the learned Subordinate Judge, Kallakurichi.

For Petitioners : Mr.R.Nalliyappan

For Respondent : Mrs.G.V.Seethalakshmi

ORDER:

The defendants in O.S.No.97 of 2002 on the file of the Sub Court, Kallakurichi are the petitioners herein. Before the said court, the respondent in this Civil Revision Petition filed the above referred suit and seeks the relief of specific performance directing the revision petitioners to execute sale deed after receipt of Rs.30,000/- towards balance sale consideration as per the sale agreement dated 08.03.2001. During the course of trial proceedings, on 15.12.2005, for the reason that the petitioners had not appeared before the court below, exparte decree has been passed against them. For set asiding the same, they filed application in I.A.No.708 of 2011 under Section 5 of Limitation Act to condone the delay of 744 days in filing the application to set aside the exparte decree. The learned Subordinate Judge, Kallakurichi after affording opportunity to the respondent in its order dated 02.09.2014 dismissed the application filed by the revision petitioners. Aggrieved over the same, the petitioners are before this Court with the present Civil Revision Petition.

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2.In the affidavit filed in support of the petition filed in I.A.No.708 of 2011, the petitioners herein averred as follows. On 15.12.2005 when the case is posted for trial, due to illness, they have

not appeared before the trial court. Further they have not advised their advocate for getting adjournment. Hence, on the day itself, the learned Subordinate Judge, Kallakurichi passed an ex parte decree against them. Further since the petitioner was suffering from jaundice he did not contact the counsel. Only in the month of January, he came to the knowledge that the suit filed by the respondent was decreed ex parte. Hence, the application is filed to condone the delay of 744 days in filing the application to set aside the ex parte decree.

3.Resisting the claim made by the petitioners, the respondent herein filed counter affidavit and states as follows. It is not correct to say that the petitioner filed the application in the month of January 2008. Even assuming that the petition filed by the petitioner returned for rectifying the defects, the same has not been represented within the time fixed by this Court. Only to protract the proceedings, the petitioner filed this application. Further in respect of the second and third petitioners before passing the order of ex parte, the court guardian was appointed and only thereafter the decree has been granted in favour of the respondent. As of now, the sale deed has been executed in favour of the respondent and the matter is posted for effecting delivery to the respondent and thereby the petitioners approached this Court without sufficient cause. After receiving counter

affidavit, the first petitioner examined himself as PW1 before the trial court. The learned Sub Judge, Kallakurichi after considering the evidence given by the first petitioner as already stated by order dated 02.09.2014 had dismissed the application.

4.In the said circumstances the sole ground raised by the counsel appearing for the petitioners before this Court is that since the suit has been filed against the minor defendants, if the natural guardian has not appeared before the court concerned, it is the duty of the court to appoint court guardian to the second and third minor defendants. In this case, while at the time of passing the decree, the learned Sub Judge, Kallakurichi without following the procedure to be adopted, simply examined the respondent as PW1 and allowed the suit, which is purely illegal. On the above score alone, the decree and judgment passed by the learned Sub Judge, Kallakurichi is liable to be set aside.

5.On the other hand, the learned counsel appearing for the respondent would contend that, after executing the sale deed in favour of the respondent set asiding the decree already passed by the competent court is creating multiplicity of proceedings and thereby it is not necessary in interfering with the orders passed by the learned

Subordinate Judge, Kallakurichi.

6.Upon considering the arguments advanced by either side, for deciding the Civil Revision Petition, it would be necessary to see the judgment and decree dated 15.12.2005 passed by the learned Subordinate Judge, Kallakuruchi, which reads as follows:

"Since the defendant was being called absent, set exparte, plaintiff examined as PW1, Ex.A1 to 3 marked, Claim proved and the suit is decreed as prayed for with costs."

7.In fact on the date when the above judgment was pronounced, the learned Subordinate Judge, Kallakurichi is very well aware that the second and third petitioners herein are minor at the time of pronouncing judgments.

8.In this occasion, it is necessary and useful to see the judgment of our Hon'ble Apex Court in the judgment of **Ram Chandra Arya Vs. Man Singh and another** reported in **AIR 1968 SC 954**, wherein the Hon'ble Apex Court has held as follows:

"It is now a well-settled principle that, if a decree is passed against a minor without

appointment of a guardian, the decree is a nullity and is void and not merely voidable.”

9.In this case also, on go through the entire judgment rendered by the learned Sub Judge, Kallakurichi, there is no averment in respect to the appointment of guardian to the second and third petitioners at the time of passing decree against them. So he violated the settled principles of law.

10.As already observed, since the decree passed against the minor itself is void one, enforcing the same by way of filing the execution petition is also void one. Though the sale deed was executed in favour of the respondent since the decree itself is having nullity, the same has to be necessarily set aside. So the submissions made by the learned counsel appearing for the respondent is no way helpful to his case.

11.Therefore, I am of the opinion that the decree passed in O.S.No.97 of 2002 is void one. Though it was stated in the counter affidavit filed by the respondent that court guardian was appointed to the second and third petitioners before passing the decree, there is no whisper in respect to the appointment of court guardian in the

judgment rendered by the Sub Court, Kallakurichi. So in all aspects, for the above said reasons, the impugned order passed by the learned Subordinate Judge, Kallakurichi in I.A.No.708 of 2011 is liable to be set aside and accordingly the petition filed by the petitioners before the trial court in I.A.No.708 of 2011 is allowed. However at the time when the sale deed was executed in favour of the respondent, he has purchased non judicial paper for Rs.4,000/-. Hence, it is appropriate to impose some cost which has to be paid to the respondent by the first petitioner. Accordingly, the petition filed by the petitioners in I.A.No.708 of 2011 is allowed on condition that the first petitioner has to pay Rs.15,000/- (Rupees Fifteen Thousand only) to the respondent within a period of two weeks from the date of receipt of a copy of this Order. On payment of cost, the learned Subordinate Judge, Kallakurichi is directed to dispose the suit in O.S.No.97 of 2002 as early as possible, preferably within a period of three months from the date of payment of cost.

12.The Civil Revision Petition is disposed of, accordingly. Consequently, connected miscellaneous petition is closed. No costs.

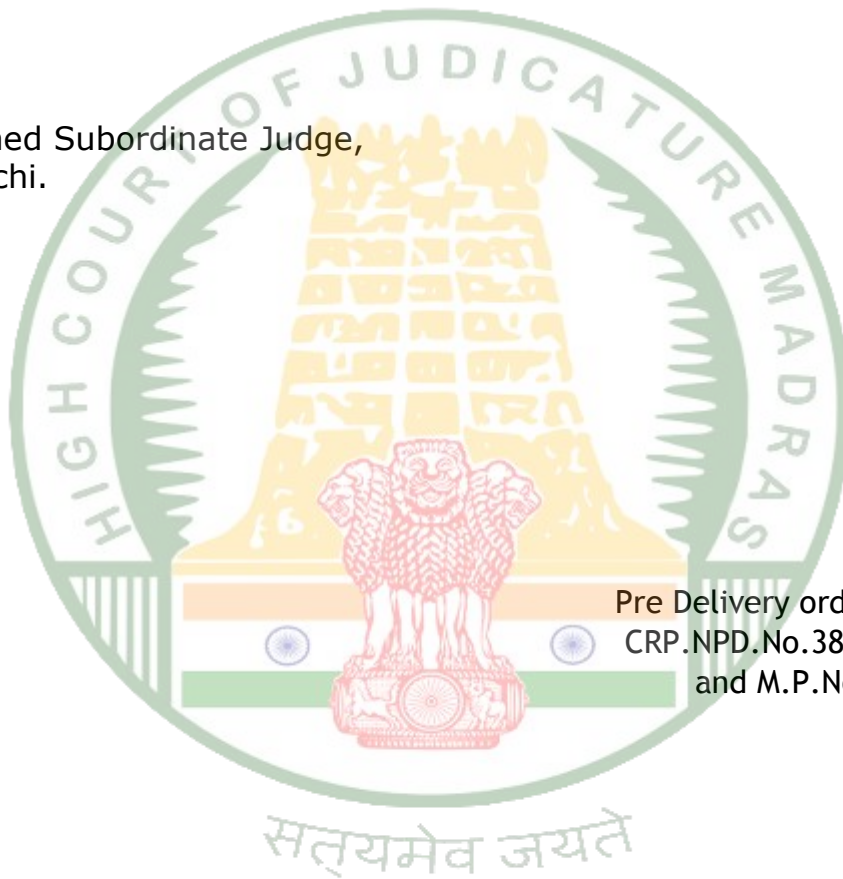
14.11.2019

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No
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R.PONGIAPPAN,J.

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To
The learned Subordinate Judge,
Kallakurichi.



Pre Delivery order made in
CRP.NPD.No.3898 of 2014
and M.P.No.1 of 2014

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