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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 07..02..2020
Orders Pronounced on : 12..05..2020
CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

C.R.P.Nos.3352 and 3353 of 2015
and
M.P.No.1 of 2015

C.R.P.No.3352 of 2015:

E.A.A.Jeyaraj

... Petitioner

-Versus-

Samiyathal

... Respondent

Prayer in C.R.P.No.3352 of 2015:- Petition under Section 115 of CPC praying to set aside the order dated 27.03.2015 made in I.A.No.76 of 2015 in O.S.No.794 of 2010 by the learned II Addl. District Munsif, Erode, Erode District.

C.R.P.No.3353 of 2015:

E.A.A.Jeyaraj

... Petitioner

-Versus-

1.Jeyalakshmi
2.Manoharan
3.Raja
4.Samiyathal

... Respondents

Prayer in C.R.P.No.3353 of 2015:- Petition under Section 115 of CPC praying to set aside the order dated 27.03.2015 made in I.A.No.77 of 2015 in O.S.No.494 of 2010 by the learned II Addl. District Munsif, Erode, Erode District.



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For Petitioner

: Mr.M.Karthik
for Mr.I.C.Vasudevan
for petitioner in both CRPs

For Respondent

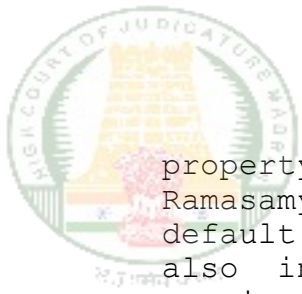
: Mr.N.Manokaran for respondent
in in CRP No.3352 of 2015 and
respondents 2 to 4 in CRP
No.3353 of 2015

COMMON ORDER

Challenging the order of the II Additional District Munsif, Erode, Erode District, dated 27.03.2015, dismissing the delay condonation applications thereby refusing to condone the delay in filing the applications to set aside the ex parte decree passed in O.S.No.794 of 2010 and set aside the ex parte order of dismissal passed in O.S.No.494 of 2010 for the default of the petitioner on 09.09.2014, the petitioner is before this court with these civil revision petitions.

2. The brief facts leading to the filing of the revision petitions are as follows: The petitioner is the plaintiff in O.S.No.494 of 2010 and the respondents in the revision are the defendants in the suit. The above suit has been filed for permanent injunction restraining the defendants from evicting the petitioner from the suit property except under the due process of law. The petitioner is the defendant in the other suit in O.S.No.794 of 20. The above suit has been filed against him seeking recovery of possession and also for arrears of rent. The suit was filed on the ground that the suit schedule property was originally belonged to the 1st defendant's father Ramasay and mother of the 2nd respondent herein and the mother of the defendants 2 and 3. The petitioner was the tenant under the original owner and he had been paying the rent to them regularly and after the death of the original owners, he has been paying the rent to the defendants. Now, the defendants are asking the petitioner to vacate the premises. The petitioner apprehends that the defendant would take steps to evict him forcibly from the premises. Hence, he was constrained to file the suit for permanent injunction from evicting him from the premises except under due process of law.

3. The other suit in O.S.No.794 of 2010 has been filed by one Samiyathal who is the 4th defendant in O.S.No.494 of 2010 for recovery of possession claiming that she is the only daughter of Ramasamy Gounder and Pappayee Ammal and after their death, she has become entitled to the property. The suit



property was leased out to the petitioner by the original owner Ramasamy and Pappayee Ammal. The petitioner had committed default in the payment of rent. That apart, the suit premises is also in a highly dilapidated condition and therefore, she required the premises for demolition and reconstruction. Hence, the suit for recovery of possession and arrears of rent.

4. Since the suit premises in both the suit and the parties are also one and the same, a joint trial was ordered and it was decided to record evidence in common in O.S.No.794 of 2010. After the evidence on the side of the plaintiff in O.S.No.794 of 2010 was over, when the suit was posted for the evidence on the side of the petitioner, he did not come forward to give evidence on his side. Hence, the court below had proceeded to dispose of the suit and thereby decreed the suit in O.S.No.794 of 2010 and dismissed the suit in O.S.No.494 of 2010.

5. Thereafter, the petitioner filed two applications to set aside the ex parte decree passed in O.S.NO.794 of 2010 and set aside the ex parte dismissal of the suit in O.S.NO.494 of 2010. Since there were a delay in filing the applications, the petitioner filed two separate applications under Section 5 of the Limitation Act seeking to condone the delay in filing the applications in I.A.NO.76 of 2015 and 77 of 2015 seeking to set aside the ex parte decree and ex parte dismissal of the suit. Both the applications are dismissed by the court below holding that it is not an ex parte decree and the decree was passed under under Order XVII, Rule 2 of CPC. Even on merits, there is no sufficient cause to condone the delay. Challenging the same, the present revision petitions have been filed.

6. The leaned counsel for the petitioner would submit that it was only an ex parte decree and ex parte dismissal of the suit passed against the petitioner for his absence and not giving evidence and it is not decree on merits. According to the petitioner, the exception to the provision under Order XVII, Rule 2 of CPC is not applicable as the plaintiff alone had led evidence, whereas without examining the defendants, decrees were passed and therefore, it was only an ex parte decree and therefore, the provision of Order IX, Rule 13 of CPC alone applicable.

7. The learned counsel for the petitioner would further submit that the reason for the delay was that after the examination of the plaintiff's side witnesses, the petitioner fell ill and therefore, he could not let in evidence and to substantiate his contention he had also produced valid documents. But, the court below without considering the same has mechanically dismissed the condone delay applications.



8. Per contra, the learned counsel for the contesting respondent would contend, it is not an ex parte decree as contended by the petitioner. The petitioner was required to let in evidence on his side, but, despite several opportunities, the petitioner did not do so and the petitioner was also not present in court on the date fixed by the court below. Therefore, the court below had proceeded under Order XVII, Rule 2 of CPC and disposed of the suit on merits based on the available evidence. Therefore, it is only a decree on merits. Therefore, the only remedy available to the petitioner is to file regular appeals against the common judgement and decree. Even assuming that it was an ex parte decree, the court below based on the available material has come to a conclusion that the medical certificate is nothing but a false one and dismissed the applications as the cause shown by the petitioner for the delay was not genuine. Even on the grounds also the order of the court below cannot be found fault with.

9. I have considered the rival submissions carefully.

10. The main controversy arises in these revision petitions is as to whether the decree passed by the court below is an ex parte decree or a decree on merits.

11. As the controversy revolves around order XVII, Rule 2 of CPC, it would be useful to refer to the relevant provisions hereunder.

12. Order XVII, Rule 2 of CPC reads as follows:-

"2. Procedure if parties fail to appear on day fixed. - Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation - Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.



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- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, -

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is, absent, proceed under rule 2."

13. Under Order XVII, Rule 2 of CPC, if a suit is adjourned to a particular date and on the adjourned date, if the parties are, or any of them is absent, the court may proceed to dispose of the suit in one of the modes directed in that behalf in order IX and order make such other order as court thinks fit. However, as per explanation to Order XVII, Rule 2 of CPC, where the evidence or a substantial portion of the evidence of any party has already been recorded and such party failed to appear on the day on which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present.

14. For the application of the above provision, the court has to see whether a substantial portion of the evidence of the party has already been recorded and thereafter, the party has failed to appear on the adjourned date, then the court can proceed with the suit under Order IX of CPC or make such order as the court thinks fit. However, the explanation is an exception to the power given under the rule conferring discretion on the court in a case where the evidence or a substantial portion of the evidence of the party has already been recorded and the party has failed to appear on the date on which hearing of the case was adjourned.

15. Under Order XVII, Rule 3 of CPC, where any party to a suit to whom time was granted, failed to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit, for which the matter was adjourned, the court may, notwithstanding such default, if the parties were present, proceed to decide the suit forthwith or if the parties were, or any of them was, absent, proceed under rule 2.

16. In B.Janakiramaiah Chetty v. A.K.Parthasarathi, 2003 (5) SCC 631, the Hon'ble Supreme Court explained the scope of Order XVII. The relevant portion of the judgement reads as follows:-



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"8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that: (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion deem as if such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are "proceed with the case". Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not."

9. In Rule 2, the expression used is "make such order as it thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party



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is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present."

17. In the instant case, the evidence of the plaintiff was over and the evidence on the side of the defence was not commenced. Despite time granted by the court, the petitioner failed to produce his witness. Hence, as per Order XVII, Rule 3 (b) of CPC, the court has to proceed under Order XVII, Rule 2. When the evidence of the defendant was not recorded, the explanation to Order XVII, Rule 2 of CPC is not applicable to the instant case. Thus, the court has to proceed and dispose of the suit only under order IX of CPC. That apart, from a perusal of the judgement and decrees passed by the court below, it could be seen that the petitioner was already set ex parte on 19.08.2014 and after setting the petitioner ex parte, an ex parte decree was passed, therefore, the judgement and decree passed against the petitioner by the court below could only be construed as ex parte decree, at any rate, it cannot be said to be a decree passed on merits. Therefore, to that extent, the finding of the court below is not sustainable in law and the same required interference.

18. Coming to the next part of the order relating to the condonation of delay in filing the application under Order IX,



Rule 9 and Rule 13 of CPC, the reason for the delay is stated to be that the petitioner was bed ridden from 10.08.2014 to 30.08.2014 and therefore, he could not appear before the court for letting in evidence. To substantiate his claim, the petitioner had produced a medical certificate which shows that the petitioner was suffering from viral hepatitis and he was asked to be bed ridden. However, on 12.08.2014, when the suit was posted for the examination of the petitioner, an application was filed seeking to adjourn the suit wherein it was stated that the petitioner was out of station on a business trip and therefore, he could not appear before the court for giving evidence. However, the court below has found that when the petitioner is said to have been confined to bed rest as advised by the doctor from 10.08.2014 to 30.08.2014, how he could have taken business trip. Therefore, the court below has come to a conclusion that the medical certificate filed by the petitioner was not a genuine one and therefore, it has discarded the medical certificate. That apart, the petitioner was advised to take bed rest till 30.08.2014, but, even thereafter, the petitioner did not file the applications and the applications came to be filed only in November, 2015. There is no explanation for the delay. Therefore, the reasons set out by the petitioner for the delay is not bona fide. On a careful consideration of the entire materials available on record, this court is of the considered view that the court below has rightly dismissed the application for want of bonafide explanation for the delay and the cause shown by the petitioner was not genuine and this court does not find any infirmity in the order of the court below in dismissing the applications.

19. In the light of the facts and circumstances of the case and in view of the legal position, even though the applications to set aside the ex parte decree and ex parte dismissal of the suit are maintainable, there is no sufficient reason for the condonation of the delay in filing the applications. Thus, on merits the applications lack bona fide and they are only liable to be dismissed. The court below was right in dismissing the delay condonation applications and this court finds no merit in the revisions. The revisions fail and the same deserve only to be dismissed.



20. In the result, both the civil revision petitions are dismissed. No costs. Consequently, connected CMP is closed.

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-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To

1.The II Addl. District Munsif, Erode,
Erode District.

CRP Nos.3352 and 3353 of 2015

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