



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.11.2018

DELIEVRED ON : 30.04.2019

CORAM:

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

C.R.P(MD)Nos.2035 and 2144 of 2018 (PD)
and

C.M.P.(MD).Nos.8998 of 2018 in C.R.P.(MD).No.2035 of 2018

C.R.P. (MD) .No.2035 of 2018 :

Malarkodi ... Petitioner/ Petitioner / 2nd defendant

Vs.

1.M.Asan Kuthuse ... 1st respondent / Respondent / Plaintiff

2.T.A.Samsudeen ... 2nd respondent/ 2nd respondent /
1st defendant

(As there is no claim as against the 2nd respondent, the relief as against him is given up and he is no more. Hence, notice may be dispensed with)

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order, dated 14.08.2018, passed in E.A.No.7 of 2016 in E.P.No.168 of 2009 in O.S.No.622 of 2004, by the Additional District Munsif, Madurai Town, Madurai.

C.R.P. (MD) .No.2144 of 2018 :

Malarkodi ... Petitioner/ Petitioner / 2nd defendant

Vs.

M.Asan Kuthuse ... Respondent / Respondent / Plaintiff

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order, dated 28.02.2018, passed in I.A.No.344 of 2011 in O.S.No.622 of 2004, by the Additional District Munsif, Madurai Town, Madurai.



For Petitioner in
both the petitions

: Mr.N.TamilMani
for Mr.K.Sudalaiyandi

For 1st respondent in
C.R.P. (MD) .No.2035/2018
and respondent in
C.R.P. (MD) .No.2144/2018

: MS.A.Hafiza

COMMON ORDER

C.R.P. (MD) .No.2035 of 2018 has been filed by the petitioner/2nd defendant challenging the order, dated 14.08.2018, passed by the Court below dismissing the petition filed by the petitioner for setting aside the *ex parte* order, dated 21.12.2015, in E.P.No.168 of 2009 in O.S.No.622 of 2004.

2.C.R.P. (MD) .No.2144 of 2018 has been filed by the petitioner/2nd defendant challenging the order, dated 28.02.2018, passed by the Court below dismissing the petition filed by the petitioner for condonation of delay of 389 days in filing a petition to set aside the *ex parte* decree.

3.Since the issue involved in both the petitions are interrelated to each other, both the matters heard together and disposed of by way of this common order. For better appreciation, the rank assigned in the suit is taken into account.

4. The brief facts of the case, which are necessary for the disposal of these petitions, are as follows:

(a) The plaintiff filed the suit in O.S.No.1318 of 1995 for the relief of declaration that the decree obtained by the 1st defendant on 26.02.1998 in O.S.No.1318 of 1995 on the file of the Subordinate Court, Madurai and consequential proceedings in respect of the plaintiff's property are null and void and not binding on the plaintiff, and for consequential relief to surrender vacant possession of the property to the plaintiff. According to the plaintiff, the first defendant, in collusion with the plaintiff's sister, who was in permitted occupation of the property in dispute, had filed the suit in O.S.No.1318 of 1995 for money by forging the signature of the plaintiff in *pro note* and without his knowledge, the first defendant fraudulently obtained *ex parte* decree on 26.02.1997 and then, through the execution proceeding, 1st defendant himself purchased the property of the plaintiff as Court auction purchaser and that only on 01.06.2004, the petitioner came to the knowledge of the same, while attempting to evict the tenants of the said property in E.P.No.30 of 1997 in R.C.O.P.No.385 of 1995 and that the 1st defendant allowed the 2nd defendant to occupy the property under some arrangement best known to them. According to the 2nd defendant, she purchased the suit property from the first respondent / Court Auction Purchaser by registered sale deed, dated 19.04.2004 and hence, she is a *bona fide* purchaser.



(b) In the suit, one Advocate by name Sambathkumar entered appearance on behalf of the 2nd defendant and filed written statement. On 20.10.2004 the 2nd defendant called absent and there was no representation for the 2nd defendant and hence, she was set *ex parte*. Through the very same Advocate, the 2nd defendant filed I.A.No.853 of 2008 praying to set aside the *ex parte* order dated 20.10.2004. The Court below allowed the said petition subject to the payment of cost of Rs.500/- on or before 13.10.2008. But, the 2nd defendant did not comply with the said conditional order and therefore, the said application was dismissed on 14.10.2008. The 2nd defendant did not challenge that order. The 1st defendant had not appeared to cross examine the plaintiff and he was called absent and hence, set *ex parte* on 22.10.2008. Thus, the trial Court decreed the suit in *ex parte* on 31.12.2008.

(c) Thereafter, the plaintiff filed Execution Petition in E.P.No.168 of 2009. Due to non appearance of the first and second defendants even after receipt of notice, they were set *ex parte* on 18.01.2010 and 01.09.2009 respectively in the execution proceedings. Thereafter, the 2nd defendant filed I.A.No.94 of 2011 praying to set aside the *ex parte* order, dated 18.01.2010, passed in the execution proceedings and the same was allowed by the Court below. Even after lapse of five years, the 2nd defendant did not file counter and therefore, she was set *ex parte* on 21.12.2015 and delivery was ordered in favour of the plaintiff. Seeking to set aside the *ex parte* order, dated 21.12.2015, the 2nd defendant filed E.A.No.7 of 2016 in E.P.No.168 of 2009. The Court below dismissed the said petition holding that the 2nd defendant filed the said petition for the 2nd time and she dragged on the matter without even filing counter for about five years. Aggrieved by that order, the 2nd defendant filed C.R.P.(MD).No.2035 of 2018

(d) In the meantime, the 2nd defendant filed I.A.No.344 of 2011 praying to condone the delay of 389 days in filing a petition to set aside the *ex parte* decree, dated 31.12.2008, stating that only on 23.02.2011 she got knowledge about the suit and she had not entered appearance through any Advocate and filed written statement and she did not put signatures in the Vakalath, written statement, etc. The Court below dismissed the said petition holding that the 2nd defendant did not prove that the signatures found in the Vakalath, written statement, ad-interim injunction order (Ex.C1) and Court summon (Ex.C2) are not her signature and Exs.C1 and C2 were not served to him and that the petitioner has not assigned convincing reasons for condoning the enormous days of delay. Aggrieved by that order, the 2nd defendant filed C.R.P.(MD).No.2144 of 2018.

5. The learned counsel appearing for the 2nd defendant submitted that the 2nd respondent is the *bona fide* purchaser of the property and she came to know about the suit filed by the plaintiff only on 23.02.2011 through one of her relatives and she has not



received any summons or order from the Court below and she has not engaged the counsel by name Sampathkumar and she has not put her signatures in vakalath, written statement, etc. She was impersonated by some other person and her signatures in the said documents were forged. After coming to know about the *ex parte* decree, the 2nd defendant filed the petition for condoning the delay of 389 days in filing a petition to set aside the *ex parte* decree. The delay was neither willful nor want. So far as the *ex parte* order, dated 21.12.2015, passed in the execution proceedings is concerned, on that day, the 2nd defendant was not in station and therefore, she could not instruct her counsel and further, her counsel was engaged in the High Court and therefore, he could not appear before the Court below. The non appearance of the 2nd defendant was neither willful nor wanton. The Court below, without considering the said aspects and without providing an opportunity to agitate her lawful defence, has erroneously dismissed both the petitions. Thus, he prayed to provide the 2nd defendant an opportunity to agitate her lawful defence by allowing both the revision petitions.

6. The learned counsel appearing for the plaintiff submitted that though the 2nd defendant stated that she did not aware of the proceedings till 22.02.2011 and that she has not put her signatures in the vakalath, written statement, etc., she has not proved the same through oral and documentary evidence. On the other hand, the Process Server, who examined as RW2, has categorically stated in his evidence, that on 27.08.2004, the 2nd defendant received summons and injunction order and put her signatures. Hence, the Court below come to the conclusion that the reason stated by the 2nd defendant is not acceptable. He would further submit that the Court below has set aside the earlier *ex parte* order dated 18.01.2010 passed against the 2nd defendant in the execution petition, by allowing the petition filed by her in I.A.No.94 of 2011. The 2nd defendant, thereafter, dragged on the matter about 5 years without even filing counter affidavit and there was no representation for the 2nd defendant on 21.12.2015 and therefore, the Court below passed the *ex parte* order and ordered delivery on 21.12.2015. The 2nd defendant has not assigned valid reason for her absence on that day before the Court below and therefore, the Court below dismissed the petition filed by the 2nd defendant in E.A.No.7 of 2016 and the same need not be interfered with. Thus, he prayed to dismiss both the revision petitions.

7. Heard the learned counsel appearing for both sides and perused the records carefully.

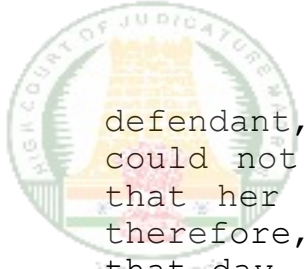
8. The suit is of the year 2004. The 2nd defendant entered appearance through one Advocate by name Sampathkumar and filed written statement. Since the 2nd defendant called absent, she was set *ex parte* on 20.10.2004. Through the very same Advocate, the 2nd defendant filed I.A.No.853 of 2008 praying to set aside the *ex parte* order dated 20.10.2004. The Court below allowed the said



petition subject to the payment of cost of Rs.500/- on or before 13.10.2008. But, the 2nd defendant did not comply with the said conditional order and therefore, the said application was dismissed on 14.10.2008. The suit was decreed in *ex parte* on 31.12.2008.

9. The reason stated by the 2nd defendant for condoning the enormous days of delay is that she did not engage the counsel by name Sampathkumar and she did not sign in the written statement, vakalath, etc. and that she did not receive any notice from the Court and she was impersonated and she came to know about the pendency of the *ex parte* decree only on 23.02.2011 from one of his relatives and thus, the delay had occurred. Though the 2nd respondent raised serious objections against the said counsel, she never chose to examine him or prefer any complaint against him before the Bar Council. The 2nd defendant has stated in her evidence that for the past 4 years, she is used to sign only as "மலர் கொடி" and not as "மலர் க் கொடி" and thus, her signatures are forged in vakalath, written statement, etc. The 2nd defendant has not substantiated the said version by adducing any oral and documentary evidence. On the other hand, RW2, the Process Server of the Court, has categorically stated in his evidence that on 27.08.2004 he served Exs.C1 - Ad-interim injunction order and C2 - Court summons directly to the 2nd defendant and the 2nd defendant also acknowledged the same by putting her signatures. Thus, it is proved that Exs.C1 and C2 served to the 2nd defendant as per the formalities laid down for the service thereof. More over, the 2nd defendant has also admitted that she is still residing in the address mentioned in Ex.C2. The 2nd defendant has not produced any rebuttal evidence. The totality of the above circumstances strengthened the version of the plaintiff that knowing fully well about the pendency of suit proceedings and consequences of the decree and orders passed against her and in order to drag on the matter, the 2nd defendant filed the petition for condonation of law suppressing the facts. This Court is of the view that the 2nd defendant does not come before the Court with clean hands. A person, who suppresses the facts, cannot succeed, that too before the Court. As the reason stated by the 2nd defendant is not acceptable, the Court below dismissed the petition filed for condonation of delay. This Court does not find any reason to interfere with the order passed by the Court below in respect of condonation of delay.

10. So far as the order passed by the Court below dismissing the petition for setting aside the *ex parte* order, dated 21.12.2015, is concerned, it is seen that due to non appearance of the second defendant even after receipt of notice, she was set *ex parte* on 18.01.2010 in the execution proceedings. Subsequently, based on the petition filed by the 2nd defendant in I.A.No.94 of 2011, the said *ex parte* order, dated 18.01.2010, was set aside by the Court below. Even after lapse of five years, the 2nd defendant did not file counter affidavit. Finally, due to non appearance, the 2nd defendant was set *ex parte* on 21.12.2015. According to the 2nd



defendant, she was not in station on that day and therefore, she could not give instruction to her counsel to prepare counter and that her counsel was engaged in the High Court on that day and therefore, her counsel also could not present before the Court on that day. The execution proceeding was pending from 2009 onwards. Though an opportunity was given by the Court below to proceed her case by setting aside the earlier *ex parte* order, the 2nd defendant has not utilized the same and she could be managed to drag on the proceedings for about five years without even filing counter to the execution proceedings. A person, who is really affected, would not be silent for years together. In this case, knowing fully well that an *ex parte* decree has been passed against her and it is the second opportunity given by the Court by setting aside the earlier *ex parte* order in the execution proceedings, the 2nd defendant kept silent for years together. Even after five years, she required time to give instruction to her counsel to file counter in the execution proceedings. It gives an impression that the object of the 2nd defendant is only to drag on the matter and not to make her lawful defence. In view of the above, this Court does not find any reason to interfere with the *ex parte* order passed by the Court below in the execution proceedings also.

11. In the result, both the Civil Revision Petitions are dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (Writs)

// True Copy //

Sub Assistant Registrar (CS)

gcg

To

1.The Additional District Munsif,
Madurai Town, Madurai.

2.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1CC TO MR.K.SUDALAIYANDI, Advocate Sr. No. 64578

common order made in
C.R.P (MD) Nos.2035 and 2144 of 2018 (PD)
30.04.2019

MR (CO)

<https://hcservices.ecourts.gov.in/hcservices/>

IR (27.05.2019) 6P 5C