

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.07.2018

Pronounced on : 13.06.2019

CORAM

THE HONOURABLE **MR.JUSTICE P.VELMURUGAN**

CRP.(NPD).No.4134 of 2017

and

C.M.P.No.19381 of 2017

R. Sampath

..Petitioner

versus

S.Suresh

.. Respondent

Prayer :- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the judgment and decree passed in C.M.A.No.64 of 2017 on the file of the learned XVI Additional City Civil Court, Chennai dated 19.09.2017.

For Petitioner : Mr. B.Ramprabhu

For Respondents : Mr. P.Rajkumar pandiyan

ORDER

This Civil Revision Petition has been filed to set aside the judgment and decree passed in C.M.A.No.64 of 2017, dated 19.09.2017, on the file of the learned XVI Additional City Civil Court, Chennai.

2. It is seen that the revision petitioner is the petitioner in I.A.No.7862 of 2016 in O.S.No.6388 of 2015 and the defendant in the above suit. The respondent herein is the respondent in I.A.No.7862 of 2016 and the plaintiff in the above said suit.

3. The respondent/plaintiff filed a suit against the petitioner/defendant under Order 37 Rule 1 & 2 of C.P.C. After service of summons, the petitioner herein has entered into an appearance in that suit through his counsel on 18.12.2015. Subsequently, he filed the written statement on 02.02.2016 and based on the pleadings, the trial Court framed the issues on 08.02.2016 and the suit was posted on 05.04.2016 for trial. The respondent/plaintiff has filed the memo to reject the written statement filed by the petitioner/defendant. Subsequently, when the case was posted on 07.04.2016, since the petitioner/defendant did not appear before the Court, therefore, the Court passed an exparte decree under Order 37 Rule 1 & 2 of C.P.C. Subsequently, the petitioner has filed an Interlocutory Application in I.A.No.7862 of 2016 to set aside the exparte decree passed by the trial Court. The trial Court, after hearing the application, dismissed the same on the ground that there is no sufficient reason has been

assigned to set aside the exparte decree.

4. Challenging the above said order dated 18.07.2016 in I.A.No.7862 of 2016, passed by the learned XIV Assistant Judge, City Civil Court, Chennai, the petitioner has filed the Civil Miscellaneous Appeal in C.M.A.No.64 of 2017 before the XIV Assistant Judge, City Civil Court, Chennai. The learned Judge, after hearing the appeal, dismissed the same and confirmed the order passed by the trial Court.

5. As against the judgment passed by the learned XIV Assistant Judge, City Civil Court, Chennai in C.M.A.No.64 of 2017, dated 19.09.2017, the appellant/petitioner/defendant has filed the present revision before this Court.

6. The learned counsel for the revision petitioner would submit that after receiving the summon, the petitioner has entered into appearance through his counsel and the Court has also adjourned the matter for filing the written statement. As per the directions of the Court, the revision petitioner has also filed his written statement. Thereafter, the Court framed the issues and posted the case for trial. Once the written statement is received and the issues were framed,

when the matter is posted for trial, the Court should have proceeded with the trial, in ordinary course and ought not to have passed the judgment under Order 37 of C.P.C. When the respondent/plaintiff has filed the memo to reject the written statement, the trial Court should have passed the order on merit and subsequently, the Court should have given an opportunity to the revision petitioner for defending the case or should have served the summon before passing the judgment. Hence, without adopting the procedures as contemplated under law, the trial Court simply passed an ex parte decree. Therefore, he filed the petition to set aside the ex parte decree, which was not considered on merit and opportunity was not given to him to defend the case and dismissed the application filed by the revision petitioner for setting aside the ex parte decree passed by the trial Court. When he challenged the said order, the lower appellate Court also failed to consider the mandatory provisions under Order 37 of C.P.C. and simply dismissed the appeal and confirmed the order passed by the trial Court. Further the learned counsel for the petitioner would submit that once the written statement filed and issues framed, the suit should trial in accordance with general provisions of C.P.C., not under Order 37 of C.P.C. Therefore, the orders passed by both the Courts below warrants interference.

7. The learned counsel for the respondent/plaintiff would submit that once the summon served to the revision petitioner/defendant, either he should have applied for leave to defend and after getting leave to defend only he can file the written statement and defend the suit. So without getting any leave, simply he filed the written statement. Since the trial Court inadvertently accepted the written statement, after noticing the same, the respondent/plaintiff filed the memo to reject the written statement. When the case was posted for appearance of the petitioner/defendant, neither he appeared before the trial Court nor filed any objection to the memo filed by the respondent/plaintiff. Therefore, the trial Court rightly passed an ex parte decree, as per the Rule 4 contemplated under Order 37 of C.P.C. Subsequently, he has filed an application in I.A.No.7862 of 2016 to set aside the ex parte decree without any valid reason. Therefore, the trial Court dismissed the petition. Challenging the same before the Appellate Court, the Appellate Court dismissed the petition and confirmed the order of the trial Court. Since the order passed by the trial Court and appellate Court is well within the law and therefore, there is no reason to interfere with the order passed by the Appellate Court in C.M.A.No.64 of 2017, dated 19.09.2017.

8. Heard the learned counsel for the petitioner and the learned counsel for the respondent and perused the materials available on record.

9. Admittedly, the respondent/plaintiff filed the suit in O.S.No.6388 of 2015 on the file of the XIV Assistant Judge, City Civil Court, Chennai under Order 37 Rule 1 & 2 of C.P.C. against the revision petitioner/defendant. After service of summons, the petitioner/defendant has entered into appearance through his counsel on 18.12.2015 and the case was posted for filing written statement on 19.01.2016. Subsequently the written statement was filed on 02.02.2016 and the case was posted on 18.02.2016 for framing of issues. On 18.02.2016, the trial Court framed the issues and posted the case for trial on 05.04.2016. In the meanwhile, on 01.03.2016, the respondent filed the memo before the trial Court to reject the written statement. Based on the memo filed by the respondent/plaintiff, the trial Court directed the revision petitioner/defendant to appear before the Court, since the revision petitioner/defendant did not appear before the Court, the trial Court passed an ex parte decree on 07.04.2016 against the petitioner/defendant. Subsequently, the

petitioner/defendant filed an interlocutory application in I.A.No.7862 of 2016 before the trial Court on 25.04.2016 under Order 9 Rule 13 of C.P.C. Subsequently, the said petition was dismissed. Challenging the same, the petitioner herein filed Civil Miscellaneous Appeal in C.M.A.No.64 of 2017 before the learned XVI Assistant Judge, City Civil Court, Chennai and the same was dismissed on 19.09.2017. Challenging the same, the petitioner/defendant is before this Court by way of this petition.

10. A perusal of the entire records, the respondent/plaintiff filed the suit against the revision petitioner/defendant under Order 37 Rule 1 & 2 of C.P.C. Once the suit filed under Order 37 Rule 1 & 2 of C.P.C., the Court has to send the suit summons to the petitioner/defendant. The petitioner/defendant, after receiving the suit summons, he has to appear before the trial Court either in person or through his counsel. Once he appeared as per the Order 37 Rule 3(iii) of C.P.C., notice of the appearance shall be given by the defendant to the counsel for the plaintiff. If the defendant entered an appearance as per Rule 3(iv) of the said order, the plaintiff shall serve notice on the defendant summons for judgment in Form No.4(A) in Appendix-B, returnable not less than 10 days from the date of service supported by

an affidavit, verifying the cause of action and the amount claimed and stating that in his leave, there is no defence to the suit. If such notice is served on the defence, as per the sub Rule (v) of the above said order, the defendant may at any time within 10 days from the service of summons for the judgment by affidavit or otherwise disclosing such facts may apply on such summons leave to defend such suit. If he filed an affidavit for leave, in the suit, the Court can grant such leave, if otherwise not granted leave, than the Court can pass the judgment under this order.

11. Whereas in this case, the plaintiff has not sent a suit notice to the revision petitioner/defendant as per order 37 CPC. A perusal of the records would go to show that the respondent/plaintiff in this suit, instead of sending suit notice under Order 37 Rule 1 & 2 of C.P.C., they sent the notice under sub Rule 4 straight away to the revision petitioner/defendant. Even after receiving that notice, the revision petitioner/defendant entered into an appearance through the counsel on 18.12.2015. When the trial Court failed to adopt any of the provisions under Order 37 Rule 3 of C.P.C. and simply adjourned the case for filing the written statement as any other case filed under order VII rule 1. After filing the written statement and framing issues,

the case was posted for trial. The respondent/plaintiff has not filed any affidavit as per sub Rule (4) of Rule 3 Order 37 of C.P.C. In this case, neither the plaintiff filed any affidavit under sub Rule (4) of Rule 3 above said order, nor the revision petitioner/defendant filed any affidavit under Sub Rule (5) of Rule 3 of the above said order and simply filed the written statement and the Court was also accepted. Even after filing the memo by the respondent/plaintiff to reject the written statement, the lower Court, after rejecting the memo, should have directed the respondent/plaintiff to comply with the sub rule (4) of Rule 3 of the above said order. The trial Court failed to adopt any of the procedures and even without filing any affidavit by the respondent/plaintiff as contemplated under Sub Rule (4) of Rule 3 of the above said order, simply passed the exparte judgment and decree.

12. When the petitioner/defendant for filing an application in I.A.No.7862 of 2016 to set aside the exparte decree, the trial Court, without considering the same, dismissed the petition by invoking Order 37 Rule 4 of C.P.C. and dismissed the same. The lower Appellate Court has also failed to consider the fact that the trial Court has not followed the procedure as contemplated under Order 37 Rule 3 of C.P.C. and find fault with the revision petitioner/defendant and dismissed the

application filed by the revision petitioner/defendant and the said exparte order which warrants interference of this Court.

13. On a perusal of the records, while filing the memo by the respondent/plaintiff, before the trial Court to reject the written statement, the copy of the memo was not served to the revision petitioner/defendant. Only the trial Court directed the appearance of the revision petitioner/defendant, since the revision petitioner herein did not appear before the trial Court and even without passing any detailed order regarding rejection of the written statement and also to direct the appellant to file an affidavit under Sub Rule (iv) of Rule 3 of Order 37 C.P.C. and passed an exparte decree.

14. Under these circumstances, the contention raised by the revision petitioner/defendant, once the written statement filed and received, the Court has to adopt normal Course of trial as contemplated under Civil Procedure Code other than the order 37 of C.P.C. which is also not acceptable. Since the respondent/plaintiff filed the suit under Order 37 Rule 1 & 2 of C.P.C. The trial Court has not followed the procedure as contemplated under Order 37 Rule 3 of the above said order. The Appellate Court has also failed to look into the

legal provisions and dismissed the appeal. Once the trial Court received the written statement and framed the issues and posted the suit for trial, the trial Court should have conducted the trial and dispose of the case in accordance with law. Therefore, the judgment passed by the lower Appellate Court in C.M.A.No.64 of 2017 in I.A.No.7862 of 2016 in O.S.No.6388 of 2015 is hereby set aside and the trial Court is directed to dispose of the O.S.No.6388 of 2015 in accordance with law.

15. With the above directions, the Civil Revision petition is allowed. Consequently, connected miscellaneous petition is closed.

13.06.2019

Index:Yes/No

Speaking order/Non speaking order

rli

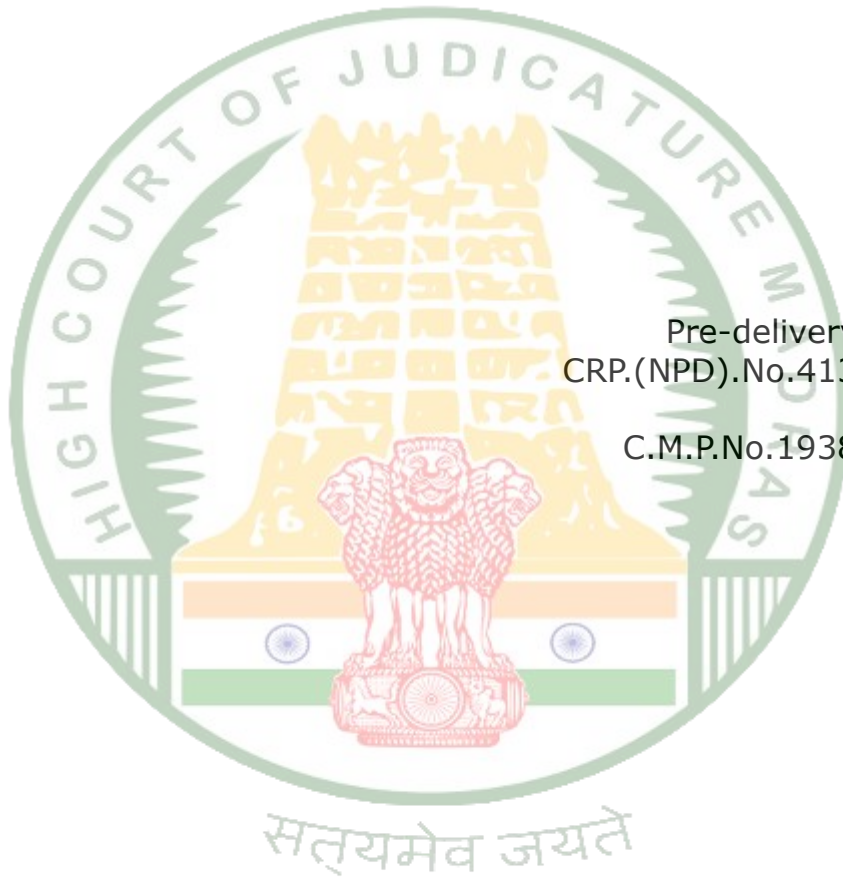
To

The XVI Additional City Civil Court,
Chennai.

WEB COPY

P.VELMURUGAN, J.,

rli



Pre-delivery Order in
CRP.(NPD).No.4134 of 2017
and
C.M.P.No.19381 of 2017

WEB COPY

13.06.2019